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REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 100.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1879.

REPORTED BY

WILLIAM T. OTTO.

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VOL. X.

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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. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. STEPHEN J. FIELD.
HON. WILLIAM STRONG.	HON. JOSEPH P. BRADLEY.
HON. WARD HUNT.	HON. JOHN M. HARLAN.

ATTORNEY-GENERAL.

HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 22, 1878, 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.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Jan. 12. PRESIDENT BUCHANAN
	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	Dec. 11. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	Feb. 18. PRESIDENT GRANT.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	Jan. 24. PRESIDENT LINCOLN.
	SEVENTH.	1877.
HON. J. M. HARLAN, Kentucky.	INDIANA, ILLINOIS, AND WISCONSIN.	Nov. 29. PRESIDENT HAYES.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, NEBRASKA, AND COLORADO.	July 16 PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

MR. JUSTICE HUNT, *by reason of indisposition, took no part in deciding the cases reported in this volume.*

GENERAL RULES.

RULE 31.

All records and arguments printed for the use of the court must be in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume. After the first day of October, 1880, the clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule.

[Promulgated Dec. 1, 1879.]

AMENDMENT TO GENERAL RULES.

AMENDMENT TO RULE 15.

Strike out the words, "in which the laws of the United States shall be printed by authority," in the first section, and insert the words, "of general circulation."

[Promulgated Dec. 11, 1879.]

MEMORANDUM.

DANIEL WESLEY MIDDLETON, Esquire, the clerk of the court, having died during the term, Mr. CHIEF JUSTICE WAITE, May 10, 1880, announced the following order: —

"It is hereby ordered that JAMES HALL MCKENNEY be appointed clerk of this court in the place of DANIEL WESLEY MIDDLETON, deceased, and that he forthwith take the oath of office and give bond conditional, according to law. In this connection we cannot refrain from giving expression to our high regard for the personal and official character of Mr. MIDDLETON. His handwriting first appears on the records of the court under date of the 7th of February, A.D. 1825. From that date until his death he was, without interruption, actively engaged in the business of the office to which his successor has just been appointed, and even a whisper of complaint against him in any particular has never reached our ears. Three chief justices of the court and eighteen associate justices have died since his service began. He was a most accomplished officer, courteous in manner, dignified in deportment, faithful in every duty, and never unmindful of the confidential relations he had with the court. We sincerely mourn his loss, both as an officer and a friend, and direct that this testimonial be entered on the records of the court and a copy transmitted to his widow, in token of our respect for the memory of him that is gone, and our sympathy for his family in their affliction."

On the same day Mr. MCKENNEY appeared in open court and took the oath of office.

TABLE OF CASES.

Page

Adams, County of, Emigrant Company *v.* 61
Arthur *v.* Herold 75

Baltimore, Guy *v.* 434
Bank, Case *v.* 446
Beckwith, Mount Pleasant *v.* 514
Blackwell, Jones *v.* 599
Blair, Railroad Company *v.* 661
Bowen, United States *v.* 508
Branch *v.* United States 673
Brownsville *v.* Cavazos 138
Burkhardt, National Bank *v.* 686
Burns *v.* Meyer 671

Case *v.* Bank 446
Cass, County of, *v.* Gillett 585
Cavazos, Brownsville *v.* 138
Clardy *v.* National Bank 704
Clark *v.* Trust Company 149
Clarke, *Ex parte* 399
Colgrove, Dickerson *v.* 578
Collector, Railroad Company *v.* 595
Commissioners, Newton *v.* 548
Construction Company *v.* Meyer 457
Cornell, Mount Pleasant *v.* 535
County of Adams, Emigrant Company *v.* 61
County of Cass *v.* Gillett 585
County of Gallatin, Fairfield *v.* 47
Cowell *v.* Springs Company 55
Cox *v.* National Bank 704

Page

Craig *v.* Smith 226
Creswell, Savings Bank *v.* 630
Curtis *v.* United States 119

Daniels, Lansdale *v.* 113
Davis, Tennessee *v.* 257
Dickerson *v.* Colgrove 578
Dow *v.* Johnson 158
Dozier, Garneau *v.* 7

Elastic Fabrics Company *v.* Smith 110
Embry *v.* United States 680
Emigrant Company *v.* County of Adams 61
Ex parte Clarke 399
Ex parte French 1
Ex parte Reed 13
Ex parte Siebold 371
Ex parte Virginia 339

Fairfield *v.* County of Gallatin 47
Fraloff, Railroad Company *v.* 24
French, *Ex parte* 1

Gage, Machine Company *v.* 676
Gallatin, County of, Fairfield *v.* 47
Garneau *v.* Dozier 7
Gillett, County of Cass *v.* 585
Graham, National Bank *v.* 699
Gridley, Insurance Company *v.* 614
Guy *v.* Baltimore 434

Hatch *v.* Oil Company 124
Hauenstein *v.* Lynham 483
Herold, Arthur *v.* 75
Hinckley *v.* Railroad Company 153
Hirsch, United States *v.* 33
Holden *v.* Trust Company 72
Hollingsworth, Hurt *v.* 100
Hotchkiss, Kirtland *v.* 491
Hough *v.* Railway Company 213
Hurt *v.* Hollingsworth 100

Page
Improvement Company *v.* Slack 648
Insurance Company *v.* Gridley 614
Insurance Company, Manning *v.* 693
Insurance Company, National Bank *v.* 43

Johnson, Dow *v.* 158
Johnson, Kidd *v.* 617
Johnson, United States *v.* 82
Jones *v.* Blackwell 599

Kidd *v.* Johnson 617
Kirkland *v.* Hotchkiss 491

Lansdale *v.* Daniels 113
Lippitt, United States *v.* 663
Lynham, Hauenstein *v.* 483

Machine Company *v.* Gage 676
Manning *v.* Insurance Company 693
Meeks *v.* Olpherts 564
Meyer, Burns *v.* 671
Meyer *v.* Construction Company 457
Meyer, Railroad Company *v.* 457
Mining Company *v.* Taylor 37
Montgomery *v.* Sawyer 571
Moore, Phillips *v.* 208
Moore *v.* Simonds 145
Mount Pleasant *v.* Beckwith 514
Mount Pleasant *v.* Cornell 535
Mulford, Paving Company *v.* 147
Murray, United States *v.* 536

Nagle *v.* Rutledge 675
National Bank *v.* Burkhardt 686
Clardy *v.* 704
Cox *v.* 704
v. Graham 699
v. Insurance Company 43
Oates *v.* 239
Tintsman *v.* 6
Newton *v.* Commissioners 548

Page

Oates *v.* National Bank 239
Oil Company, Hatch *v.* 124
Olpherts, Meeks *v.* 564

Packet Company *v.* St. Louis 423
Parish *v.* United States 500
Paving Company *v.* Mulford 147
People *v.* Weaver 539
Perryman, United States *v.* 235
Phillips *v.* Moore 208
Pierce *v.* Tough 445
Pierce *v.* Wade 444
Powell, Ricker *v.* 104

Railroad Company *v.* Blair 661
v. Collector 595
v. Fraloff 24
Hinckley *v.* 153
v. Meyer 457
v. Schutte 644
Shaw *v.* 605
v. Trook 112
Railway Company, Hough *v.* 213
v. Slack 659
v. Twombly 78
Reed, *Ex parte* 13
Removal Cases 457
Ricker *v.* Powell 104
Rives, Virginia *v.* 313
Russell, Wills *v.* 621
Rutledge, Nagle *v.* 675

San Francisco, Trenouth *v.* 251
Savings Bank *v.* Creswell 630
Savings Bank *v.* Ward 195
Sawyer, Montgomery *v.* 571
Schutte, Railroad Company *v.* 644
Shaw *v.* Railroad Company 605
Siebold, *Ex parte* 371
Simonds, Moore *v.* 145
Slack, Improvement Company *v.* 648

Page
Slack, Railway Company *v.* 659
Smith, Craig *v* 226
Smith, Elastic Fabrics Company *v.* 110
Soule *v.* United States 8
Springs Company, Cowell *v.* 55
St. Louis, Packet Company *v.* 423
Steffens, United States *v.* 82
Strauder *v.* West Virginia 303

Taylor, Mining Company *v.* 37
Tennessee *v.* Davis 257
Tillson *v.* United States 43
Tintsman *v.* National Bank 6
Tobin, Vicksburg *v.* 430
Tough, Pierce *v.* 445
Trade-Mark Cases 82
Trenouth *v.* San Francisco 251
Trook, Railroad Company *v.* 112
Trust Company, Clark *v.* 149
Trust Company, Holden *v.* 72
Twombly, Railway Company *v.* 78

United States *v.* Bowen 508
Branch *v.* 673
v. Curtis 119
Embry *v.* 680
v. Hirsch 33
v. Johnson 82
v. Lippitt 663
v. Murray 536
Parish *v.* 500
v. Perryman 235
Soule *v.* 8
v. Steffens 82
Tillson *v.* 43
v. Witteman 82

Vicksburg *v.* Tobin 430
Virginia, *Ex parte* 339
Virginia *v.* Rives 313

Page

Wade, Pierce *v.* 444
Ward, Savings Bank *v.* 195
Weaver, People *v.* 539
Weaver, Williams *v.* 547
West Virginia, Strauder *v.* 303
Williams *v.* Weaver 547
Wills *v.* Russell 621
Witteman, United States *v.* 82

TABLE OF CASES

CITED BY THE COURT.

PAGE

Ableman *v.* Booth, 21 Pet. 506 278, 375
21 How. 516 278
Adams *v.* Goddard, 48 Me. 212 692
v. The County of Logan, 11 Ill. 336 556, 560
Ainsworth *v.* Walmesley, 44 L. J. 355 620
Aldridge *v.* Johnson, 7 E. & B. 885 137
Allen *v.* Cerro Gordo County, 34 Iowa, 54 69
Almy *v.* State of California, 24 How. 169 95
Andrews *v.* Garrett, 2 Cent. Law Jour. 797 473
Armstrong *v.* The Commissioners, 4 Blackf. (Ind.) 208 556, 560
Assessors *v.* Osborne, 9 Wall. 567, 573 293
Atkyns *v.* Hoarde, 1 Burr. 119 583
Audubon County *v.* American Emigrant Co., 40 Iowa, 460 70
Austin *v.* Cambridgeport Parish, 21 Pick. (Mass.) 215 58

Baker *v.* Peterson, 4 Dill. 562 473
Bank of the United States *v.* Smith, 11 Wheat. 171, 175 715
Bank of Vergennes *v.* Warren, 7 Hill (N. Y.), 91 455
Barnard *v.* Kellogg, 10 Wall. 390 692
Barnes *v.* The Railroads, 17 Wall. 294–299 658
v. Vaughan, 6 R. I. 259 708
Barnett *v.* National Bank, 98 U. S. 555 250
Barr *v.* Gratz's Heirs, 4 Wheat. 213 81
Barrett *v.* Kelly, 31 Tex. 210
Barstow *v.* Union Consolidated Silver Mining Co., 10 Nev. 386 41
Bartonshill Coal Co. *v.* McGuire, 3 Macq. H. L. Cas. 307 221
v. Reid, 3 Macq. H. L. Cas. 266 221, 223
Bass *v.* Fanthroy, 11 Tex. 698 560
Beckett *v.* Selover, 7 Cal. 215 569

PAGE

Beckwith *v.* City of Racine, 7 Biss. 142, 149 535
Bellamonte Case, 2 Salk. 625 188
Bernhizel *v.* Furman, 22 Wall. 170 74
Bethel's Case, Salk. 348; 5 Mod. 19 375
Bishop of Durham *v.* Liddell, 2 Bro. P. C. 63 108
Blanc *v.* Hertzog, 23 La. An. 199 450
Blanchard *v.* Bissell, 11 Ohio St. 96 533
Bliven *v.* New England Screw Co., 23 How. 433 692
Boone *v.* Chiles, 10 Pet. 177 118
Boot *v.* Franklin, 3 Johns. (N. Y.) 208 716
Borough of Dunmore's Appeal, 52 Pa. St. 374 532
Bowlin *v.* Commonwealth, 2 Bush (Ky.), 15 364
Bowman *v.* Tallman, 27 How. (N. Y.) Pr. 212, 274 198
Brabbits *v.* R. W. Co., 38 Mo. 289 225
Brent's Exrs. *v.* The Bank of the Metropolis, 1 Pet. 89, 92 713
Brewster *v.* Wakefield, 22 How. 118 74
Bristol *v.* New Chester, 3 N. H. 521 526
Brockett *v.* Brockett, 3 Sum. 691 527
Brooklyn Park Com. *v.* Armstrong, 45 N. Y. 234, 247 533
Broughton *v.* Pensacola, 93 U. S. 266, 269 529
Brown *v.* Maryland, 12 Wheat. 419 438, 443, 677
v. Wheeler, 17 Conn. 345, 353 582
Browne *v.* Hare, 3 H. & N. 484; s. c. 4 id. 821 137
Bruce *v.* United States, 17 How. 439 11
Bulkley *v.* United States, 19 Wall. 37 507
Burrows *v.* Whitaker, 71 N. Y 291–296 155
Butler *et al. v.* Pennsylvania, 10 How. 402 559

Butz *v.* City of Muscatine, 8 Wall. 575, 583 532

Calcutta Co. *v.* De Mattos, 32 Law J. Rep. N. S. Q. B. 322–338 134
Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271 717
Campbell *v.* Miltenberger, 26 La. An. 72 451
Cannon *v.* W. New Orleans, 20 Wall. 577 428, 437
Canter *v.* The American and Ocean Insurance Companies, 3 Pet. 307 112
Carneal *v.* Banks, 10 Wheat. 181 489
Carpenter *v.* Hale, 8 Gray (Mass.), 157 131
v. Prov. Ins. Co., 16 Pet. 495 246
Carter *v.* Smith, 9 Cush. (Mass.) 321 718
Case of the State Freight Tax, 15 Wall. 232 678
Chandler *v.* Boston, 112 Mass. 200; 6 Cush. (Mass.) 580 533
Chapman *v.* Shepard, 39 Conn. 413–419 134
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 561
Chase *v.* Heaney, 70 Ill. 268 205
Chattahooche National Bank *v.* Schley, 58 Ga. 369 703
Cherokee Tobacco, 11 Wall. 616 490
Chicago & Iowa Railroad Co. *v.* Pinckney, 74 Ill. 277 50
Chirac *v.* Chirac, 2 Wheat. 259 412, 489
Christ Church *v.* Philadelphia, 24 How. 300 561
Christmas *v.* Russell, 5 Wall. 290, 302 186
14 Wall. 69 477
Citizens' Bank *v.* Knapp, 22 La. An. 117 450
City of Brownsville *v.* Cavazos, 2 Woods, 293 140
City of Cincinnati *v.* Lessee of White, 6 Pet. 431 582, 583
City of New York *v.* Miln, 11 Pet. 102 678
City of Olney *v.* Harvey, 50 Ill. 453 532
Clarke *v.* Bazadone, 1 Cranch, 212 290
v. Holmes, 7 H. & N. 937 222, 225
Clay *v.* Clay, 26 Tex. 210
Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235 642, 643
Coal Company *v.* Blatchford, 11 Wall. 174 469
Cohens *v.* Virginia, 6 Wheat. 264 264, 270, 286
6 Wheat. 375 286
Colchester *v.* Seaber, 3 Burr. 1866 529
Coleman *v.* Tennessee, 97 U. S. 509 165, 169
v. Walker, &c., 3 Metc. (Ky.) 65 570

Collector *v.* Day, 11 Wall. 124–126 358, 359
Collender *v.* Dinsmore, 55 N. Y. 200 692
Collis *v.* Selden, Law Rep. 3 C. P. 496 204
Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348, 350 455
Commonwealth *v.* Alger, 7 Cush. 53, 85 300
v. Ashmun, 3 Grant, Cas. 436; id. 416–418 271
v. Casey, 12 Allen, 214, 217 293
v. Hitchings, 5 Gray (Mass.), 482 99
v. Palmer, 2 Bush (N. Y.), 570 189
Commonwealth of Kentucky *v.* Dennison, 24 How. 66 328, 347, 391, 409
24 How. 107 359
Confiscation Cases, 7 Wall. 452 297
Conroy *v.* Vulcan Iron Works, 62 Mo. 35 225
Cook *v.* Mutual Insurance Co., 53 Ala. 37 243
v. Pennsylvania, 97 U. S. 566 679
Cooley *v.* Board of Wardens of Port of Philadelphia, 12 How. 209 385
Coolidge *v.* Guthrie, 2 Amer. Law Reg. N. S. 22 169
Cornelius *v.* Ivins, 2 Dutch. (N. J.) 376 58
Cornett *v.* Williams, 20 Wall. 226 23
Couch's Heirs *v.* Couch's Administrator, 9 B. Mon. (Ky.) 160 569
County of Henry *v.* Nicolay, 95 U. S. 619 587, 590, 592
County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631 594
County of Schuyler *v.* Thomas, 98 U. S. 169 592
County of Warren *v.* Marcy, 97 U. S. 107 593
Cox *v.* United States, 6 Pet. 172 11
Crane *v.* Reeder, 15 Alb. Law Jour. 103 473
Cromwell *v.* County of Sac, 94 U. S. 351 74
Cross *v.* Harrison, 16 How. 164 183
Croxall *v.* Sherrard, 5 Wall. 268 570
Cruikshank Case, 92 U. S. 558, 568 353
Cunningham *v.* Ashley, 45 Cal. 485 571
Curran *v.* State of Arkansas, 15 How. 304 557

Daniels *v.* Lansdale, 43 Cal. 41 116
Darling *v.* Bowen, 10 Vt. 148, 151 189

Darnall *v.* Adams, 13 B. Mon. (Ky.) 273 569, 570
Dartmouth College Case 557
Davis *v.* Braden, 10 Pet. 286 173
v. Gray, 16 Wall. 203 557, 560
Dayton *v.* Lash, 94 U. S. 112 662
De Lizarde *v.* The New Orleans Canal and Banking Co., 25 La. An. 414 451
De Wolf *v.* Johnson, 10 Wheat. 367 250
Dixon *v.* Yates, 5 Barn. & Adol. 313, 340 132
Doe *v.* Keeling, 1 Mau. & Sel. 95 58
Doe d. Morris *et al. v.* Rosser, 3 East, 15 582
Douglass *v.* Mitchell, 35 Pa. St. 440 698
Dugan *v.* United States, 3 Wheat. 172 12
Dunlop *v.* Lambert, 6 Cl. & Fin. 600 134
Durousseau *v.* The United States, 6 Cranch, 307, 314 290
Dyer *v.* Libbey, 61 Me. 45 135
Dykers *v.* Allen, 7 Hill (N. Y.), 497 692
Dynes *v.* Hoover, 20 How. 65 21

East Hartford *v.* Hartford Bridge Co., 10 How. 511 553, 556, 558
Edwards *v.* Woolfolk's Administrator, 17 B. Mon. (Ky.) 376 570
Eichelberger *v.* Pike, 22 La. An. 142 451
Elgee Cotton Cases, 22 Wall. 180 136
Elmendorf *v.* Taylor, 10 Wheat. 152 52
Elphinstone *v.* Bedreechund 168
Elsineur, 1 Wheat. 439 230
Elwell and Others *v.* Tucker, 1 Blackf. 285 560
Emigrant Company *v.* County of Wright, 97 U. S. 339 63, 66
Etting *v.* The Commercial Bank of New Orleans, 7 Rob. (La.) 459 456
Evans *v.* St. John, 9 Port. (Ala.) 186, 193 716
Evans *et al. v.* Snyder *et al.*, 64 Mo. 516 582
Exchange, 7 Cranch 165
Ex parte Bollman and Swartout, 4 Cranch, 75, 98 282
4 Cranch, 100, 101 374, 375
Bradley, 7 Wall. 364 324, 330
Burford, 3 Cranch, 448 343, 374
Garland, 4 Wall. 333, 378 198
Hamilton, 3 Dall. 17 343
Jackson, 96 U. S. 727 343
Kearney, 7 Wheat. 38 23, 283
Lange, 18 Wall. 163 343, 375
18 Wall. 166 351
Milligan, 4 Wall. 2 23
Parks, 93 U. S. 18 375
Robinson, 19 Wall. 505 330
Watkins, 3 Pet. 193 23, 283
3 Pet. 202 375
7 Pet. 568 375
Wells, 18 How. 307, 328 375
Ex parte Yerger, 8 Wall. 85 342, 351 375
8 Wall. 98 374

Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603 484
7 Cranch, 627 490
Farmer *v.* Lewis, 1 Bush, 66 172
Farmers' & Mechanics' National Bank *v.* Dearing, 91 U. S. 29 250
Farwell *v.* Boston & Worcester Railway Corporations, 4 Metc. (Mass.) 49 215
Faxton *v.* Faxon, 28 Mich. 159 581
Fenouille *v.* Hamilton, 35 Ala. 319 245
Fertilizing Company *v.* Hyde Park, 97 U. S. 659 561
First National Bank of Carlisle *v.* Graham, 79 Pa. 106 702
Fish *v.* Kelly, 17 C. B. N. S. 194 200
Fisk *v.* The Union Pacific Railroad Co., 6 Blatch. 362; s. c. 8 Blatch. 243 294
Fitch *v.* Baldwin, 17 Johns. (N. Y.) 161 61
Fitton *v.* Macclesfield, 1 Vern. 264 108
Foden & Slater *v.* Sharp, 4 Johns. (N. Y.) 183 712
Follett *v.* Hall, 16 Ohio, 111 689
Ford *v.* Fitchburg Railroad Co., 110 Mass. 241 219
110 Mass. 261 225
Ford *v.* Surget, 97 U. S. 594 169
Foster *v.* Essex Bank, 17 Mass. 479 702
Foster & Elam *v.* Neilson, 2 Pet. 253 490
Fournequet *v.* Perkins, 7 How. 160, 169 182
Fox *v.* The State of Ohio, 5 How. 410 278, 390
Franklin Bank *v.* Steward, 37 Me. 519, 522 455
Freese *v.* Brownell, 35 N. J. L. 285 717
Fuller *v.* Bean, 34 N. H. 290–300 134
Furman *v.* Nichol, 8 Wall. 44 532, 552
8 Wall. 62 532

Gaither *v.* The Farmers' & Mechanics' Bank, 1 Pet. 37 249
George *v.* Skivington, Law Rep. 5 Exch. 1 203
Gibbons *v.* Ogden, 9 Wheat. 203 301
Gibson *v.* Stevens, 8 How. 384, 399 128
Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 185 61
Gilman *v.* City of Sheboygan, 2 Black, 510 561
Gilmore *v.* Supple, 11 Moore, P. C. C. 551 134
Gladwell *v.* Steggall, 5 Bing. N. C. 733 203
Goodman *v.* Simonds, 20 How. 334 247, 248
Gordon *v.* Lewis, 2 Sum. 143 527

Gordon *v.* Longest, 16 Pet. 97 317
Graft *v.* Fitch, 58 Ill. 373 136
Gratiot *v.* United States, 4 How. 80 22
Gray *v.* Blanchard, 8 Pick. (Mass.) 283 58
97 U. S. 564 6
Green *v.* Neal's Lessee, 6 Pet. 291 52, 54
Griffin *v.* Wilcox, 21 Ind. 370 189
Griggs *v.* Gear, 8 Ill. 2 107
Grisar *v.* McDowell 6 Wall. 363 139, 251
6 Wall. 379 255
Groff *v* Belche, 62 Mo. 400–402 133
Groves *v.* Slaughter, 15 Pet. 449 52, 53

Hall *v.* Barrows, 10 Jur. N. S. 55 620
Halstead *v.* Skelton, 5 Q. B. 86; 1 & 2 Geo. IV. c. 78 715
Hamilton *v.* Dillon, 21 Wall. 73 12
Hannibal Railroad *v.* Swift, 12 Wall. 272 29
Harding *v.* Handy, 11 Wheat. 103 528
Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149, 171 532
Harkness *v.* Toulmin, 25 Mich. 80 581
Halran & Huff *v.* Peck, 33 Cal. 515 568
Harmony *v.* Mitchell, 1 Blatch. 548 172
Harris *v.* Shaw, 13 Ill. 463 563
Heirs of Holliman *v.* Peebles, 1 Tex. 673 210
Henderson *v.* The Mayor of New York *et al.*, 92 U. S. 260 679
Hills *v.* Place, 48 N. Y. 520 717
Hine *v.* Allely, 1 Nev. & M. 433 716
Hinson *v.* Lott, 8 Wall. 148 438, 678, 679
Hoadley *v.* San Francisco, 3 Saw. 553 473
Holmes *v.* Clarke, 6 H. & N. 937 225
v. Worthington, 2 Fos. & Fin. 533 225
Hornbuckle *v.* Toombs, 18 Wall. 103
Hornthall *v.* Collector, 9 Wall. 560, 566 293
Houghton *v.* Jones, 1 Wall. 702, 706 626
Houseman *v.* Girard Mutual Building & Loan Association, 81 Pa. St. 256 205
Howard *v.* Miner, 20 Me. 325–330 135
Hoyt *v.* United States, 10 How. 109 11
Hubbard *v.* Jarrell, 23 Md. 66 152
Hughes *v.* Edwards, 9 Wheat. 489 489
9 Wheat. 490 640
Hyde *v.* Lathrop, 3 Keyes (N. Y.), 597 135

Indianapolis & St. Louis Railroad Co. *v.* Horst, 93 U. S. 291 226
In re Bogart, 2 Sawyer, 396 22
In re Kaine, 14 How. 103 341
Insurance Company *v.* Dunn, 19 Wall. 214 317, 475
Insurance Company *v.* Folsom, 18 Wall. 249 32

Jackson *v.* Litch, 63 Pa. St. 451, 455 626
Jerome *v.* McCarter, 21 Wall. 17 5, 646
Johnson *v.* Towsley, 13 Wall. 72, 91 117
Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157 712
Justices *v.* Murray, 9 Wall. 274 295

Kahl *v.* Love, 37 N. J. L. 5, 8 202
Kaine's Case, 14 How. 103 402
Kearney *v.* Case, 12 Wall. 281 213
Kelly *et al. v.* The Gilman, Clinton, & Springfield Railroad Co. 155
Knight *v.* Bank, 3 Cliff. 429, 431 448
Kortright *v.* The Commercial Bank of Buffalo, 20 Wend. 91 455

La Grange *v.* Southwestern Telegraph Co., 25 La. An. 383 452
Lamar *v.* Browne, 92 U. S. 187 169
Lancaster County National Bank *v.* Smith, 62 Pa. St. 47 702
Langridge *v.* Levy, 2 Mee. & W. 519, 530; 4 id. 337 206
Langton *v.* Higgins, 4 H. & N. 400 133
Laning *v.* N. Y. C. Railroad Co., 49 N. Y. 521 225
Lanoy *v.* The Duke and Duchess of Athol, 2 Atk. 444 641
Lansing *v.* County Treasurer, 1 Dill 522, 528 533
Laramie County *v.* Albany County, 92 U. S. 307 526
Layton *v.* New Orleans, 12 La. An. 515 533
Leather Cloth Company *v.* American Leather Cloth Company, 11 Jur. N. S. 620
Le Caux *v.* Eden, 2 Doug. 594 169
Le Clair *v.* The First Division of the St. Paul & Pacific Railroad Co., 20 Minn. 9 225
Lee County *v.* Rogers, 7 Wall. 181, 184 532
Leffingwell *v.* Warren, 2 Black, 599 52, 583, 677
Leonard *v.* Davis, 1 Black, 476–483 128
Lessee *v.* Clute, 51 N. Y. 494–496 205
Lessee of Cooper *v.* Galbraith, 3 Wash. C. C. 546 152
Levy *v.* Gadsby, 3 Cranch, 180 249
Lingham *v.* Eggleston, 27 Mich. 324, 328 133
Lippincott *v.* The Town of Pana 51
Lloyd *v.* The West Branch Bank, 15 Pa. St. 172 455
Logan *v.* LeMesurier, 6 Moore, P. C. C. 116 133

Longmeid *v.* Holliday, 6 Exch. Rep. 761–767 203
Loop *v.* Litchfield, 42 N. Y. 351–358 204
Luther *v* Borden, 7 How. 1, 46 170

McClane *v.* Fitch, 4 B. Mon. (Ky.) 599 716
McCulloch *v.* The State of Maryland, 4 Wheat. 316 543
4 Wheat. 428 497
McCullough Case 413
McKee *v.* Rains, 10 Wall. 22, 25 295
McLaughlin *v.* Green, 50 Miss. 453–462 188
McMicken *v.* Perin, 18 How. 507 527
Macomber *v.* Parker, 13 Pick. (Mass.) 175, 183 135
Macrow *v.* Great Western Railway Co., Law Rep. 6 Q. B. 121 29
Magruder *v.* Bank, 3 Pet. 87, 90 712
Mallory *v.* Bryant, 17 Conn. 178 188
Marbury *v.* Madison, 1 Cranch, 137 327, 337, 341, 408
Marine Insurance Co. *v.* Young, 5 Cranch, 187 81
Martin *v.* Hunter's Lessee, 1 Wheat. 304 269, 270, 286, 291, 295
1 Wheat. 323 286
1 Wheat. 349 291, 295, 299
1 Wheat. 363 262
Martineau *v.* Kitching, Law Rep. 7 Q. B. 436, 439 131
Matter of Metzer, 5 How. 176 341
May *v.* Le Claire, 11 Wall. 217 584
Mayor *v.* Cooper, 6 Wall. 247 270
v. State, *ex rel.* of the Board of Police of Baltimore, 15 Md. 376 532
Mayor, &c. of Albany *v.* Cunliff, 2 N. Y. 165, 174 204
Mead *v.* Ballard, 7 Wall. 290 562
Merchants' Bank *v.* State Bank, 10 Wall. 604 702
Merchants' and Manufacturers' National Bank *v.* Wheeler, 13 Blatch. 218 473
Merle *v.* Mathews, 26 Cal. 456 211
Miller *v.* Shackleford, 4 Dana (Ky.), 287, 288 61
Mills *v.* Duryee, 7 Cranch, 483 186
Minor *v* Mechanics' Bank of Alexandria, 1 Pet. 46 454
Mitchell *v.* Harmony, 13 How. 115 169, 171
Moore *v.* Illinois, 14 How. 13 277, 390
v. Robbins, 96 U. S. 530 118
v. Voughton, 1 Stark. 396 691
Morgan *v.* Beloit, City and Town, 7 Wall. 613, 617 528
Morse *v.* Sherman, 106 Mass. 430, 433 133
Mortyn *v.* Fabrigas, 1 Cowp. 161, 175 187

Mullhall *v.* Keenan, 18 Wall. 342 81
Murdock *v.* Memphis, 20 Wall. 590, 636 283
Murray *v.* Patrie, 3 Blatch. 342 294
v. Phillips, 35 Law Times Rep. 477 223

Nathan *v.* Louisiana, 8 How. 73 95, 499
National Bank *v.* Insurance Company, 95 U. S. 673 617
National Bank of the Commonwealth *v.* Mechanics' National Bank, 94 U. S. 437 73
Natoma Water and Mining Co. *v.* Clarkin, 14 Cal. 552 61
Nesmith *v.* Sheldon, 7 How. 812 52
New Orleans *v.* Clark, 95 U. S. 644, 654 534
Nichols *v.* Morse, 100 Mass. 523 135
North Hempsted *v.* Hempsted, 2 Wend. (N. Y.) 109 532
Norton *v.* Jamison, 23 La. An. 102 576

Oddie *v.* The National City Bank of New York, 45 N. Y. 735 690
Ogg *v.* Shuter, Law Rep. 10 C. P. 159–162 133
Ogle *v.* Lee, 2 Cranch, 33 173
Olcott *v.* The Supervisors, 16 Wall. 678 52
Oliver *v.* Alexander, 6 Pet. 143 148
Orr *v.* Hodgeson, 4 Wheat. 453 489
Ortman *v.* Green, 26 Mich. 209, 212 133
Orvis *v.* Powell, 98 U. S. 176 106, 640
Osborn *v.* Bank of the United States, 9 Wheat. 738 264, 543, 560
Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 291, 293 716

Pacific Iron Works *v.* Long Island Railroad Co., 62 N. Y. 272, 274 133
Packer *v.* Nixon, 10 Pet. 408 173
Packet Company *v.* Keokuk, 95 U. S. 80 428, 432, 443
Page County *v.* American Emigrant Co., 41 Iowa, 115 70
Parsons *v.* Bedford, 3 Pet. 446 32
21 How. 167 32
Passenger Cases, 7 How. 283 679
Paterson *v.* Wallace, 1 Macq. H. L. Cas. 748 221
Patterson *v.* P. & C. R. W. Co., 76 Pa. St. 389 225
v. The Syracuse National Bank, C. A. (N. Y.) 703
Paul *v.* Virginia, 8 Wall. 168 95
Peete *v.* Morgan, 19 Wall. 581 678
People *v.* The Commissioners, 4 Wall. 244 546
v. Dolan and Others 36 N. Y. 59 542

People *v.* Utica Insurance Co., 15 Johns. (N. Y.) 357, 380 244
15 Johns. (N. Y.) 358 616
People, &c. *v.* Gerke & Clark, 5 Cal. 381 490
Pepin *v.* Lachenmeyer, 45 N. Y. 27–33 183
Peppin and Wife *v.* Sheppard, 11 Price, 400 203
Philadelphia *v.* Collector, 5 Wall. 728 292
Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Quigley, 21 How. 209 702
Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, 484 203
Philadelphia & Trenton Railroad Co. *v.* Stimpson, 14 Pet. 448, 459 626
Philpot *v.* Northwestern Railway Co., 19 C. B. N. S. 321 28
Piatt *v.* Oliver, 3 How. 333 584
Pickard *v.* Sears, 6 Ad. & Ell. 474 529
Picquet *v.* Curtis, 1 Sumn. 478 712
Planters' Bank *v.* Union Bank, 16 Wall. 483 183, 189, 190
Plumb *v.* Tubbs, 41 N. Y. 442 58
Police Jury *v.* Duralde, 22 La. An. 107 450
Polks's Lessee *v.* Wendell, 9 Cranch, 87 52
Pontchartrain Railroad Co. *v.* Heirne, 2 La. An. 129 456
Priestly *v.* Fowler, 3 Mee. & W. 1 221
Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet. 539 310, 418
Protector, 11 Wall. 82 146
Providence Bank *v.* Billings, 4 Pet. 514 561
4 Pet. 563 497
Pueblo Case, 4 Sawyer, 563 139

Railroad Company *v.* Fort, 17 Wall. 553, 557 217
v. Gladmon, 15 Wall. 401 226
v. Grant, 98 U. S. 398 113
Railway Company *v.* Whitton, 13 Wall. 270 265, 337
Reform, 5 Wall. 628 181
Regents *v.* Williams, 4 Gill & J. (Md.) 321 559
Rex *v.* Suddis, 1 East, 306 376
Rich *v.* Lambert, 12 How. 347 148
Riddle *v.* Varnum, 20 Pick. (Mass.) 280, 283 133
Riggs *v.* State, 3 Cold. (Tenn.) 87 189
Ringgold County *v.* Allen, 42 Iowa, 697 70
Robertson *v.* Fleming, 4 Macq. H. of L. Cas. 167, 209 202
Robinson *v.* Imperial Silver Mining Co., 5 Nev. 44 41
Rogers *v.* Dutt, 13 P. C. C. 209, 236 189
Rohde *v.* Thwaites, 6 B. & C. 388 136
Rosson *v.* Anderson, 9 B. Mon. (Ky.) 423 569, 570
Rowan *v.* Runnels, 5 How. 134 53, 54
Rowe *v.* Young, 2 Bli. 391, 395 714
2 Brod. & B. 165 712
Rubber Company *v.* Goodyear, 9 Wall. 805 107
Ruch *v.* Rock Island, 97 U. S. 693 58
Russell *v.* Carrington, 42 N.Y. 118, 125 136

Sarah Ann, 2 Sumn. 211 128
St. Louis *v.* The Ferry Company, 11 Wall. 423 497
Savage Manuf. Co. *v.* Armstrong, 19 Me. 147 135
Scott *v.* The National Bank of Chester Valley, 72 Pa. St. 471 702
Seaver *v.* Bigelows, 5 Wall. 208 148
Sellards *v.* Zomes, 5 Bush, 90 185
Shanks *v.* Dupont, 3 Pet. 242 487, 490
Shepley *v.* Cowan, 91 U. S. 330 118
Sill *v.* The Village of Corning, 15 N. Y. 297 532
Simmons *v.* Swift, 5 B. & C. 857 132
Sir William Herbert's Case, 3 Coke, 11 641
Slaughter-House Cases, 16 Wall. 27 345
16 Wall. 36 306, 307, 364, 365
Slauson *v.* The City of Racine, 13 Wis. 398 522
Smilie *v.* Biffle, 2 Pa. St. 52 569
Smith *v.* Little, 10 N. H. 526, 530 716
v. Northampton Bank, 4 Cush. (Mass.) 1, 11 455
v. The County of Clark, 54 Mo. 58 593
v. The First National Bank in Westfield, 69 Mass. 605 702
v. United States, 5 Pet. 292 11
Soutter *v.* The City of Madison, 15 Wis. 30 533
State *v.* Elder, 54 Me. 381 294
v. Hoskins, 77 N. C. 530 271, 297
77 N. C. 546 297
State, *ex rel.* Hasbrouck, *v.* The City of Milwaukee, 25 Wis. 122, 133 532
State of Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, 563 282
State Railroad Tax Cases, 92 U. S. 575 52
State Tax on Foreign-Held Bonds, 15 Wall. 300 497, 499
Steamship Company *v.* The Portwardens, 6 Wall. 31 677
Steven Morgan, 97 U. S. 599 527
Stoddard *v.* Chambers, 2 How. 284 583
Story *v.* Livingston, 13 Pet. 359 528
Stratton *v.* Jarvis, 8 Pet. 41 148

Suckley *v.* Furse, 15 Johns. (N. Y.) 338 244
Sumner *v.* Hicks, 2 Black, 532 52
Suydam *v.* Williamson, 24 How. 427 55
Swain *v.* Seamens, 9 Wall. 254, 274 529
Swift *v.* Tyson, 16 Pet. 1 246

Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 198 42
Taylor & Raddin *v.* Graham, 15 La. An. 418 452
Terry *v.* Wheeler, 25 N. Y. 520, 525 136
Texas *v.* Gaines, 2 Woods, 344 332
v. White, 7 Wall. 725 355, 357, 358
The Bank of Vergennes *v.* Warren, 7 Hill (N. Y.), 91 455
The Cherokee Tobacco, 11 Wall. 616 490
The City of Brownsville *v.* Cavazos, 2 Woods, 293 140
The Collector *v.* Day, 11 Wall. 124–126 358, 359
The Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348, 350 455
The Elsineur, 1 Wheat. 439 230
The Exchange, 7 Cranch 165
The First National Bank of Carlisle *v.* Graham, 79 Pa. 106 702
The Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149, 171 532
The Heirs of Holliman *v.* Peebles, 1 Tex. 673 210
The Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157 712
The Justices *v.* Murray, 9 Wall. 274 295
The Mayor *v.* Cooper, 6 Wall. 247 270
The Mayor, &c. of Albany *v.* Cunliff, 2 N. Y. 165, 174 204
The Merchants' and Manufacturers' National Bank *v.* Wheeler, 13 Blatch. 218 473
The People *v.* Dolan and Others, 36 N. Y. 59 542
v. Utica Insurance Co., 15 Johns. (N. Y.) 357, 380 244
15 Johns. (N. Y.) 358 616
The People, &c. *v.* Gerke & Clark, 5 Cal. 381 490
The Philadelphia & Trenton Railroad Co. *v.* Stimpson, 14 Pet. 448, 459 626
The Pontchartrain Railroad Co. *v.* Heirne, 2 La. An. 129 456
The Protector, 11 Wall. 82 146
The Pueblo Case, 4 Sawyer, 563 139
The Reform, 5 Wall. 628 181
The Regents *v.* Williams, 4 Gill & J. (Md.) 321 559
The Sarah Ann, 2 Sumn. 211 128
The Steven Morgan, 97 U. S. 599 527
The Venice, 2 Wall. 258–274 181, 182
The Western Saving Fund Society *v.* The City of Philadelphia, 31 Pa. St. 175, 185 533
Thomas *v.* Harvie's Heirs, 10 Wheat. 146 107, 109
v. Winchester, 2 Seld. 397, 410 204
Thompson *v.* Abbott, 61 Mo. 176, 177 528
v. Railroad Companies, 6 Wall. 134 103
v. Riggs, 5 Wall. 674 692
5 Wall. 663, 679 207
Thorpe *v.* R. & B. R. Co., 27 Vt. 140, 147 300
Tod, Relator, *v.* Fanfield Com. Pleas, 15 Ohio St. 377, 387 294
Tome *v.* Dubois, 6 Wall. 548, 554 131
Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625 49, 50, 52, 54
Town of Depere and Others *v.* Town of Bellevue and Others, 31 Wis. 120, 125 528
Town of Middleport *v.* The Ætna Life Insurance Co., 82 Ill. 562 51
Townsend *v.* Greeley, 5 Wall. 326 139, 255
Tregeles *v.* Sewell, 7 H. & N. 573 137
Truesdale *v.* Ward, 24 Mich. 117 581
Tucker *v.* Ferguson, 22 Wall. 527 561
Turley *v.* Bates, 2 H. & C. 200–208 133
Turner *v.* The First National Bank of Keokuk, 26 Iowa, 562 702
Twitchell *v.* The Commonwealth, 7 Wall. 321 284

United States *v.* Amy, 14 Md. 135 n. 278
v. Babbit, 1 Black, 55 703
v. Bevans, 3 Wheat. 336 275, 279
3 Wheat. 387 275
3 Wheat. 391 279
v. Bogart, 3 Benedict, 257 22
v. Coolidge, 1 Wheat. 415 275
v. Cruikshank, 92 U. S. 542 390
v. Dewitt, 9 Wall. 41–45 301
v. Eckford, 1 How. 250 11
v. Gleason, 1 Woolw. 75, 128 279
v. Kirby, 7 Wall. 482 244
v. Kirkpatrick, 9 Wheat. 720 12

United States *v.* Hudson & Goodwin, 7 Cranch, 32 275
v. Marigold, 9 How. 560 278
9 How. 569 390
v. McLean, 95 U. S. 750 685
v. More, 3 Cranch, 159 283, 290
3 Cranch, 170 290
v. Phisterer, 94 U. S. 219 670
v. Powell, 14 Wall. 493, 502 11
v. Reese, 92 U. S. 214 98, 311
v. Reid, 12 How. 361, 365 298
v. Rice, 4 Wheat. 246 183
v. Ross, 92 U. S. 281, 284 698
v. Russell, 13 Wall. 623 171
v. Singer, 15 Wall. 111, 121 11
v. Ward, 1 Woolw. 17, 20 280
v. Williamson, 23 Wall. 411 669
v. Wiltberger, 5 Wheat. 76 276, 279
5 Wheat. 96 276
v. Worral, 2 Dall. 384, 393 282

Van Hoffman *v.* City of Quincy, 4 Wall. 535, 554 532
Van Valkenburg *v.* Huff, 1 Nev. 142 40
Venice, 2 Wall. 258–274 181, 182

Walker *v.* State Harbor Commissioners, 17 Wall. 648 52
Wallace *v.* McConnell, 13 Pet. 136, 150 714
Ward *v.* Chamberlain, 2 Black, 430–434 173
v. State of Maryland, 12 Wall. 163, 204 678, 679
12 Wall. 418 439, 493, 678, 679
Warden *v.* Bailey, 4 Taunt. 65–87 190
Ware *v.* Barataria Co., 15 La. 169 456
v. Hylton, 3 Dall. 199 489
3 Dall. 242 490
Waring *v.* The Mayor, 8 Wall. 110 677
Watson *v.* Tarpley, 18 How. 517 246
Way *v.* Yally, 6 Mod. Rep. 195 188
Wayman *v.* Southard, 10 Wheat. 1, 66 173
Welton *v.* State of Missouri, 91 U. S. 275 439, 678, 679
Western Saving Fund Society *v.* The City of Philadelphia, 31 Pa. St. 175, 185 533
Weston *v.* The City Council of Charleston, 2 Pet. 449 543
White *v.* Cannon, 6 Wall. 443–450 182
v. The Franklin Bank, 22 Pick. (Mass.) 181 701
Whitehead *v.* Dugan, 25 La. An. 409 451
Whitney *v.* The First National Bank of Brattleboro', 50 Vt. 389 703
Wild *v.* Bank, 3 Mas. 505 454
Wilkinson *v.* Holiday, 33 Mich. 386–388 133
v. Leland, 2 Pet. 627 244
Willey *v.* The First National Bank of Brattleboro', 47 Vt. 546 703
Williams *v.* Mellish, 1 Vern. 117 108
v. Norris, 12 Wheat. 117 285
Wilson *v.* Franklin, 63 N. C. 259 189
Windsor *v.* McVeigh, 93 U. S. 274 23
Winterbottom *v.* Wright, 10 Mee. & W. 109, 115 203
Wiscart *v.* Dauchy, 3 Dall. 321, 327 290
Wise *v.* Withers, 3 Cranch, 331, 337 189
Wiser *v.* Blachly, 2 Johns. Ch. 488 108
Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248 712
Wood *v.* Mann, 2 Sumn. 334 234
v. Matthews, 2 Blatch. 370 294
Woodruff *v.* Parham, 8 Wall. 123 437, 438, 677, 679

Young *v.* Matthews, Law Rep. 2 C. P. 127–129 133
Yulee *v.* Vose, 99 U. S. 539 474

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1879.

PROPERTY OF
UNITED STATES SENATE
COMMITTEE COPY

Ex parte French.

In ejectment, where A., B., and the other defendants were respectively in the separate possession of specific parcels of the land, judgment was rendered against them for the recovery thereof and costs of suit, and also against each for damages for withholding the parcel whereof he was in possession, which exceed in the aggregate $6,000. A writ of error was sued out by all the defendants. A. and B., to render it a *supersedeas* of the judgment against them, severally gave a bond, which was duly approved and accepted. The court below thereupon ordered that the proceedings on the judgment as to A. and B. be stayed, and that a writ of restitution and execution be issued against the remaining defendants. *Held*, that a *mandamus* directing that the judgment be carried into execution against all the defendants would not lie.

PETITION for a *mandamus* against the Circuit Court of the United States for the District of California.

Upon the showing made by French in his petition, it appears that he brought a suit in ejectment in the court below against Lincoln, O'Ness, Onesti, DeSilva, and others, to recover the possession of a large tract of land. On the trial the court found, among other things, that Lincoln was in the separate possession of a specific portion of the tract, and that O'Ness, Onesti, and DeSilva were in the possession of another portion. Judgment was rendered, Oct. 7, 1878, in favor of French against all the defendants jointly for the recovery of the entire tract and the costs of suit, amounting to $959.25; and against Lincoln

separately for $330, damages for withholding possession; and against O'Ness, Onesti, and DeSilva for $225, for like cause. Other separate judgments for damages were rendered against the other defendants, the aggregate of all the money judgments being $6,091.

On the 28th of October a writ of error from this court was sued out in the name of all the defendants, and the Circuit Court on the same day made the following order: —

"And now, on motion of the defendants' attorneys, it is ordered that the amount of the bond to stay the execution of the judgment in this case, as to the possession of the land found by the findings filed herein to be in the separate possession of the defendant Lincoln, and also as to the judgment against him for damages and costs, be and the same is hereby fixed at $3,000. And it is further ordered that the amount of the bond to stay the execution of the judgment as to the land found by the findings filed herein to be in the separate possession of the defendants O'Ness, Onesti, and DeSilva, and also to stay the execution of the judgment against them for costs and damages, be and the same is hereby fixed at $3,000."

On the following day separate bonds were filed by the defendants named in this order for the designated amounts, and conditioned as required by law for the stay of execution, which were approved and accepted in due form by the circuit judge, and on the 31st of October the following order was made by the Circuit Court: —

"A writ of error having been sued out and perfected by the defendants in said action, and defendant L. M. Lincoln having given the proper bond to operate as a *supersedeas* as to the judgment against him, and the defendants Onesti, O'Ness, and DeSilva having given a similar bond as to the judgment against them: ordered, that proceedings be stayed as to the moneys recovered against said Lincoln, and as to the sixty acres of land found by the court to be in his possession, as described in the findings in said cause; and also that the proceedings be stayed as to the judgment for damages and costs against said O'Ness, Onesti, and DeSilva, and as to the land found to be in their possession, as described in the findings of the court in this cause; and that a writ of restitution and

execution issue as to the remaining defendants, and the remainder of the land recovered in the action."

Afterwards, French applied to the clerk of the Circuit Court to issue execution against all the defendants, as well those who had filed *supersedeas* bonds as the others; and this being refused, he moved the court to vacate its order of October 31, and direct the complete execution of the judgment. This also being refused, he now prays "that a writ of *mandamus* issue from this court to the Circuit Court, . . . directing said Circuit Court to proceed and completely execute its said judgment, notwithstanding said writ of error and said orders of said Circuit Court."

Mr. John Reynolds for the petitioner.

Rule 29 of this court, following the requirements of sect. 1000 of the Revised Statutes, provides that in real actions the bond must be for an amount sufficient to secure the sum recovered, and "just damages for delay," and costs and interest.

In *Stafford* v. *Union Bank of Louisiana* (17 How. 275), this court held that, when the bond was not equal to the whole amount recovered, the writ did not operate as a *supersedeas*, and that a writ of *mandamus* would be awarded directing the Circuit Court to execute the judgment.

It is no answer to say that the judgment in question is in effect a separate one against each defendant, for the land in his possession, and for damages for his withholding the same; for it is the writ of error which operates as a *supersedeas*, and coextensive with its operation must be the stay.

If the judgment be such that each defendant is, indepen dently of the others, entitled to a stay, each must sue out his separate writ. The defendants, against whom several judgments have been entered, cannot join in the writ for the purpose of conferring jurisdiction on this court, and then sever for any other purpose. All of them may be required to join in order to make the jurisdictional amount; and the writ cannot be upheld by the joinder, and operate severally.

Mr. Walter H. Smith, contra.

In California each defendant in ejectment may answer severally, and each demand findings and a judgment upon his possession of a separate parcel of the demanded premises

Winans v. *Christy*, 4 Cal. 70; *Anderson* v. *Parker*, 6 id. 200; *Curtis* v. *Sutter*, 15 id. 264; *Ellis* v. *Janes*, 26 id. 276; *Luse* v. *Clark*, 28 id. 35. It is clear, therefore, that the defendant against whom a separate judgment has been entered may stay proceedings without giving a bond rendering him responsible for the judgments against his co-defendants.

The amount of the bond and the sufficiency of the surety are matters of discretion in the judge below. An error committed in that regard is not ground for a *mandamus*. Rev. Stat., sect. 1000; *Jerome* v. *McCarter*, 21 Wall. 17. And a writ directing the execution of the judgment below will be refused, unless the record shows that on his part there has been mistake, misconduct, or omission of duty. *United States* v. *Trigg*, 11 Pet. 173. *Stafford* v. *Union Bank of Louisiana*, cited by counsel for the relator, is not applicable to this case.

MR. JUSTICE WAITE stated the case and delivered the opinion of the court.

The argument in support of this petition is, that as when the judgment or decree is for the recovery of money not otherwise secured, the rule of this court (Rule 29) requires the bond for stay of execution to be for the whole amount of the judgment or decree; and as in this case the writ of error was sued out by all the defendants, and the aggregate of all the money judgments against them severally is more than $6,000, the bonds that have been executed are insufficient, and therefore no stay of execution has been lawfully perfected. The object of the rule, which was made to put into form the practice that had prevailed before its promulgation, is to secure the eventual payment or performance of the judgment or decree, the execution of which is stayed by the *supersedeas*, in case the appeal or writ of error is not prosecuted to effect. Here, although the writ of error has been sued out to obtain the reversal of the entire judgment, a stay of execution is sought only as to certain specified parts. The judgment is severable as between the defendants, and has actually been severed by the court below for the purposes of the stay of execution. We see no impropriety in this, as in legal effect the judgment as it stands is against each of the several defendants for the lands they

respectively occupy, and the damages they are respectively liable to pay. In this view of the case the bonds are sufficient in amount and form. So far as the money parts of the judgment are concerned, they are far in excess in each instance of the amount recovered against the several defendants who seek the stay; and as to the damages on account of the detention of the property, we decided in *Jerome* v. *McCarter* (21 Wall. 17) that the amount of the bond rested in the discretion of the judge or justice who signed the citation or allowed the *supersedeas*, and would not be reconsidered here.

It is said, however, that if the judgment is separate, so that each defendant is entitled to a stay independently of the others, each must sue out his separate writ of error. To this we do not agree. The writ and the *supersedeas* are two separate things, and the writ can be sustained without a *supersedeas*. All the defendants want the judgment reviewed, but a part only desire to have the execution against them stayed; and we see no reason why they may not all join in the writ, and separate when they ask for a stay. There is certainly no settled practice against it, and very strong reasons can be found in its favor. The whole question is one of practice and not of statutory law. "Good and sufficient security that the plaintiff in error or the appellant . . . shall answer all damages and costs," "if he fail to make his plea good," is all the statute (Rev. Stat. sect., 1000) requires; and the rules of practice are satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected. But if the writ is informal, the remedy is by motion to vacate the writ, and not by *mandamus* to have the judgment carried into execution.

Petition denied.

TINTSMAN *v.* NATIONAL BANK.

Where, by an agreed statement of facts in the nature of a special verdict, the plaintiff's claim was admitted by the defendant, except the sum of $3,134.20, — *Held*, that that sum was the amount actually in dispute, and although judgment was rendered below for the entire claim, being more than $5,000, the writ of error must be dismissed for want of jurisdiction.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. D. T. Watson in support of the motion.

Mr. Welty McCullogh, *contra*.

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

In *Gray* v. *Blanchard* (97 U. S. 564), we held that a case must be dismissed, if, on an examination of the whole record, it appeared that the value of the matter actually in dispute between the parties was less than our jurisdictional amount. This writ of error was brought by the defendant below to reverse a judgment against him of more than $5,000; but on looking into the record we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant $8,233.79, and interest from June 4, 1876. The defendant admitted that he owed of this amount $5,099.59, for which the plaintiff was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or $3,134.20. This, then, is the amount actually in dispute, and as it is less than $5,000, we have no jurisdiction.

Writ dismissed.

GARNEAU *v.* DOZIER.

For the purposes of an appeal to, or a writ of error from, this court, the transcript of the record is sufficiently authenticated, if it be sealed with the seal of the court below, and signed by the deputy clerk thereof in the name of and for his principal.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This is an appeal taken by Garneau from a decree rendered in favor of the defendants below, partners doing business under the firm name of Dozier, Weyl, & Co. The authentication of the transcript of the record filed here is as follows: —

"UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, *ss.*

"I, M. M. Price, clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, proceedings, and exhibits in case No. 560 of Joseph F. Garneau, plaintiff, against Dozier, Weyl, & Co., defendants, as fully as the same remain on file and of record in said case in my office.

"In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this seventeenth day of July, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL.]

"M. M. PRICE,
"*Clerk of said Court.*
"By T. L. CRAWFORD,
"*Deputy.*"

Mr. Edward Boyd in support of the motion.
Mr. Robert H. Parkinson, contra.

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

Since the act of June 8, 1872 (17 Stat. 330), Rev. Stat. 558, 624, 678, authorizing the appointment of deputies of the clerks of the courts of the United States, a transcript of the record is sufficiently authenticated for the purposes of an appeal or a writ of error to this court, if it is signed by the deputy in the

name of and for the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court. The transcript sent up in this case comes within this rule.

Motion denied.

SOULE *v.* UNITED STATES.

Debt on the bond of a collector of internal revenue, bearing date Jan. 12, 1867. *Held*, 1. That the audit of his accounts was the duty of the First Auditor. 2. That the settlement of them, as the same appears by the transcript from the books of the Treasury Department, duly certified and authenticated, is *prima facie* evidence of the balance thereby shown, and it is competent for the accounting officer to correct mistakes and restate the balance. 3. That the sureties are liable for the gauger's fees received by the collector. 4. Where a bond given by the latter is objectionable in point of form, the direction of the Commissioner of Internal Revenue to execute a new one must be considered as that of the Secretary of the Treasury, and the bond given in compliance therewith cannot be considered as having been extorted from the collector and his sureties contrary to the statute.

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

This was an action by the United States on the bond executed by Soule as collector of internal revenue for the first collection district of the State of California, and his sureties, bearing date Jan. 12, 1867, and conditioned according to law. There was a judgment in favor of the United States. The defendants sued out this writ of error.

The assignment of errors and the facts are set forth in the opinion of the court.

Mr. W. W. Morrow for the plaintiffs in error.
The Solicitor-General for the United States.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Internal-revenue collectors are required, before entering upon the duties of their office, to execute a bond for such amount as shall be prescribed by the commissioner, under the direction of the secretary, with not less than five sureties, conditioned that

the collector shall faithfully perform his duties, and account for and pay over to the United States all public moneys which may come into his hands and possession. 13 Stat. 225.

Pursuant to that requirement, the defendant first named, having been appointed such collector, on the 12th of January, 1867, gave the bond described in the complaint, and the other defendants signed the same as his sureties, the charge in the complaint being that the collector failed to perform the conditions of the bond.

Service having been made, the defendants appeared and pleaded as follows: 1. That the allegations of the complaint are not true. 2. That the bond is void because executed under duress. 3. Performance.

Subsequently the parties went to trial, and the verdict and judgment were in favor of the plaintiff. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court.

Errors assigned here are as follows: —

1. That the court erred in admitting in evidence the transcript of accounts as audited by the fifth auditor.

2. That the court erred in instructing the jury that the sureties were liable for the item charged in the transcript as the excess collected on the amount of gauger's fees.

3. That the court erred in instructing the jury that the transcript was *prima facie* evidence of the correctness of the item charged therein as the amount of error by the assessor in footing lists, as per report of the supervisor.

4. That the court erred in instructing the jury that upon the evidence given the bond was a voluntary bond and was not extorted, and that the collector and his sureties were liable upon it.

5. That the court erred in instructing the jury that the direction to the collector contained in the letter of the commissioner to execute the bond, he having previously given one, must be considered as the direction of the Secretary of the Treasury.

Five things are established by the act of Congress: 1. That it is the duty of the commissioner to pay over daily to the treasurer all public moneys which may come into his posses-

sion. 2. That the treasurer is required to give proper receipts for the money, and keep a faithful account of the same. 3. That it is also the duty of the commissioner, at the end of each month, to render true and faithful accounts of all public moneys received or paid out or paid to the treasurer, and to exhibit proper vouchers for the same. 4. That it is the duty of the fifth auditor to receive such vouchers and examine the same, and to certify the balance, if any, and to transmit the accounts with the vouchers and certificate to the first comptroller for his decision thereon. 5. That it is the duty of the commissioner, when such accounts are settled as provided in that section, to transmit a copy thereof to the Secretary of the Treasury. 13 Stat. 223.

Argument to show that by the true construction of that section the fifth auditor is the proper officer to audit such accounts is scarcely necessary, as it is clear that the act contemplates that they should be audited, and that it does not devolve the duty upon any other officer. Conclusive support to that theory, if more be needed, is also derived from the first paragraph of sect. 277 of the Revised Statutes, which, among other things, provides that the fifth auditor shall receive and examine all reports of the commissioner of internal revenue, which of course embraces such accounts as that of the collector in this case, as it includes all the accounts rendered in the department of the commissioner. Rev. Stat. (2d ed.), sect. 277, p. 46.

Authority to appoint gaugers was conferred by the fifty-third section of the act imposing taxes on distilled spirits and tobacco, and for other purposes. 15 Stat. 147. Fees for gauging and inspecting, as prescribed by the commissioner, were to be paid to the collector by the owner or producer of the articles to be gauged and inspected. Such fees were to be retained by the collector until the last day of each month, when the aggregate amount of fees so retained was, under regulation of the commissioner, to be paid to the officers performing that duty, not to exceed, however, the rate of $3,000 per annum.

Four hundred and ninety-four dollars and thirty-eight cents, money collected from that source in excess of what the collector had paid out, remained in his hands, and was charged in the accounts as settled by the accounting officers of the

treasury. Due exception was taken by the sureties to the ruling of the court that they were liable for that charge. No objection was made to the charge as against the collector, but the objection was that the sureties were not liable, because the money was received under the subsequent act.

Viewed in that light, it must be assumed that the charge was a proper one as against the collector, and inasmuch as it was money collected by law of the owner or producer of the articles to be gauged and inspected, it was clearly public money in his hands to which he had no legal right. By the terms of the bond in suit the sureties are to become responsible if their principal does not justly and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. Beyond doubt the amount went into his hands and possession as public money, and in the judgment of the court here, the ruling of the court below, that the sureties are liable for it, is correct. *United States* v. *Powell*, 14 Wall. 493, 502; *United States* v. *Singer*, 15 id. 111, 121.

When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register, and authenticated under the seal of the department, . . . shall be submitted as evidence; and the court trying the cause shall be authorized to grant judgment and award execution accordingly. Rev. Stat., sect. 886; *Bruce* v. *United States*, 17 How. 439; *Smith* v. *United States*, 5 Pet. 292; *Cox* v. *United States*, 6 id. 172; *Hoyt* v. *United States*, 10 How. 109.

Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. *United States* v. *Eckford*, 1 id. 250. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account.

Sufficient appears to show that the principal defendant was appointed collector March 28, 1865, in the recess of the Senate,

to hold until the expiration of the then next session of Congress, and no longer. On the 25th of July following he was appointed to the same office by the President and was confirmed by the Senate. Due notice of his appointment was given, and he was furnished with a blank form of bond, which, on Nov. 2, 1866, he executed with sureties; but the bond being several and not joint and several, as it should be, he was officially requested to execute a new bond correcting that error. In pursuance of that request, on the 12th of January of the next year he executed the bond described in the complaint, and from the date of the first bond to the date of the second his accounts were settled by the treasury officers under the first bond. When the second bond was offered in evidence, the defendant objected to its admissibility; but the court overruled the objection, and instructed the jury that it was not extorted, which instruction constitutes the fourth exception.

Evidence to support the charge of duress is entirely wanting. Instead of that, the defendant testified that he did not remember that he made any objection to executing the bond, and supposed that he did it because the commissioner had given such directions.

Exception was also taken to the instruction of the court that the direction of the commissioner to execute a new bond must be considered as the direction of the secretary, which is so obviously correct as to require no argument in its support, as it is matter of common knowledge that the commissioner is a subordinate officer of the Treasury Department. *Dugan* v. *United States*, 3 Wheat. 172; *United States* v. *Kirkpatrick*, 9 id. 720; *Hamilton* v. *Dillon*, 21 Wall. 73.

Suffice it to say that in view of these suggestions it is clear that there is no error in the record.

Judgment affirmed.

EX PARTE REED.

1. The regularly appointed clerk of a paymaster in the navy is a "person in the naval service of the United States," within the meaning of art. 14, sect. 1624, of the Revised Statutes, and, for a violation of its provisions, is subject to be tried, convicted, and sentenced by a naval general court-martial.
2. The "regulations for the administration of law and justice" in that service, established by the Secretary of the Navy with the approval of the President, have the force of law.
3. Where, pursuant to such regulations, a general court-martial is duly ordered, the officer clothed with the revising authority may, before it is dissolved, direct it to reconsider its proceedings and sentence; and if it, upon being reconvened, renders a sentence which he approves, such sentence cannot be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority.
4. A., the clerk of a paymaster in the navy, was, by a court-martial, found guilty of certain charges and specifications of malfeasance in the discharge of his official duties. Sentence was passed upon him, and transmitted, with the record, to the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon A. a severer punishment. A., who was imprisoned pursuant thereto, alleging that it was illegal and void, and that he was thereby unlawfully deprived of his liberty, prayed for a writ of *habeas corpus*. *Held*, that the court-martial had jurisdiction of the person and of the subject-matter, and was competent to pass the sentence whereof A. complained.

MR. GEORGE S. BOUTWELL presented the following petition of Alvin R. Reed for a writ of *habeas corpus*: —

"*To the Supreme Court of the United States:*

"The petition of Alvin R. Reed, of Medford, in the county of Middlesex and State of Massachusetts, respectfully shows, —

"*First*, That on or about the twenty-sixth day of June, A.D. 1878, your petitioner was ordered to appear before a naval general court-martial convened by Rear-Admiral Ed. T. Nichols, on board the U. S. ship 'Essex,' then stationed in the waters of Rio Janeiro, South America, to answer to certain charges and specifications of malfeasance in the discharge of his official duties as clerk to George L. Davis, then a paymaster in the navy of the United States.

"*Secondly*, That in obedience to said order your petitioner appeared before said court-martial, and on the fifth day of July,

A.D. 1878, pleaded not guilty to the several charges and specifications then made and read to him; and that thereupon, from day to day, the trial proceeded until the sixteenth day of July, A.D. 1878, when the said court-martial found him guilty of certain of the charges and specifications.

"*Thirdly*, That on the said sixteenth day of July, A.D. 1878, the court passed sentence upon your petitioner, made a record thereof in their proceedings, and transmitted the sentence to Rear-Admiral Nichols after the members of the court had affixed their signatures thereto.

"*Fourthly*, That on the nineteenth day of July, A.D. 1878, Rear-Admiral Nichols returned the said sentence to the president of the court-martial, with a communication in writing, in which the admiral says that the finding is in accordance with the evidence, but regrets to be compelled to differ with the court as to the adequacy of the sentence.

"*Fifthly*, That on the twentieth day of July, A.D. 1878, the court-martial proceeded to revise the sentence so returned, and adopted an order that the following sentence be placed on the record in substitution of the former sentence, which is hereby revoked: —

"'That the said Alvin R. Reed, paymaster's clerk, U. S. Navy, be imprisoned in such place as the honorable Secretary of the Navy may designate for the term of two years; to lose all pay which may become due him during such confinement, excepting the sum of $10 per month, this loss amounting to $1,960; to be fined in the sum of $500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of term of confinement, to be detained in confinement without pay until such fine be paid, and at the expiration of term of confinement to be dishonorably dismissed from the naval service of the United States.

"'W. S. SCHLEY, *Commander U. S. N., President of Court.*
H. T. STANCLIFF, *Past Assistant Paymaster and member.*
CHAS. H. BLACK, *Lieutenant and member.*
E. S. HOUSTON, *Lieutenant and member.*
ASA WALKER, *Lieutenant and member.*
W. P. DAY, *Lieutenant and member.*
ROBERT L. MEAD, *Captain U. S. M. C., Judge Advocate.*'

"*Sixthly*, That the second sentence, so imposed, was more severe upon your petitioner than the sentence passed upon him on

the sixteenth day of July, A.D. 1878, and revoked by the court-martial as aforesaid.

"*Seventhly*, And your petitioner further represents, that in his capacity as paymaster's clerk, as aforesaid, he was not amenable to trial by court-martial, nor subject to the jurisdiction of said court.

"*Eighthly*, That under said second sentence your petitioner has been for a long time, and now is confined on the U. S. ship 'Wabash,' at the navy yard, Boston, Mass., and under the custody of Capt. S. L. Breese, commander of said ship.

"*Ninthly*, That on or about the twelfth day of April, A.D. 1879, your petitioner presented his petition to the Hon. John Lowell, Circuit Judge of the United States in the first circuit, praying for a writ of *habeas corpus;* that a hearing thereupon was had before the Hon. Thomas L. Nelson, Judge of the District Court, sitting in the said Circuit Court, and such proceedings were thereon had that on the twelfth day of June, A.D. 1879, the said Circuit Court, to which said writ was returnable, remanded your petitioner and discharged said writ.

"And your petitioner now is, and ever since the said twelfth day of June, A.D. 1879, has been, a prisoner confined on said ship, at the navy yard, at said Boston, in the custody of said S. L. Breese, under the said illegal sentence pronounced on him on the said twentieth day of July, A.D. 1878, and restrained of his liberty in violation of the Constitution of the United States and of the laws of the country.

"Wherefore your petitioner prays that a writ of *habeas corpus* issue directed to the said S. L. Breese, commander of the said ship 'Wabash,' commanding him to produce your petitioner before this honorable court, at the city of Washington, at such time as the court shall direct, and that he then and there show the cause of your petitioner's detention, to the end that your petitioner may be discharged from custody.

"And your petitioner also prays that a writ of *certiorari* may issue to John G. Stetson, clerk of the U. S. Circuit Court for the District of Massachusetts, commanding him to certify to your honorable court the petition of your petitioner before referred to, the return thereto, and all the records of said court respecting the same, and the adjudication thereon, to the end that the errors therein may be corrected by this honorable court.

"And your petitioner will ever pray.

"ALVIN R. REED

"Dated BOSTON, Sept. 3, 1879."

The petition was duly verified, and the facts therein stated were set forth with more fulness and particularity in an agreed statement filed therewith.

Mr. George S. Boutwell for the petitioner.

I.

The prisoner is now held by order of the Circuit Court, whereby he was remanded into the custody of Captain Breese, and this proceeding is in the nature of an appeal, in which is included the power of revision in the exercise by this court of its appellate jurisdiction. *Ex parte Yerger*, 8 Wall. 85; *Ex parte Vallandigham*, 1 id. 243.

Courts-martial are exceptional in their organization, jurisdiction, modes of procedure, and the rules by which findings are made or judgments pronounced. In an ordinary judicial tribunal, nothing, therefore, is to be presumed in their favor. *Brooks* v. *Adams*, 11 Pick. (Mass.) 442; *Dynes* v. *Hoover*, 20 How. 65.

Paymasters' clerks are only recognized indirectly in the chapter on the organization of the navy. By sects. 1386, 1387, 1388, Rev. Stat., paymasters and assistant paymasters are, under certain circumstances, allowed clerks. By sect. 1556 their pay is fixed. For the same reason, by sect. 1367, the admiral and vice-admiral are each allowed a secretary to aid in the discharge of their respective duties. Sect. 1366 provides that "the active list of the pay corps of the navy shall consist of thirteen pay directors, thirteen pay inspectors, fifty paymasters, thirty passed assistant paymasters, and twenty assistant paymasters." Sect. 1383 requires every paymaster, passed assistant paymaster, and assistant paymaster to give bonds for the faithful performance of his duties. No such obligation is laid upon paymasters' clerks, nor are they officers holding either commissions or warrants, nor are they deemed petty officers. Sect. 1410.

If a reasonable doubt exists whether paymasters' clerks are of the naval force and subject to the jurisdiction of a court-martial, the petitioner is entitled to the writ.

II.

1. There is no common law of the United States. *Wheaton* v. *Peters*, 8 Pet. 591. As the existence, jurisdiction, and powers of courts-martial are exceptional, with stronger reason it can be maintained that such courts have no common law, and hence any reference to the usages or laws of Great Britain is inapplicable to this case. In one particular, by the statute of 1799 (1 Stat. 715), the common law of nations, which was the law of Great Britain, was incorporated in our naval code. The statute was in these words: "All faults, disorders, and misdemeanors which shall be committed on board any ship belonging to the United States, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea." It was superseded by art. 22, sect. 1624, Rev. Stat., which provides that "all offences committed by persons belonging to the navy which are not specified in the foregoing articles shall be punished as a court-martial may direct."

The adoption, however, of one common-law rule by statute excludes the idea that, by virtue of the Constitution, the naval usages and laws of Great Britain became a part of our naval code.

As Reed was tried upon the charge of malfeasance and misdemeanors prohibited specifically in the rules and articles for the government of the navy, his case did not fall under art. 22.

2. Sect. 1624, Rev. Stat., provides a system for the organization and conduct of naval courts-martial, and their proceedings are valid only when the statutes are followed and obeyed.

3. As the case of the government is now understood by the counsel for the petitioner, the act of Rear-Admiral Nichols, in sending the sentence of the 17th of July to the court for revision, is justified under art. 54 of sect. 1624 of the Revised Statutes, which declares that "every officer who is authorized to convene a court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm;" and by sect. 262 of the rules and regulations for the administration of law and justice in the navy, as au-

thorized or confirmed by sect. 1547 of the Revised Statutes, which provides that "the authority who ordered the court is competent to direct it to reconsider its proceedings and sentence, for the purpose of correcting any mistake which may have been committed." Regulations for the Administration of Law and Justice in the U. S. Navy, 1870, p. 49. Sect. 1547, Rev. Stat., is as follows: "The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the navy, subject to alterations adopted in the same manner."

Sect. 5 of the statute of July 14, 1862 (12 Stat. 565), provides "that the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States."

The position of the government is not tenable, and for these reasons: —

a. If the regulation of the department had, in precise words, been enacted in a statute, Rear-Admiral Nichols would have had no lawful authority for doing what was done.

He could then have directed the court to reconsider its sentence only for the purpose of correcting a mistake in matter of law or in matter of fact. What he alleged as having happened in the court was neither, being only, in his opinion, an error of judgment within the limits of the discretion conferred by law upon courts-martial.

b. But if it were otherwise, and the regulation of the department be construed as giving him authority to direct the court to reconsider its sentence for any reason that seemed to him sufficient, that regulation would be valid only so far as it conformed to the Constitution and laws. If in any respect it exceeded the limits which they impose, it would not bind even the officers and men of the navy, and with stronger reason it could not be invoked to deprive a citizen of his right to be tried according to the laws of the country.

Art. 54 of sect. 1624, Rev. Stat., specifically limits the authority which the officer convening a court-martial has to revise its proceedings. He may confirm, remit, or mitigate the sentence, but cannot increase it either directly or indirectly, or even transmit it to any one except his superior in office.

c. The sole power of revision was in the admiral himself, and the manner of its exercise was prescribed in that article. When the sentence was signed and transmitted, the power of the court over it ended; and neither by any original action on its own part, nor by delegation from another, could that power be revived.

It is claimed on behalf of the petitioner that when, on the 17th of July, the sentence was made, signed by the several members of the court, recorded, and transmitted to the admiral, not only were the powers of the court exhausted, but the court itself ceased to exist. His action was equivalent to a formal dissolution of the court, and the members who had composed it were thereafter utterly incapable of lawfully doing any act or thing touching or affecting the rights or the liberty of Reed. It follows that on the 22d of July, 1878, when the so-called sentence, whose validity is now under consideration, was pronounced and recorded, a legally constituted court-martial for his trial did not exist. He has therefore been twice put in peril for the same offence, or he is now deprived of his liberty without due process of law. In either case, his imprisonment is contrary to the guaranty contained in art. 5 of the amendments to the Constitution. *Osborn* v. *Nicholson*, 13 Wall. 654, 662.

The Attorney-General, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

There is no controversy in this case about the facts. The questions we are called on to consider are all questions of law. A brief summary of the facts will therefore be sufficient.

The petitioner, Reed, was the clerk of a paymaster in the navy of the United States. He was duly appointed, and had accepted by a letter, wherein, as required, he bound himself "to be subject to the laws and regulations for the government of

the navy and the discipline of the vessel." His name was placed on the proper muster-roll, and he entered upon the discharge of his duties. While serving in this capacity, charges of malfeasance were preferred against him, and on the 26th of June, 1878, he was directed by Rear-Admiral Nichols to appear and answer before a general court-martial, convened pursuant to the order of that officer on board the United States ship "Essex," then stationed at Rio Janeiro, in Brazil. The court found the petitioner guilty, and sentenced him accordingly. The admiral declined to approve the sentence, and remitted the proceedings back to the court, that the sentence might be revised. The court thereupon pronounced the following sentence in substitution for the former one: —

"That the said Alvin R. Reed, paymaster's clerk, U. S. Navy, be imprisoned in such place as the honorable Secretary of the Navy may designate, for the term of two years; to lose all pay which may become due him during such confinement, excepting the sum of $10 per month, this loss amounting to $1,960; to be fined in the sum of $500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of the term of confinement, to be detained in confinement without pay until such fine be paid, and at the expiration of the term of confinement to be dishonorably dismissed from the naval service of the United States."

This sentence was different from the preceding one in two particulars, and in both it was more severe. It was approved by the admiral, and ordered to be carried out. The court was subsequently dissolved. While in confinement, under the sentence, on board a naval vessel at Boston, the petitioner sued out a writ of *habeas corpus*, and brought his case before the Circuit Court of the United States for the District of Massachusetts. After a full hearing, that court adjudged against him, and ordered him back into the custody of the naval officer to whom the writ was addressed. The petitioner thereupon made this application in order that the conclusions reached by the Circuit Court may be reviewed by this tribunal.

It is supposed that courts-martial were intended originally to be a partial substitute for the court of chivalry of former times

3 Christian's Bl. 68, 108; Bouv. Law Dict., tit. Courts-martial. The difference between military law and martial law is too well known to require any remark. 1 Kent, Com. (12th ed.) 241, note (*a*).

". . . The common law . . . knew no distinction between citizen and soldier; so that if a life-guardsman deserted, he could only be sued for a breach of contract; and if he struck his officer, he was only liable to an indictment or an action of battery." 3 Campbell's Lives of Chief Justices, 91.

The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const., art. 1, sect. 8, and amendment 5. In *Dynes* v. *Hoover* (20 How. 65), the subject was fully considered and their validity affirmed.

The regularity of the original organization of the court here in question is not denied.

Three points in support of the petition have been brought to our attention. It is insisted —

1. That the court had no jurisdiction to try a paymaster's clerk.

2. That when the first sentence was pronounced, the power of the court was exhausted, and that the second sentence was, therefore, a nullity.

3. That the court could revise its former sentence only on the ground of mistake, and that there was no mistake, and consequently no power of revision.

The first of these propositions is clearly not maintainable.

Where the punishment is death, or fine and imprisonment, the jurisdiction in question is extended to all persons "in the naval service of the United States" (Rev. Stat., sect. 1624, arts. 4, 14); and it embraces, besides the frauds enumerated, "any other fraud against the United States." Id., art. 14.

In case of conviction, adequate punishment is required to be adjudged. Id., art. 51.

Except where the sentence is death or the dismissal of a commissioned or warrant officer, it may be executed when confirmed by the officer ordering the court. Id., art. 53.

The place of paymaster's clerk is an important one in the

machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also become entitled to a pension and to bounty land. Navy Regulations of Aug. 7, 1876, p. 95; *In re Bogart*, 2 Sawyer, 396; *United States* v. *Bogart*, 3 Benedict, 257; Rev. Stat., sects. 4695 and 2426.

The good order and efficiency of the service depend largely upon the faithful performance of their duties.

If these officers are not in the naval service, it may well be asked who are.

The second and third points will be considered together.

The Secretary of the Navy is authorized to establish "Regulations of the Navy," with the approval of the President. 12 Stat. 565; Rev. Stat., sect. 1547. Such "Regulations for the Administration of Law and Justice" were issued on the 15th of April, 1870. Thereby it is declared as follows: —

"The authority who ordered the court is competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed.

"It is not the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

"The proceedings must be sent back for revision before the court shall have been dissolved." Reg., c. 5, sects. 262–264.

Such regulations have the force of law. *Gratiot* v. *United States*, 4 How. 80.

The proceedings with respect to the revision of the second sentence were in conformity to these provisions.

It is clear that the court was not dissolved until after the approval of the second sentence by the admiral.

The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.

We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void. *Cornett* v. *Williams*, 20 Wall. 226; *Windsor* v. *McVeigh*, 93 U. S. 274; 7 Wait's Actions and Defences, 181. Here there was no defect of jurisdiction as to any thing that was done. Beyond this we need not look into the record. Whatever was done, that the court could do under any circumstances, we must presume was properly done. If error was committed in the rightful exercise of authority, we cannot correct it.

A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Milligan*, 4 Wall. 2.

The application of the petitioner is, therefore, denied.

RAILROAD COMPANY *v.* FRALOFF.

1. It is competent for general carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with a statute or their duties to the public, to protect themselves against liability as insurers of his baggage which exceeds a fixed amount in value, except upon additional compensation proportioned to the risk.
2. As a condition precedent to a contract for its transportation, they may require information from him as to its value, and demand *extra* compensation for any excess beyond that which he may reasonably demand to be transported as baggage under the contract to carry the person.
3. They may be discharged from liability for its full value, if he, by any device or artifice, evades inquiry as to such value, whereby a responsibility is imposed upon them beyond what they are bound to assume in consideration of the ordinary fare charged for the transportation of the person.
4. In the absence of legislation, or of special regulations by the carriers, or of conduct by him misleading them as to such value, his failure to disclose it, when no inquiry is made of him, is not, in itself, a fraud upon them.
5. To the extent that articles taken by him for his personal use when travelling exceed in quantity and value such as are ordinarily or usually taken by passengers of like station and pursuing like journeys, they are not baggage for which the carriers are, by general law, responsible as insurers.
6. Whether he has taken such an excess of baggage is a question not of law for the sole or the final determination of the court, but of fact for the jury, under proper guidance as to the law of the case. Their determination of it upon the evidence — no error of law appearing — is not subject to re-examination here.
7. Sect. 4281, Rev. Stat., has no reference to the liability of carriers by land for the baggage of passengers.

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

The facts are stated in the opinion of the court.

Mr. Elliott F. Shepard for the plaintiff in error.

Mr. James W. Gerard, *contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action by Olga de Maluta Fraloff to recover the value of certain articles of wearing-apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the

company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts: —

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after travelling in Europe, Asia, and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing-apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theatres, or attending dinners, balls, and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case, in 1873, the jury, being unable to agree, was discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and, at the same time, submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge, to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instructions to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated the company excepted in due form. The jury returned a verdict against the company for the sum of $10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a minor and merely technical nature, which do not involve the merits of the case, or the just rights of the parties.

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction

would have been proper. 1 Wall. 369; 11 How. 372; 19 id. 269; 22 Wall. 121. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action.

The Circuit Court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents. It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the

carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when travelling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage, — the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier, which defeats all right of recovery. The instructions asked by the company virtually assumed that the general law governing the rights, duties, and responsibilities of passenger carriers prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveller," says Erle, C. J., in *Philpot* v. *Northwestern Railway Co.* (19 C. B. N. S. 321), "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that,

by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing-apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when travelling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveller usually carries with him for his personal convenience." Angell, Carriers, sect. 115. In *Hannibal Railroad* v. *Swift* (12 Wall. 272), this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the Queen's Bench in *Macrow* v. *Great Western Railway Co.* (Law Rep. 6 Q. B. 121), where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons, Contr., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier,

by general law, is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing-apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience. comfort, or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while travelling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted any thing essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the company at Albany for transportation to Niagara Falls, the court charged the jury, in substance, that every traveller was entitled to provide for the exigencies of his journey in the way of baggage, was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons travelling, for their comfort, convenience, and gratification upon such journeys; that the liability of carriers could not be maintained to

the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travellers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveller might lead that traveller to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort, or convenience, the company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion.*

Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instruc-

tions correctly defining the legal rights of parties. *Parsons* v. *Bedford*, 3 Pet. 446; 21 How. 167; *Insurance Company* v. *Folsom*, 18 Wall. 249.

It is, perhaps, proper to refer to one other point suggested in the elaborate brief of counsel for the company. Our attention is called to section 4281 of the Revised Statutes, which declares that "if any shipper of platina, gold, gold-dust, coins, jewelry, . . . trinkets, . . . silk in a manufactured or unmanufactured form, whether wrought up or not wrought up with any other material, furs or laces, or any of them, contained in any parcel, package, or bundle, shall lade the same as freight or baggage on any vessel, without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any of such goods beyond the value and according to the character thereof, so notified and entered."

It is sufficient to say that the section has no application whatever to this case. It has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

Judgment affirmed.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE MILLER and MR. JUSTICE STRONG, dissenting.

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by the owner to be worth $75,000, and found by the jury to be of the value of $10,000, can, as a matter of law, be properly considered as baggage of a passenger, for the loss of which the railroad company, in the absence of any special agreement, should be held liable.

UNITED STATES *v.* HIRSCH.

1. A period of less than five years will not bar a prosecution for effecting an entry of goods at the custom-house by a fraudulent invoice of them, and a false classification as to their quality and value.
2. A conspiracy to defraud the United States of the duties on certain imported goods is not "a crime arising under the revenue laws," and the persons charged therewith cannot be prosecuted therefor unless they be indicted within three years next after the alleged committing thereof.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

An indictment, consisting of four counts, was found, Feb. 3, 1877, against Hiram Hirsch and others, who pleaded that the offences therein charged had been committed more than three years before the finding of the indictment.

The first count was drawn under sect. 5440, Rev. Stat., and charges the defendants with a conspiracy, entered into on the first day of September, 1873, to defraud the United States out of the duties on certain described merchandise to be thereafterwards imported into the United States.

The second count charges a conspiracy, entered into on the thirteenth day of September, 1873, to defraud the United States out of duties on certain merchandise theretofore imported into the United States. The remaining counts were drawn under sect. 5445, and charge that the defendants knowingly effected an entry of the goods at the custom-house, by a fraudulent invoice of them, and by a false classification as to their quality and value.

The United States demurred to the plea, and the judges of the Circuit Court were divided in opinion upon the question "whether the trial is barred by sect. 1044, the indictment having been found more than three years after the commission of the alleged offence, or whether it is within the provisions of sect. 1046, as having been found within five years next after the commission of the alleged offence."

It is enacted by sect. 1044 that "no person shall be prosecuted for any offence, not capital, except as provided in sect.

1046, unless the indictment is found within three years next after such offence shall have been committed;" and by sect. 1046, that "no person shall be prosecuted, tried, or punished for any crime arising under the revenue laws or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime."

The Solicitor-General for the United States.

Mr. George Hoadly, for the defendants, cited *United States* v. *Mayo*, 1 Gall. 396; *United States* v. *Norton*, 91 U. S. 566.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The question before us is whether the indictment describes crimes arising under the revenue laws of the United States.

There can be little doubt that the crimes set out in the third and fourth counts, conforming as they do to the description of the offence found in sect. 5445, of a false classification of goods as to value and quality, and effecting an entry of goods at less than the true weight or measure, arise under the revenue laws. The section, intended solely for the protection of the revenue arising from customs, was originally the third section of the act of March 3, 1863, entitled "An Act to prevent frauds upon the revenue, to provide for the more certain and speedy collection of claims against the United States, and for other purposes." 12 Stat. 737. It is, beyond question, a revenue law, and the offence defined by it is therefore a crime arising under the revenue laws of the United States.

With regard to the first two counts the answer is not so clear.

The *gravamen* of the offence here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common-law definition of a conspiracy is necessary to complete the offence, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offence, and that a party who did not join in the previous conspiracy cannot, under this section, be convicted on the overt act.

Nor does the section, as found in the Revised Statutes or in the original act, make any special reference to the revenue or to the revenue laws. Its language is: "If two or more persons conspire, either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties shall be liable," &c.

The conspiracy here described is a conspiracy to commit any offence against the United States. The fraud mentioned is any fraud against them. It may be against the coin, or consist in cheating the government of its land or other property. The offence may be treason, and persons have been convicted under this statute for a conspiracy to do the acts which constitute treason against the United States.

Since, then, the section does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States, and every form of conspiracy to defraud them, it is difficult to see how the crimes it defines, and which are punishable under it, can be said to arise under the revenue laws. Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws.

In support of the opposite view, it is said that sect. 5440 was originally sect. 30 of the act of March 2, 1867 (14 Stat. 484), which was a revenue law, and that this section must be held also to be a revenue law.

It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

The force of the argument arising from finding an enactment in a statute directed mainly to a particular subject is much diminished by our experience of the manner in which

incongruous legislation is combined in the same bill as passed by the two Houses of Congress. The important principle, revolutionary in the law of evidence, by which parties to suits and persons having a pecuniary interest in the results are made competent witnesses, is found in a few words, inserted as a proviso to an appropriation bill.

The act of 1867 is entitled "An Act to amend existing laws relating to internal revenue, and for other purposes," and it consists of thirty-four sections. Every section except the one defining conspiracies has reference to *internal* revenue, and if the argument is worth any thing, the act must be limited to that kind of revenue.

But the title indicates that other purposes than revenue may be found in the provisions of the act.

Looking, then, to the section in question, which makes no mention of revenue whatever, but enacts in the most general terms a law against conspiracies, we are of opinion that one of the other purposes of the act was to adopt this general penal provision, and that an offence punishable under that section alone is not a crime arising under the revenue laws, though the overt act necessary to be alleged may be one affecting the revenue of the United States.

It will be certified to the Circuit Court that the plea of the Statute of Limitations of three years is good in bar of the first two counts of the indictment, and is bad as to the third and fourth; and it is

So ordered.

MINING COMPANY *v.* TAYLOR.

1. In ejectment for an undivided interest in a mining claim in Nevada, where both parties derive title from the original owner, the validity and regularity of his location are not in question.
2. Where the plaintiff was a tenant in common with the defendants, their possession of the claim was his possession until he was ousted. The Statute of Limitations would then run against him, but not bar his recovery, unless, after such ouster, their adverse possession was maintained two years before the commencement of the suit.
3. The Statute of Limitations of that State, as construed by its Supreme Court, excepts from its protection a foreign corporation.
4. Where the Circuit Court, under a written stipulation of the parties, tries the issue, its special finding should set forth the ultimate facts, and not the evidence establishing them. Where, therefore, both parties claimed under A., and the court found his ownership, the chain of conveyances by which he acquired it need not be set forth.
5. A conveyance in writing is not necessary to the valid transfer of a mining claim.
6. The admission of immaterial and irrelevant evidence, which it is manifest could not have affected injuriously the case of the plaintiff in error, does not entitle him to a reversal of the judgment.

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

This was an action of ejectment brought Dec. 23, 1874, by James D. Taylor against The Union Consolidated Silver Mining Company, to recover the possession of an undivided interest, equal to five feet, of a mining claim and lode, part of the Comstock lode, situate in the Virginia Mining District, in Storey County, State of Nevada. Under an agreement of the parties the case was, without a jury, tried by the court, which found as facts that the parties were tenants in common of the mining claim known as the Union claim, for an undivided interest in which the suit was brought; that they claimed and derived title from the same source, namely, Payne and Cook, the original locators of the claim; that one Solomon Wood, on the eleventh day of October, 1862, was the owner of at least an undivided fifty feet of the claim, having derived his title thereto regularly from the original locators, and that on that day he sold and conveyed by deed to the plaintiff an undivided five feet of the claim, describing it as "five undivided feet interest in the claims of the Union Company, located upon the

Comstock silver lode; said claims consist of three hundred feet, bounded north by the claims of the Sierra Nevada Silver Mining Company, and on the south by the claims of the Ophir Silver Mining Company;" that during the years 1860, 1861, 1862, 1863, and 1864, the original locators of the Union claim, and others deriving title from them, including Wood, the immediate grantor of the plaintiff, and the plaintiff himself, expended over $30,000 in prospecting and developing the claim, though the plaintiff personally had done no work upon it since 1863, nor had any been done for him, except so far as the work done by his co-tenants can be considered work done for him; that after the plaintiff's title had been acquired, namely, on the thirtieth day of September, 1863, C. H. Reynolds and others, all of whom had derived title from the original locators of the mining claim, sold and conveyed all their interests therein to a California corporation, styled the Union Gold and Silver Mining Company; and that, on the twenty-seventh day of May, 1874, that company sold and conveyed all its interest in the Union claim to the defendant, a California corporation, organized in and under the laws of that State.

The court further found that the defendant and its grantors had been in possession of the ground in controversy during more than two years before the commencement of this action, and were in possession when the suit was brought, and had been for more than five months before that time in possession of the Union claim, which extends on the Comstock lode a distance of three hundred feet, including the ground in dispute, and that the plaintiff had made no demand to be let into possession of the premises before commencing his action, but that the defendant was in the exclusive adverse possession before that time, and had in fact ousted the plaintiff from the possession.

In the course of the trial the company excepted to the admission of exhibits "A" and "C," and certain mining rules and regulations. Judgment was rendered for the plaintiff. The company thereupon sued out this writ, and assigns for error that the court below erred: 1st, In admitting as evidence said exhibits and said rules; 2d, in ruling that the plaintiff

was entitled to recover; 3d, in giving judgment upon the facts found for five instead of two and a half feet; 4th, in giving judgment for the plaintiff, when the finding, which is special, and should therefore contain every fact essential to a recovery, does not show such facts of conveyance, possession, &c., as result necessarily in the legal conclusion that the plaintiff was entitled to the property sued for.

Exhibit A.

"COOK & PAYNE to A. KENNEDY & Co.

"VIRGINIA CITY, Sept. 20, 1859.

"This is to certify that we, D. B. Cook, J. Cook, and E. Payne, have this day sold, bargained, and conveyed all our rights to and interest in a certain set of mining claims to A. Kennedy & Co., said claims being situated as follows: lying and being in the Virginia district north of the Comstock claims and situated on the Comstock and Penrod vein, for and in consideration of which A. Kennedy & Co. agree to prospect the same thoroughly, and when pay dirt is struck, then Cook, Payne, & Co. agree to pay one-half of the expense and come in equal partners to the same, Kennedy & Co. receiving one undivided half of six hundred feet.

"D. B. COOK.
"JAMES COOK.
"E. PAYNE.

"Witness: S. MCFADDEN.
"Filed Sept. 7, '60, at 2½ P.M.
"Rec. Sept. 8, '60, at 3 P.M., p. 548, Vol. B, Kinsey's records."

Exhibit C.

"GOLD HILL, UTAH TERRITORY, July 20, 1859.

"This is —— show that I, Edward Payne, have this day admitted David B. Cook into the claim north of the Comstock and Co.'s stakes as an equal partner in the six hundred feet of the quartz lead, and known as the Comstock lead, and running north of the Comstock stakes. And als— give the power to manage that claim to work or let as he D. B. Cook sees fit.

"EDWARD PAYNE.
"JAMES COOK."

Mr. Harry I. Thornton and *Mr. H. L. Smoot* for the plaintiff in error.

Mr. W. E. F. Deal, contra.

MR. JUSTICE STRONG, after stating the case, delivered the opinion of the court.

Upon the facts found by the Circuit Court it is evident that Taylor, the plaintiff below, was entitled to recover, unless he was barred by the Statute of Limitations. Claiming, as both parties did, under Payne and Cook, the regularity and validity of the location of the mining claim are not in question. And when, in 1862, the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantor and with others deriving title from the original locators, expending large sums in prospecting and developing it (acts which the State statute declares shall constitute adverse possession), he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase that company succeeded to a tenancy in common with him, and so did the defendant when it became the purchaser. Although after 1863 the plaintiff did no work personally upon the property, he did not thereby lose the possession he had after his purchase from Wood. The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied. And we find nothing in the statutes of Nevada to which we have been referred that is at variance with the rule, even when applicable to mining claims. That it does apply is expressly held in *Van Valkenburg* v. *Huff*, 1 Nev. 142. It follows that neither the defendant nor its grantor had any possession adverse to the plaintiff prior to the time when the ouster was made, and no ouster is found to have been made two years before the suit was brought. The finding that the defendant was in possession more than two years before suit was brought is not a finding of an adverse possession during all that period, such as to constitute a bar under the Statute of Limitations. Such a bar, therefore, does not exist, unless the ouster took place anterior to the commencement of those two years; and as that is a matter of defence, it should appear affirmatively, to be of any avail.

It is, however, useless to enlarge upon this, for the findings show clearly that the defendant has no protection under the

Statutes of Limitations. The plaintiff was in possession with others who derived their title from the original locators, until the Union Gold and Silver Mining Company, a California corporation, acquired their title, in September, 1863. After that time the statute could not run against him in favor of that corporation, or its grantee, the defendant, also a foreign corporation. The Statutes of Limitations of Nevada are held by the Supreme Court of that State to except foreign corporations from their protection. *Robinson* v. *Imperial Silver Mining Co.*, 5 Nev. 44; *Barstow* v. *Union Consolidated Silver Mining Co.*, 10 id. 386. Hence those statutes cannot be set up by the defendant as a defence in this case; and as the Circuit Court found as a fact that the plaintiff had been ousted by the defendant from his property, no reason appears why he was not entitled to recover according to the interest which he held prior to the ouster.

It is insisted, however, that, if entitled to recover at all, judgment should have been given for no more than two and a half undivided feet of the mining claim. This position cannot be maintained. It is true the original locators claimed six hundred feet extending along the Comstock vein, but of more than three hundred feet they never had an undisputed title, and that three hundred feet lies next to the claim of the Ophir Company on the south. Indeed, the finding is express, that the Union claim begins at a point fifteen hundred feet north of the claim of the Ophir Company, and extends northward on the Comstock lode three hundred feet, including the ground in dispute. Of that claim Solomon Wood, the plaintiff's grantor, was the owner of at least fifty feet undivided; and he sold and conveyed to the plaintiff five undivided feet interest therein, describing the claim as consisting of three hundred feet, bounded on the south by the claim of the Ophir Company. There can be no doubt, therefore, what was intended to be conveyed. Plainly, it was five undivided feet of that three hundred, and, therefore, whether the whole claim in fact consisted of three hundred or six hundred feet can make no difference. Owning, as Wood did, fifty feet undivided, it was in his power to convey, as he did, an undivided interest of five feet in the southern three hundred.

It is objected by the plaintiff in error that the special finding of the court was not sufficiently full and formal to justify any judgment; that it did not find the essential facts, but left presumptions of fact to be drawn; that it did not find how Solomon Wood became the owner, or set out in words the conveyances under which the parties claimed. Whether a special finding of facts by the court must have all the requisites of a special verdict, it is not necessary now to assert or deny, for all that is essential to such a verdict is an ascertainment of the ultimate facts. A jury is not to find evidence. We think the ultimate facts were sufficiently found in this case. The ownership of Wood in 1862 was an ultimate fact, and even if Taylor had no other right to the possession than that which he derived from Wood by conveyance, it was not necessary to set forth the chain of conveyances by which Wood became the owner. A transfer of possession is sufficient. They would have been but evidence of Wood's ownership. Besides, a written conveyance is not necessary to the transfer of a mining claim. *Table Mountain Tunnel Co.* v. *Stranahan*, 20 Cal. 198. But Wood was in possession when he sold to Taylor, and Taylor then went into joint possession within. That possession is enough to justify a recovery by him against a disseisor.

The only other assignment of error is the first, and it needs no consideration. Apart from the fact that the defendant claims under Payne and Cook, and is therefore not at liberty to dispute their title, it is impossible to discover how it could have been injured by the reception of Exhibits A and C. The instrument C was certainly sufficient to transfer an interest in the mining claim, and the mining rules, at worst, were only immaterial. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent, as in this case, that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.

Judgment affirmed.

MR. JUSTICE FIELD did not sit in this case

NATIONAL BANK v. INSURANCE COMPANY.

Where the record has not been printed, a motion to dismiss an appeal or a writ of error will not be considered where there is any question about the facts on which the motion rests.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. James O. Broadhead in support of the motion.
Mr. Lucien Eaton, contra.

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

The further consideration of this motion is postponed until the case is heard on its merits. The record has not been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file.

TILLSON v. UNITED STATES.

Where the claim of a party for loss and damage growing out of the alleged failure of the United States to perform its contracts with him, as to time and manner of payment, is, by a special act of Congress, referred to the Court of Claims, "to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, if any, for such loss and damage," — *Held*, that the rules of law applicable to the adjudication of claims by that court in the exercise of its general jurisdiction must govern, and that interest, not having been stipulated for in the contracts, cannot be allowed thereon.

APPEAL from the Court of Claims.

This was a suit brought by Robert Tillson & Co. against the United States.

The Court of Claims found the following facts: —

"I. The claimants and the defendants entered into the various contracts and agreements set forth in the petition.

"II. The claimants, at various times between the 9th of October, 1862, and the 24th of October, 1864, delivered horse equipments and infantry accoutrements, under said contracts and agreements, to the defendants' officers at the United States arsenal in St. Louis, to the amount of $494,972.66.

"III. There were one hundred and fifteen distinct deliveries of the above-described goods made by the claimants, extending from the 9th of October, 1862, to the 24th of October, 1864; and the goods delivered were then, at the respective times of delivery, inspected and approved by the defendants' officers, and bills therefor were duly authenticated by the proper officers of the Ordnance Department, as provided by the contract, and no negligence or delay is attributable to the officers of the Ordnance Department in regard to the inspection of the goods or the issuing of the vouchers. The vouchers so received by the claimants were by them presented to the Ordnance Office in Washington, and were by the Ordnance Office transmitted to the treasury, to be audited and paid, and no delay in so transmitting them is attributable to the Ordnance Office. After the vouchers reached the Treasury Department, intervals of different length occurred before they were audited and drafts issued in payment thereof. The shortest interval between the receipt of a voucher by the Treasury Department and the issuing of the draft in payment was seven days, and the longest was one hundred and fourteen days; the average was thirty-six days. During the period of the fulfilment of their contracts and agreements, before described, the claimants' business necessities compelled them to borrow money by hypothecating or selling their vouchers, and the rate of discount paid by them generally was ten per cent per annum.

"IV. A portion of the payments made to the claimants upon the vouchers before described were made, to the extent of twenty-five per cent thereof, by certificates of indebtedness issued under the act of 1st March, 1862. 12 Stat. 352. These certificates were sent by mail to the claimants, accompanied by ordinary treasury drafts for the remaining seventy-five per cent of the payments. The claimants neither solicited such

certificates nor objected to them. Being below par in the market, the claimants sold them at a discount of seven and a half per cent. The total amount of the certificates so issued to them was $77,000, and the discount or loss suffered by the claimants in disposing of them for cash was $5,775."

Upon the foregoing facts that court decided as conclusions of law, —

"1. The loss and damage suffered by the claimants from the failure to keep and perform the contracts referred to in the findings aforesaid, as to the time and manner of payment thereof, were too remote to be a subject of recovery in this action, within the meaning and intent of the private act for the relief of the claimants, passed June 23, 1874.

"2. The claimants, by voluntarily accepting certificates of indebtedness in part payment of their demands, are concluded from saying that such payments were in violation of the terms of their contracts with the government.

"3. In contracting with the government, the claimants submitted themselves to the regular routine of public business, and are not entitled to recover damages for the delays which occurred in auditing their vouchers in the Treasury Department."

The court rendered judgment dismissing the petition of the plaintiffs, and they appealed.

The act of June 23, 1874, referred to by the Court of Claims, under which this suit was brought, is as follows: —

"An Act for the relief of Robert Tillson & Company, Quincy, Illinois:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of Robert Tillson and Company, of Quincy, Illinois, for loss and damage growing out of the failure of the government of the United States to keep and perform the contract or contracts, as to time and manner of payment, under which certain horse equipments and infantry accoutrements were manufactured between the months of September, 1862, and July, 1864, by said Tillson and Company, for said government, be and the same is hereby referred to the Court of Claims, and such court is authorized and directed to investigate the same, and to ascertain, determine, and adjudge the amount equitably due said firm, if any, for such loss and damage."

Mr. Matt. H. Carpenter and *Mr. Benjamin F. Grafton* for the appellants.

The Solicitor-General, contra.

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

We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least for interest, in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power. By the statute, the court was required to investigate the claim, and "ascertain, determine, and adjudge the amount equitably due such firm, if any, for such loss or damage." There is nowhere any intimation that the investigation is to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if any thing, is due the claimants from the government, according to the rules of law applicable to the settlement in that court of controversies between the government and its citizens. The special statute does not even provide that the adjustment shall be made upon principles applicable to suits between citizens. To our minds the word "equitably," as here used, means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants.

As between citizens, no allowance could be made for loss of profits consequent on the advance in the price of materials

while payments were withheld, nor for the discount on the certificates of indebtedness sold in the market. Such damages are too remote. Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the government the rule is different, for in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares "that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless upon a contract expressly stipulating for interest." Rev. Stat., sect. 1091. This is conclusive. No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimants.

Judgment affirmed.

FAIRFIELD *v.* COUNTY OF GALLATIN.

1. Where no Federal question is involved, this court will follow the construction which has been uniformly given to the Constitution or the laws of a State by its highest court.
2. Cases affirming this principle cited and examined.
3. This court accepts as binding the decision of the Supreme Court of Illinois in *Chicago & Iowa Railroad Co.* v. *Pinckney* (74 Ill. 277) and subsequent cases, construing the section of the Constitution of that State in force July 2, 1870, which provides that "no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however,* that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption;" and holding that such previous donations, if sanctioned by a popular vote, under pre-existing laws, were not forbidden, but were, in like manner as subscriptions, excepted by the proviso from the general prohibitory terms of the section.
4. Where, therefore, pursuant to the authority conferred by a legislative enactment, such a donation was voted by a county in Illinois before the adoption of that Constitution, the donation may be thereafter completed by the issue of the requisite bonds.

5. *Chicago & Iowa Railroad Co.* v. *Pinckney* (*supra*) was decided before, but not reported until after, the ruling in *Town of Concord* v. *Portsmouth Savings Bank* (92 U. S. 625), involving the construction of that section, and the attention of this court was not called to it; but as it established in Illinois a rule of property which has been since maintained, the latter case, so far as it conflicts therewith, is overruled.

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

The facts are stated in the opinion of the court.

Mr. S. M. Cullom and *Mr. O. J. Bailey* for the plaintiff in error.

Mr. Bluford Wilson, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The facts of this case, so far as they are needed to exhibit the question presented by the writ of error, are very few. The defendant, on and prior to Feb. 28, 1868, was a lawfully organized and existing county of the State of Illinois, through which was located the railroad of the Illinois Southeastern Railway Company, a company incorporated on the 25th of February, 1867. The county was authorized by the legislature of the State to donate to the railroad company, as a bonus or inducement towards the building of the railroad, any sum not exceeding $100,000, and was authorized to order the clerk of the county court, or board of supervisors of the county, to issue county bonds to the amount donated, and deliver them to the company, provided that no donation exceeding $50,000 should be made until after the question of such larger donation should have been submitted to the legal voters of the county, at an election called and conducted in the usual manner. The statute further enacted, that if a majority of the ballots cast at such an election should be in favor of a donation, it should be the duty of the county court or board of supervisors to donate some amount, not less than $50,000 nor more than $100,000, to the company, and to order the issue of county bonds for the amount so donated.

On the 28th of February, 1868, in pursuance of these statutory enactments, an election of the legal voters of the county was held to determine whether the county would donate

$100,000 of its bonds in aid of the said road, and the election resulted in authorizing their issue. The bonds were accordingly issued by the county judge and county clerk, under the direction of the county court, and they were delivered to the railroad company on the 6th or 8th of October, 1870, after the conditions precedent to their delivery had been fulfilled. The plaintiff is the holder of coupons belonging to said issue, having purchased them before due, in the usual course of his business.

The defence set up is, in substance, that in consequence of a provision in the new Constitution of the State, which came into force July 2, 1870, the authority to issue and deliver the bonds had ceased to exist before the issue was made. The section of the Constitution relied upon is in the following words: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption."

The question presented, then, is whether a donation to a railroad company, by a county empowered by the legislature to make such a donation, when approved by a majority of the legal voters of the county at an election held for that purpose, is forbidden by this clause of the Constitution, if it was authorized under laws then existing by a vote of the people of the county prior to the adoption of the Constitution? What should be the answer to the question depends upon the construction that must be given to the section thus quoted. Are donations, thus authorized by a popular vote, within the prohibition, or are they excepted out of it by the proviso?

In *Town of Concord* v. *Portsmouth Savings Bank* (92 U. S. 625), we had occasion to construe this section of the State Constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by

it, and that they could not lawfully be made after July 2, 1870, though they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of the Constitution. We were fully aware that it is the peculiar province of the Supreme Court of a State to interpret its organic law, as well as its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed, when the case was decided, that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it, and decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the Constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by that court in 1874, more than a year before *Town of Concord* v. *Portsmouth Savings Bank* came before us; but the decision was not called to our notice, and it was not reported until 1877. It may now be found in *Chicago & Iowa Railroad Co.* v. *Pinckney*, 74 Ill. 277. The language of the court is very positive. We quote it at some length, as follows: "At the time the section of the Constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being constructed should be completed within a given time; and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the Constitution, such subscription or donation should not be affected by the formation of the Constitution. And we have no doubt it was in view of this demand of a large portion of the State that the proviso was engrafted in the foregoing section." . . . "A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term, a donation is a subscription to the capital stock of a company. We have no doubt, at the time this section was framed, there were then in the State quite as many donations voted as there were subscriptions to stock in

any other manner, and if a necessity or reason existed to protect a subscription there was also the same reason and demand to protect a donation; and we entertain no doubt it was the intention of the framers of the Constitution, by adding the proviso to the section, to place subscriptions and donations on the same footing." This authoritative exposition of the meaning of the Constitution of the State by its highest court has repeatedly been recognized by that tribunal. *Town of Middleport* v. *The Ætna Life Insurance Co.*, 82 Ill. 562; *Lippincott* v. *The Town of Pana*, decided Oct. 1, 1879, not yet reported. It has also been the understanding of the legislature of the State that donations as well as subscriptions, if authorized by a vote of the people before the adoption of the Constitution, are saved by the proviso. In 1874, an act of the General Assembly was passed which declared that the liability of all counties, cities, townships, towns, or precincts that had voted aid, *donations*, or subscriptions to the capital stock of any railroad company, in conformity with the laws of the State, should cease and determine at the expiration of three years after July 1 of that year, and that after that time no bonds should be issued on account of or upon authority of such vote. This implied that up to July, 1877, donations voted before July 2, 1870, were lawful, and might be completed by the issue of bonds. It was an expression of the legislative understanding that such donations were not forbidden by the Constitution. Act of March 17, 1874. A similar act was passed on the 29th of May, 1877, extending the time for issuing bonds for donations upon the authority of a vote of the people until July 1, 1880. It thus appears to have become a rule of property in the State that municipal bonds, issued to railroad companies on account of donations voted by the people before the adoption of the Constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the Constitution, made by the court of last resort in the State, twice since recognized by it, and recognized also by repeated legislative action. There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought, and sold in the markets of the country.

In view of all this, ought this court to adhere to the construction we gave to the State Constitution in ignorance of the fact that the Supreme Court of the State had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the Constitution or statutes of a State this court would adopt the construction of the statutes or Constitution given by the courts of the State, when that construction could be ascertained. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87. In *Nesmith* v. *Sheldon* (7 How. 812), it is declared to be the "established doctrine that this court will adopt and follow the decisions of the State courts in the construction of their own Constitution and statutes, when that construction has been settled by the decisions of its highest tribunal." In *Walker* v. *State Harbor Commissioners* (17 Wall. 648), we said, "This court follows the adjudications of the highest court of the State" in the construction of its statutes. "Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness." See also *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Leffingwell* v. *Warren*, 2 Black, 599; *Sumner* v. *Hicks*, id. 532; *Olcott* v. *The Supervisors*, 16 Wall. 678; *State Railroad Tax Cases*, 92 U. S. 575.

Such has been our general rule of decision. Undoubtedly, some exceptions to it have been recognized. One of them is, that when the highest court of a State has given different constructions to its Constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that, and disregarded the latter. The present case is not within that exception, for there have been no conflicting interpretations by the State court of the section of the Constitution we are now called upon to construe. And we are not constrained to refuse following the decision of the State court in order to save rights acquired on the faith of our ruling in *Town of Concord* v. *Portsmouth Savings Bank*. *Groves* v. *Slaughter* (15 Pet. 449) may seem to be an exception to the rule, but if carefully examined it will be found to be no exception. In that case, this court held that the Constitution of Mississippi did not, *ex proprio vigore*, prohibit the introduction of slaves into that State as merchandise or for sale, after the

first day of May, 1833, and, therefore, that a promissory note given for the price of slaves thus introduced was not void. This was held, though it appeared that prior to the decision the chancellor of the State had refused to enjoin a judgment at law recovered upon a bond for the purchase of slaves brought into the State for sale after May 1, 1833, and the Court of Errors, two judges against one, had affirmed the refusal of the chancellor. But the decision of the chancellor was rested entirely upon the ground that the matter relied upon to obtain the injunction should have been set up as a defence in the suit at law. This was all that was really decided. The opinions expressed in the Court of Errors by the judges upon the question whether the introduction of slaves after May 1, 1833, was prohibited by the Constitution, were extra-judicial, and were so regarded by this court. It was said they were not sufficient to justify this court in considering that the construction of the Constitution in Mississippi had become so fixed and settled as to preclude the Federal Supreme Court from regarding it as an open question. *Groves* v. *Slaughter*, therefore, is not an exception to the rule that this court will follow the construction given by the highest court of a State to its Constitution. On the contrary, the court assented to the rule.

Subsequently, the provision of the Constitution of Mississippi was brought before the courts of the State, and it was settled by the highest tribunals that it did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise, and for sale, and render all contracts for the sale of slaves, made after May 1, 1833, illegal and void. *Rowan* v. *Runnels* (5 How. 134) then came up to this court, where the same question was presented, and the construction given by this court to the State Constitution was adhered to in order to support a contract for slaves purchased, and apparently only for that reason. Chief Justice Taney, in delivering the opinion of the court, said that in *Groves* v. *Slaughter* the court was satisfied that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the contract was made, and that as late as the beginning of 1841, when *Groves* v. *Slaughter* was decided, it did not ap-

pear from any thing before the court that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the State. He added: "Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, will regard them as conclusive in all cases upon the construction of their own Constitution and laws. But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made."

That case is totally unlike the present. The bonds in question now were issued in October, 1870. In 1874, the highest court of the State decided that such bonds could be lawfully issued, and that they were not forbidden by the Constitution. It was, therefore, conclusively settled more than a year before *Town of Concord* v. *Portsmouth Savings Bank* was decided by us, what the meaning of the Constitution was. We are now asked to decline following the construction given and since recognized by the State court, and to adhere to that adopted by us in ignorance of the prior judgment of the State court, and that not, as in *Rowan* v. *Runnels*, to uphold contracts, but to strike them down, though they were made in accordance with the settled law of the State. We recognize the importance of the rule *stare decisis*. We recognize also the other rule, that this court will follow the decisions of State courts, giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made, or purchases in reliance upon them. And it has been held that this court will abandon its former decision construing a State statute, if the State courts have subsequently given to it a different construction. In *Green* v. *Neal's Lessee* (6 Pet. 291), the question raised was whether the court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the State court. In two previous cases a certain construction had been given to a statute of Tennessee in supposed harmony with decisions of the State court. But subsequently it was decided otherwise by the State Supreme Court; and it appeared

that the decisions upon which this court had relied were made under peculiar circumstances, and were never in the State considered as fully settling the construction of the act. This court, therefore, overruled its former two decisions, and followed the later construction adopted by the State court. See also *Suydam* v. *Williamson*, 24 How. 427. With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed a rule of property, and has never been abandoned. In such a case, we think it our duty to follow the State courts, and adopt as the true construction that which those courts have declared.

The judgment of the Circuit Court will be reversed, and the record remitted with instructions to give judgment for the plaintiff below on the findings made; and it is

So ordered.

COWELL *v.* SPRINGS COMPANY.

1. A condition in a deed conveying land that intoxicating liquors shall never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort thereon, and that if this condition be broken by the grantee, his assigns or legal representatives, the deed shall become null and void, and the title to the premises revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy.
2. Upon breach of the condition, the grantor has a right to treat the estate as having reverted, and, under a statute of Colorado, can maintain ejectment without a previous entry or a demand.
3. In such a suit, the grantee is estopped from denying the validity of the title conveyed by the deed whereunder he took possession of the land.
4. When a patent issued by the United States adds to the name of the patentee the word "trustee," without mention of any trust upon which he is to hold the land, such addition does not prevent the legal title from passing by the patentee's conveyance. If a trust be in fact created, it is for the *cestui que trust*, and no one else, to complain of the non-execution thereof.
5. By the general comity which, in the absence of positive direction to the con-

trary, obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on any lawful business in another, and to acquire, hold, and transfer property there equally as individuals.

6. When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation, which does not concern third parties.

ERROR to the Supreme Court of the Territory of Colorado.

The facts are stated in the opinion of the court.

Mr. H. C. Alleman for the plaintiff in error.

Mr. F. W. Pitkin for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was $250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterwards opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of

the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to

the grant by the Court of Appeals of New York in *Plumb* v. *Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. 14 Kan. 61. See also *Doe* v. *Keeling*, 1 Mau. & Sel. 95, and *Gray* v. *Blanchard*, 8 Pick. (Mass.) 283.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See also *Austin* v. *Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius* v. *Ivins*, 2 Dutch. (N. J.) 376; *Ruch* v. *Rock Island*, 97 U. S. 693.

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or advanced the purchase-money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust: it did not prevent the legal title from passing by his conveyance. Perry, Trusts, sect. 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado, and to hold and convey real property there. By the law of March 2, 1867, then in force, the legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits. 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact

that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the Territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property; also to construct and operate ditches, wagon-roads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the Territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State, succeeding that of the Territory, and the corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real

property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity. *Natoma Water and Mining Co.* v. *Clarkin*, 14 Cal. 552.

But there is another and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it. *Gill* v. *Fauntleroy*, 8 B. Mon. (Ky.) 185; *Miller* v. *Shackleford*, 4 Dana (Ky.), 287, 288; *Fitch* v. *Baldwin*, 17 Johns. (N. Y.) 161.

Judgment affirmed

EMIGRANT COMPANY *v.* COUNTY OF ADAMS.

1. Though the grant by the act of Congress of Sept. 28, 1850 (9 Stat. 519), of the swamp and overflowed lands to the States in which they lie, is declared to be made for the exclusive purpose of enabling such States, with the proceeds thereof, to reclaim the lands by means of levees and drains, it is questionable whether the security for the due application of the proceeds does not wholly rest upon the good faith of the several States, and whether they may not exercise their discretion in this behalf without being liable to be called to account, and without affecting the title to the lands: at all events, it seems that Congress alone has the power, in a clear case of violation of the trust, to enforce the conditions of the grant, by revocation or otherwise; and since, by the act, the proceeds are to be applied to the designated purposes only "as far as necessary," each State has, at least, a large discretion as to the "necessity" of employing the proceeds to the reclamation of the lands.
2. A grant, subject to the conditions of that act, made by a State of its swamp

and overflowed lands to the several counties in which they are situated, to be disposed of for general county purposes, is valid, and the county which has disposed of them in pursuance of the State grant cannot rescind its contract on the ground of its being a violation of the act of Congress.

3. In Iowa, such a contract, if approved by a vote of the people of the county, under the act of the legislature of that State passed in 1858, is valid, though the lands be disposed of for less than one dollar and a quarter per acre; and, if it includes also a sale of the claim of the county against the United States for indemnity for swamp lands sold by the latter, the county cannot maintain a bill in equity to set it aside, though such sale be within the law prohibiting the assignment of claims against the government.

4. If the purchaser from the county under such a contract was bound thereby to do certain acts, such as to introduce a certain number of settlers within a certain period, or to reclaim the lands, his obligation, if not made a condition of the sale, lies in covenant merely, and, if unperformed, does not avoid the sale. It is only when covenants are mutual and dependent, or when their performance is made an express condition, that a breach of them involves an avoidance of the contract.

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

The facts are stated in the opinion of the court.

The case was argued at the last term by *Mr. J. A. Harvey* and *Mr. N. M. Hubbard* for the appellant, and by *Mr. Frank M. Davis* and *Mr. R. P. Lowe* for the appellee.

The case was reargued at the present term for the appellee by the same counsel, and for the appellant by *Mr. Benjamin F. Butler* and *Mr. O. D. Barrett.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a bill in equity originally filed by the County of Adams, Iowa, against The American Emigrant Company, in the District Court of that county, and afterwards transferred to the Circuit Court of the United States. The object of the bill was to rescind a certain contract between the county and the company, made in September, 1862, whereby the county agreed to convey to the company its swamp lands, and its claim against the government for indemnity on account of swamp lands belonging to it and which had been sold by the public land officers; also to rescind a deed executed on behalf of the county in pursuance of the said contract; and to recover back the moneys and proceeds which the defendant had realized from the property and the said claim. The case is

of the same general character as that of *Emigrant Company* v. *County of Wright*, 97 U. S. 339. The act of Congress, and the laws of the State of Iowa which bear upon the case, and the character of the general operations of the defendant, are fully set forth in the opinion in that case, and need not be repeated here. Suffice it to say that on the thirtieth day of September, 1862, a written contract, similar to the contract in that case, for the sale of the swamp lands of Adams County, and of all the fund and claim of the county on the general government therefor, was signed by the chairman and clerk of the board of supervisors of said county, and by the American Emigrant Company, by its agent F. C. D. McKay, and was recorded among the proceedings of the board. By this contract the company agreed to take the lands and fund and claim and to make for the county any public work or improvements therefor which the board of supervisors might request, and which were authorized by law, to the amount of $2,000, at any time after Oct. 1, 1863; or to pay the board, if they preferred to do the work themselves, the sum of $2,000 in money by the 1st of January, 1865. It was further agreed that the lands should not be taxed as long as the county held the legal title; and the company agreed to settle all the lands fit for settlement with white settlers and purchasers, by selling farms of the usual size, one-third in three years, another third in five years, and the whole in eight years. It was also declared that the company took the lands subject to the provisions of the act of Congress of Sept. 28, 1850, and expressly released the State of Iowa and the county from all liability in reclaiming said lands, or in the draining thereof; and that any contract existing between the county and any person in relation to said lands or funds was to be respected and fulfilled by the company.

Subsequently a deed was executed in pursuance of this contract by the supervisors of the county, bearing date the 7th of September, 1863, and purporting, for the consideration of $2,000, to convey to certain trustees, in trust for the American Emigrant Company, certain lands particularly described, stated to amount in the aggregate to $3,680\frac{51}{100}$ acres, although the several parcels foot up only 2,235 acres, and the parties con

cede that, after certain reservations mentioned in the contract, the actual quantity conveyed by the deed was only a trifle over 2,000 acres. The deed contained an agreement on the part of the county that the lands within the county which might at any time be duly selected as swamp or overflowed lands, and all such lands as might not be included in the conveyance, if any, should be conveyed on request, and that any proceeds of the claim on the United States, if any should be received, should, on like request, be assigned and transferred to said American Emigrant Company, its trustees or assigns; and that any lands that should be located under or by any scrip, which might be obtained on said claim, should also be conveyed, on request, to said company, its trustees or assigns.

It appears from the proofs that the American Emigrant Company has sold about 1,500 acres of the land, upon some of which the purchasers have made improvements; and has paid to the county the said sum of $2,000 mentioned in the contract (which was paid in June, 1865), and has also paid certain expenses incurred on behalf of sixteen different counties with whom the company had like contracts (of which Adams County was one), the one-sixteenth part of which, as stated by the defendant, amounts to $4,562; and a further sum of $1,200 paid to one Grinnell as agent of Page, Adams, and Montgomery Counties, — all together, on behalf of Adams County, about $7,000.

On the other hand, the company has received under the contract, from the United States, in cash, the sum of $6,075.11; and in addition to the lands specifically conveyed, patents have been issued to the county for 2,043 acres, to which the defendant is entitled if the contract is carried out; and there is still an unadjusted claim for about 3,000 acres more.

The Circuit Court decreed the contract and deed to be void, and ordered a restitution of all moneys and securities received by either party by virtue thereof, saving the rights of *bona fide* purchasers, and referred the matter to a master to take the necessary account. From this decree the American Emigrant Company appealed; and the question for us to decide is, whether it is or is not sustained by the pleadings and proofs in the cause.

The grounds laid by the bill of complaint for avoiding the contract are, in substance, as follows: *First*, that the sale of the county's swamp lands was made at a much less price than the law allowed them to be sold for; that by an act of the legislature of Iowa, then in force, regulating the disposal of such lands, it was made unlawful to sell the same at a less price than $1.25 per acre, whereas by the said contract nearly 8,000 acres were sold for $2,000; *secondly*, that the sale of the county's claim against the United States for indemnity was void, as being contrary to law; *thirdly*, that the contract and deed were procured by false and fraudulent representations, both as to the quantity of lands comprised therein and as to the validity and condition of the claim against the United States for indemnity, it being represented that the county was entitled to only about 2,000 acres of land, and that the claim for indemnity had been rejected, and was of no value; that these representations were made by agents of the defendant, who well knew the falsity thereof, to the officers and agents of the county, who were entirely ignorant in the premises, and liable to be easily imposed upon; *fourthly*, that false representations were made as to the object of buying the lands, — namely, that the defendant desired them only for immediate settlement and improvement, whereas it has never made any effect to drain or cultivate them, and never had any intention of doing so; *fifthly*, that the delivery of the deed was procured by fraud, the same having been executed as an escrow, and left with the clerk of the board of supervisors to be delivered only upon the execution and delivery of a mortgage upon all the lands to secure a compliance with the terms of the contract; whereas, by a fraudulent combination with said clerk the defendant procured the delivery and recording of said deed without giving any such mortgage. The bill also set up insufficient consideration for said lands and the indemnity claim, and failure of consideration; that the defendant had failed to drain or improve the lands, and to release the county from its obligations in that behalf; that it had refused to pay a certain claim for over $2,000 against said county for services of an agent, in consequence of which the county had been prosecuted and obliged to pay $2,700 for judgment and

costs. It was also charged that the defendant had made use of fraudulent misrepresentations and bribery to procure a vote of the people of the county in favor of the sale (which was required by the laws of the State). The bill further stated that, on discovery of the frauds thus charged, the board of supervisors passed a resolution repudiating and rescinding the contract; and concluded by praying that the contract be declared void, and for an account.

The answer specifically denies the charges of the bill, and claims, in substance, that the contract was fairly entered into, and that the complainant had failed to perform its part thereof, and had prevented the defendant from fulfilling its part, so far as it remained unfulfilled. The answer not being sworn to, except by an agent of the defendant, who was not a party to the bill, of course is not evidence.

A great deal of evidence was produced, showing the proceedings had in the General Land-Office and in the State in relation to the claim and location of the swamp lands, and in relation to the claim for indemnity against the government; the services of agents; the negotiations between the parties respecting the contract in question; the representations that were made; the proceeds and value of the lands, and the disposition thereof. And although it is evident to us, from all the evidence taken together, that the agents of the defendant were well informed in regard to the rights of the county, and that the supervisors of the county were quite ignorant thereof, and liable to be easily imposed upon; and although it is very clear that the latter believed that the lands to which the county was entitled were only about 2,000 acres, and that the claim for indemnity against the government was of no value, — yet we see no sufficient proof that the contract was procured by false and fraudulent representations; and we are unable to sustain the decree of the Circuit Court on this ground. The case, in this respect, as to the character of the proofs, is very far short of that of *American Emigrant Co.* v. *County of Wright*, *supra*.

But there was one aspect of it which, at the conclusion of the first hearing, we thought deserving of consideration, and that was the general character of the transaction, viewed in

connection with the act of Congress by which the swamp and overflowed lands were granted to the State. This act was passed Sept. 28, 1850 (9 Stat. 519), and is entitled "An Act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits." By the first section it was enacted, "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and are hereby granted to said State." The fourth section declared that the provisions of the act should be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp or overflowed lands might be situated. These lands, therefore, were granted to the several States in which they lie for a purpose expressed on the face of the act; and that purpose was "to enable the State to construct the necessary levees and drains to reclaim them." The second section of the act, after prescribing the method in which the lands should be designated and patented to the State, concluded with the following proviso: "*Provided*, *however*, that the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid." Our first view was, that this trust was so explicit and controlling as to invalidate the scheme finally devised by the legislature of Iowa for the disposal of the land, and under which the contract in question was made. But on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow. The history of the State legislation on the subject is briefly as follows: —

The legislature of Iowa, by an act which took effect Feb. 2, 1853, granted the lands to the several counties in which they were situated, subject to the conditions of the act of Congress and such laws as the legislature might thereafter pass. It created a drainage commissioner's office, and county surveyors to lay out drains; after draining, the lands were to be appraised and sold at auction to the highest bidder in small tracts; and

it provided for reclamation of the lands in detail. Other acts were subsequently passed in pursuance and furtherance of this general scheme, which was clearly conformable to the purposes of the congressional grant. The difficulty we had arose upon the subsequent act of the legislature of Iowa, passed in 1858, by which it was declared (by sect. 1) that it should be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads, and highways, or for building institutions of learning, or for making railroads through the county or counties to which such lands belonged; and (by sect. 2) it was enacted that the proper officers of any county might contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section. It was further provided that, before any such contract could take effect, the proposition should be submitted to a vote of the people of the county, for their approval or rejection. There was a proviso in the third section that no such sale should be valid, unless the person or company purchasing should take the lands sold subject to all the provisions of the act of Congress (before referred to), and should expressly release the State of Iowa and the county from all liability for reclaiming said lands. A supplement was passed in 1862, providing that no county should be released from its obligation to make the necessary drains and levees contem plated by the act of Congress passed Sept. 28, 1850, and the act of assembly passed in 1853.

The contract in dispute was made under this law, and our first impression was that it introduced a scheme subversive of the trust imposed upon the State by the act of Congress; that its effect was to devote the lands and proceeds thereof to purposes different from those which the original grant was intended to secure; that it drew off, or endeavored to throw off, all public responsibility in relation to the trust; and hence that the scheme itself and the contract based upon it

were void. But a reconsideration of the subject has brought us to a contrary conclusion. The argument against the validity of the scheme is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have the full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application only "as far as necessary" to secure the object specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of violation of the conditions. And as the application of the proceeds to the named objects is only prescribed "as far as necessary," room is left for the exercise by the State of a large discretion as to the extent of the necessity. In the present case it is not shown by allegations in the bill, or otherwise (if such a showing would be admissible), that any necessity existed for devoting the proceeds of the lands in question to the purposes of drainage. No case is shown as the basis of any complaint, even on the part of the general government, much less on the part of the county of Adams, which voluntarily entered into the arrangement complained of. Our conclusion, therefore, is, that this objection to the validity of the contract cannot prevail.

Having disposed of the questions of fraud and of the supposed invalidity of the State legislation, the other grounds alleged by setting aside the contract will not require extended discussion.

One of these grounds is that the sale of the county's swamp

lands was made at a much less price than the law allowed them to be sold for; that by an act of the legislature of Iowa then in force, regulating the disposal of such lands, it was made unlawful to sell them at a less price than $1.25 per acre. This question has been decided adversely to this view by the Supreme Court of Iowa in *Audubon County* v. *American Emigrant Co.*, 40 Iowa, 460. It was there held that, when a county devotes its swamp lands to purposes specified in the act of March 28, 1858, it is not limited in price to $1.25 per acre, but may devote them to such purposes, upon such terms as may be agreed on, if the contract be approved by a vote of the people. The contract in that case was substantially the same as in this, and was sustained. As this is a question of State law, if we had any doubt upon it, we should defer to the decision of the State court.

Another question suggested for relief is, that the sale of the county's claim against the United States for indemnity for lands sold by the government was contrary to law, and void. If the law prohibiting assignments of claims against the government applies to such a claim as that which was the subject of the contract in this case, the government might have refused to pay it; but after it was paid, the county, being *particeps criminis*, cannot, against its own act, have a standing in a court of equity either to recover it from the appellants, or to have the contract avoided. So far as the State laws are concerned, the Supreme Court of Iowa has frequently sustained contracts precisely like that now under consideration. See *Audubon County* v. *American Emigrant Co.*, *supra*; *Allen* v. *Cerro Gordo County*, 34 Iowa, 54; *Page County* v. *American Emigrant Co.*, 41 id. 115; *Ringgold County* v. *Allen*, 42 id. 697.

The allegations of the bill to the effect that the Emigrant Company has not fulfilled its engagements with respect to the drainage and settlement of the land, rest in covenant merely, and afford no ground for avoiding the contract. Where covenants are mutual and dependent, the failure of one party to perform absolves the other, and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appel-

lants to introduce settlers and the like were to be performed in the future; and their performance was not made a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more.

To the same category belongs the question whether the appellants ought to have paid the claim of Frank M. Davis. The agreement required them to respect and fulfil any contracts then existing between the county and any person in relation to the lands and funds which formed the subject of negotiation. Davis had a claim against the county for services in surveying the lands and in prosecuting the indemnity claim. The county insisted that the appellants should pay this claim, which they refused to do, alleging it to be unjust and collusive. In 1866, Davis sued the county, and obtained judgment for $2,200. In 1869, this judgment, with interest and costs, then amounting to over $2,700, being paid by the county, was formally demanded of the appellants, and they again refused to pay it. It is claimed that this refusal entitles the county to repudiate the whole contract. We do not think so. It is one of those matters that rest in agreement merely, and is not in the form of a condition. The agreement is an independent one, — a part of the consideration of the contract, it is true; but its non-performance raises an action merely, and does not annul the entire contract. We are disposed to think that as the appellants had notice of Davis's suit, and co-operated in its defence, the claim of the county is valid; but, being a mere legal demand, it cannot be recovered in this suit; and we are satisfied that it constitutes no proper ground for the relief sought by the bill.

Looking at the whole case as presented to us, we think that the complainant below was not entitled to a decree, and that the bill should have been dismissed.

The decree of the Circuit Court will be reversed, and the cause remanded with directions to enter a decree dismissing the bill without prejudice to the right of the county to bring an action at law for any breach of the terms of the contract; and it is

So ordered

HOLDEN *v.* TRUST COMPANY.

1. In the District of Columbia, the legal rate of interest is six per cent per annum, but parties may, in writing, stipulate for any other rate not exceed ing ten.
2. Where a party made there his promissory note, whereby he promised to pay a certain sum therein named, "with ten per cent interest," — *Held*, that interest should be computed at that rate up to the maturity of the note, and thereafter at six per cent.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. William A. Meloy for the appellant.

Mr. Enoch Totten and *Mr. Thomas H. Talbot* for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This record presents no ground for controversy as to the facts, and only one legal point that requires consideration. But for the importance of that point as a matter of local law we should dispose of the case without a formal opinion.

On the 13th of October, 1870, at the city of Washington, Charles H. Holden, the appellant, made his promissory note of that date to John B. Wheeler, or order, for $5,000, payable four years from date at the Bank of Washington, with interest at the rate of ten per cent, payable semi-annually. On the same day he executed to David L. Eaton a deed of trust of certain property in the city of Washington, to secure the payment of the principal and interest of the note as they should respectively fall due. On the 19th of October, 1870, Wheeler indorsed and delivered the note to the appellee, Talbot, who paid him at the time, as the consideration of the transfer, the sum of $5,000. Talbot thereupon became a *bona fide* holder of the instrument. On the 28th of July, 1873, he executed to his co-appellee — the Savings and Trust Company — his promissory note for $1,500, payable at ninety days, and pledged the note of Holden as collateral security. Talbot's note is still unpaid. The interest on Holden's note was paid up to the 13th of April, 1873, and $75 on account of interest was paid subsequently. The principal and the residue of the interest are unpaid. Eaton, the trustee in the deed of trust, died on

the 13th of February, 1873. On the 30th of September, 1871, Holden conveyed the trust premises to John Chester, one of the defendants. This bill was filed on the 18th of November, 1874. It prayed that a trustee should be appointed in place of Eaton; that the successor so appointed should be directed to execute the trust; and for general relief. The court below found, among other things, that Holden was indebted to Talbot on the note in the sum of $5,000, "with interest thereon at the rate of ten per cent per annum from the 13th of April, 1873, less the sum of $75," and that the Savings and Trust Company had a lien on the debt for $1,500, and interest from April 13, 1875. It was decreed that a new trustee should be, and he was thereby, appointed, and that in default of payment of the amount due from Holden, and the costs, the trustee should proceed to sell the premises described in the deed of trust, &c. From this decree Holden appealed to this court.

The note of Holden, including days of grace, matured on the 16th of October, 1874. Up to that time there can be no doubt that the rate of interest to be paid was that called for by the note. But what is the rate chargeable thereafter? The court below allowed continuously the rate expressed in the note. Was this correct? This is the question we are called upon to decide.

The subject of interest in its historical aspect was considered by this court in *National Bank of the Commonwealth* v. *Mechanic's National Bank*, 94 U. S. 437.

The statutory provisions relating to interest in the District of Columbia are as follows: —

1. The rate of six per cent per annum is allowed upon all moneys due, where there is no contract upon the subject.

2. Parties may stipulate in writing for ten per cent per annum, or any less rate.

3. If more than ten per cent is taken upon any contract, all the interest received may be recovered back, if it be sued for within a year.

The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate.

Brewster v. *Wakefield*, 22 How. 118; *Bernhizel* v. *Furman*, 22 Wall. 170. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law.

This subject was fully examined in the recent case in this court of *Cromwell* v. *County of Sac*, 94 U. S. 351. We need not go over the same ground again.

Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to every thing beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred. The analogies relied upon to support a different view are obviously distinguishable from the case in hand.

The decree will be altered according to these views.

It appears that since this appeal was taken, Thomas J. D. Fuller, Esq., the trustee appointed in place of Eaton, has also died. Another trustee in his stead will be appointed here.

As modified in these two particulars, the decree will be affirmed and remitted to the court below for execution; and it is

So ordered.

ARTHUR *v.* HEROLD.

In an action against a collector of customs, to recover duties alleged to have been wrongfully exacted upon chicory imported in 1873, it was not error for the court to charge the jury that ground chicory was the same thing as burnt chicory, and to submit to them to determine from the evidence, as a matter of fact, whether the imported article in question was a new preparation, some thing other than ground chicory.

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

This was an action brought by Herold against Arthur, collector of customs of the port of New York, for an alleged illegal exaction of a duty of five cents per pound upon chicory imported in 1873. That duty was assessed under sect. 11 of the act entitled "An Act to increase duties on imports and for other purposes," approved June 30, 1864 (13 Stat. 202, 212), which provides a duty "on chicory root, four cents per pound; ground, burnt or prepared, five cents per pound."

Herold claimed that the duty should have been but one cent per pound, under sect. 1 of the act entitled "An Act to reduce duties on imports and to reduce internal taxes and for other purposes," approved June 6, 1872 (17 Stat. 230), which provides that after the first day of August of that year, in lieu of the duties theretofore imposed there shall be levied and collected "on chicory root, ground or unground, one cent per pound." Upon the ascertainment and liquidation of the duty, he protested and appealed to the Secretary of the Treasury, and within due time after an adverse decision by that officer brought this action.

The testimony offered by the plaintiff tended to show that the article in question was commercially known as "finely ground chicory, in papers," or "paper chicory," and was pulverized chicory; that chicory is grown extensively in Germany, where it is largely used as a substitute for coffee. The root, when dug from the ground, is first washed and scraped, then split and cut by machinery into pieces or sections, which are partially dried in the sun and then kiln-dried, in which latter condition it becomes an article of commerce to this coun-

try. Of this there are two forms, "light kiln-dried" and "extra kiln-dried," neither of which is burnt or roasted, except as is necessarily incident to the process of kiln-drying.

The next process is burning or roasting, which is done in heated cylinders. It is necessarily roasted before it can be ground. Then it is ground in mills, from which it emerges in coarse and fine particles commingled, in which condition, or when simply burnt or roasted, it is not an article of commerce. The chicory is then passed through sieves, by which the coarse and fine particles are separated from each other. The coarse particles are packed in barrels or casks for shipment, and is called in trade "coarsely ground" or "granulated chicory;" the finer particles, after being again ground and reduced to powder, are packed in small paper-bags, weighing ordinarily one-quarter of a pound each, sometimes half a pound, which are packed in casks. This kind is called "finely ground chicory, in papers," or "paper chicory." Both forms are drier than the atmosphere, and absorb moisture from it; the first more slowly than the second, because the particles are larger.

The casks, or paper packages, of "paper chicory" are placed in damp cellars or vaults attached to and a part of the large chicory manufactories, some of which are exclusively for the manufacture of paper chicory, in order to hasten the absorption of moisture; and in some factories the hastening of absorption is further facilitated by allowing steam to escape into the cellars. The greater quantity of moisture in finely ground chicory over that which is absorbed in the "granulated" makes the paper chicory from fifteen to thirty per cent less per pound than the "granulated."

Paper chicory, when taken out of the cellars, has the consistency of paste, and hardens as it is exposed to the air. The granulated chicory also hardens by exposure.

The granulated chicory is usually sold by importers in this country to coffee dealers and coffee roasters to adulterate coffee; the paper chicory is sold exclusively to consumers, mostly Germans and Scandinavians in the Western States, who use it as a substitute for coffee.

The defendant introduced evidence to show that the natural absorption of moisture was hastened by artificial means; *e.g.*,

by steam introduced through pipes in the vaults or cellars, and that this operation was an essential and usual process in the preparation of the paper chicory. On the part of the plaintiff, evidence was offered that nothing had been done to the chicory in these vaults, except to allow the natural absorption of moisture to take place by exposing the paper chicory to the air. Some of the witnesses testified that paper chicory had different traits as to taste and smell from granulated chicory.

The plaintiff gave some evidence to show that a different article from the imported article called "patent chicory" or "chicory coffee" was made by an admixture of water and foreign ingredients. It was not claimed that the plaintiff's goods contained any admixture of foreign ingredients.

At the close of the plaintiff's testimony, and also again when the testimony on both sides was completed, the defendant moved that the court direct the jury to find a verdict for him, which motion the court each time denied, and he duly excepted.

The court, in its charge, stated to the jury, among other things, that ground chicory was the same thing as burnt chicory, and submitted to them to determine as a matter of fact whether the chicory in question was prepared, and not simply ground, chicory.

Defendant excepted to that part of the charge which pointed out that ground chicory and burnt chicory were one and the same thing, and also to that part which stated that it was a question of fact instead of a question of law whether prepared chicory was a different thing from ground chicory.

The jury found a verdict for the plaintiff, on which judgment was entered. The defendant then sued out this writ.

Mr. Assistant Attorney-General Smith for the plaintiff in error.

Mr. Stephen G. Clarke for the defendant in error.

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

We think it was not error for the court to say to the jury that ground chicory was the same thing as burnt chicory. The chicory root cannot be ground until it is burned, and burnt chicory is not an article of commerce until it is ground.

Whether or not the article imported was a new preparation, and something other than ground chicory, that is to say, whether it was prepared chicory and not simply ground chicory, was a question of fact that was properly left to the jury.

Judgment affirmed.

RAILWAY COMPANY v. TWOMBLY.

1. Where a party moving for a new trial assigns as reasons therefor that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions and in refusing others, — *Held*, that, as he did not at the time except to the ruling of the court in regard to the instructions, they cannot be reviewed by the appellate court, although they are incorporated in the bill of exceptions allowed on the refusal of the court of original jurisdiction to grant a new trial.
2. The Supreme Court of the Territory of Colorado, therefore, properly held that such a bill of exceptions only presented for review the refusal of the District Court, on the motion for a new trial, to set aside the verdict on the ground that it was not sustained by the evidence. Such a question cannot be re-examined here on a writ of error.
3. The administratrix of A. recovered judgment for damages by reason of his death, caused by the negligence of B., who thereupon sued out of this court a writ of error. During its pendency, the statute authorizing such a suit was repealed. *Held*, that the judgment was not vacated by the writ, and that it must be affirmed, no error appearing in the proceedings below.

ERROR to the Supreme Court of the Territory of Colorado.

This was an action of trespass on the case, brought Aug. 30, 1873, in the District Court of the first judicial district for the county of Arapahoe, in the then Territory of Colorado, by Louisa Twombly, widow and administratrix of George W. K. Twombly, deceased, against the Kansas Pacific Railway Company, to recover damages for his death, caused, as she alleged, by the negligence of the agents and servants of the company, who were charged with the control and management of a locomotive and train of cars upon its road. Plea, not guilty. The issue was tried by a jury, and a verdict returned for the plaintiff at the April Term, 1874. A motion for a new trial, for reasons filed therewith, was then made. It was, at the October Term, argued and overruled, and judgment rendered; which, on

appeal to the Supreme Court of the Territory, was affirmed, March 28, 1876.

The company excepted to the overruling of the motion for a new trial. Its bill of exceptions was tendered within the time limited therefor, and was signed and sealed by the court.

Among other reasons filed for a new trial is that the court "erred in refusing to give to the jury each and every instruction asked by the defendant, and also in giving each and every instruction not asked by the defendant;" but it does not appear that, at the time when instructions were given or refused, an exception was reserved and brought into the record by bill of exceptions.

The Statute of Colorado (Rev. Stat. Col. 1868, 508) provides that in all cases "where either party shall except to any ruling, decision, or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and sign and seal the same, at any time during the term of the court at which such exceptions were taken, or at any time thereafter to be fixed by the court."

The Supreme Court, on motion of the appellee, struck out from the bill of exceptions tendered on the refusal to grant a new trial all that part relating to the instructions.

The action was founded upon an act of the Territory approved Feb. 8, 1873, providing that "when the death of any person is caused by the wrongful act, misconduct, negligence, or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she lived, against the latter for the same act, misconduct, negligence, or omission: *Provided*, the action shall be commenced within two years from the date of the death of the injured person; that the damages shall inure to the exclusive benefit, first, of the husband or wife, if living, and if there be no husband or wife, to the child or children of the deceased; secondly, if there is neither a husband, wife, child or children living, then to the father and mother, or to the surviving parent, if any."

This act was repealed by a statute of the State of Colorado, March 7, 1877. This writ of error, and a duly approved and

accepted bond to render it a *supersedeas*, were filed in the clerk's office of the Supreme Court of the Territory, May 4, 1876.

Mr. John P. Usher and *Mr. Samuel Shellabarger* for the plaintiff in error.

This action was brought, not upon a contract, or for the enforcement of a common-law right, but upon a statute, which allowed the recovery of damages in the nature of a penalty. It is submitted, —

1. That when such an act is repealed, it must be regarded, so far as pending actions are concerned, as if it had never existed. Upon its repeal, the right of action, unless there be some special saving, expires. *Norris* v. *Crocker*, 13 How. 329; *Yeaton* v. *United States*, 5 Cranch, 281; *Rex* v. *Justices of London*, 3 Burr. 1456. There can be no doubt, therefore, that had this suit been pending in the subordinate courts at the date of the absolute repeal of the act of 1873, it would have then terminated.

2. The fact that such repeal took place after the appellate jurisdiction of this court had been invoked and the bond filed does not exclude or vary the operation of that rule.

In *Yeaton* v. *United States* (*supra*), a schooner was condemned in admiralty for the breach of an act of Congress then in force. The claimants appealed here. The act having by its own limitation expired, this court reversed the sentence of condemnation, although unquestionably proper when rendered, and directions were given to the court below to dismiss the libel.

The ruling then made, although in an admiralty case, is applicable whenever this court exercises its jurisdiction in a suit pending here, when the statute authorizing it is repealed, — the controlling question being, what is the law applicable to the rights of the parties to the record, when that jurisdiction is exercised. *Lewis* v. *Foster* (1 N. H. 61) was a case at law. Judgment was rendered in an action of debt upon a statute which entitled the plaintiff to the whole penalty. The defendant removed the case to the Supreme Court, where, by reason of the repeal of the statute in the intervening time, it was decided that every right gained by the judgment was subject to be lost on a review of the cause, and that there being

no act then in force authorizing it, a judgment could not be rendered in his favor in the court of last resort.

It thus appears that, whatever be the nature of the suit, the rule is the same in the appellate court, the only distinction being that in some cases the re-examination is confined to questions of law, while in others it extends to matters of fact. The bond which stays the proceedings below does not, in any instance, annul the judgment or the decree, nor vacate the lien thereby created. The judgment should be reversed, with instructions to the court below to dismiss the suit.

Counsel discussed at length the instructions to the jury. Inasmuch as they were not excepted to and the questions arising thereon reserved, they were not passed upon by the court. The argument upon them is, therefore, omitted.

Mr. J. Q. Charles, *contra.*

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

We think that the court below was right in holding that the bill of exceptions only presented for review the refusal of the District Court, on the motion for a new trial, to set aside the verdict because not sustained by the evidence. It is well settled that such a question cannot be re-examined here on a writ of error. *Marine Insurance Co.* v. *Young*, 5 Cranch, 187; *Barr* v. *Gratz's Heirs*, 4 Wheat. 213; *Mullhall* v. *Keenan*, 18 Wall. 342.

Neither can we, as is asked, send the case back to the court below, with instructions to enter a judgment of nonsuit, because since the judgment below, and while this writ of error has been pending, the statute authorizing the action has been repealed. A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors. All we can do, therefore, is to affirm the judgment, and send our mandate to that effect to the court below.

Judgment affirmed.

TRADE-MARK CASES.

UNITED STATES *v.* STEFFENS; UNITED STATES *v.* WITTEMANN; UNITED STATES *v.* JOHNSON.

1. Property in trade-marks has long been recognized and protected by the common law and by the statutes of the several States, and does not derive its existence from the act of Congress providing for the registration of them in the Patent Office.
2. A trade-mark is neither an invention, a discovery, nor a writing, within the meaning of the eighth clause of the eighth section of the first article of the Constitution, which confers on Congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries.
3. If an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in "commerce with foreign nations, and among the several States, and with the Indian tribes."
4. The legislation of Congress in regard to trade-marks is not, in its terms or essential character, a regulation thus limited, but in its language embraces, and was intended to embrace, all commerce, including that between citizens of the same State.
5. That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress.

THE first two cases were brought here on certificates of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York. The last was brought here on a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio.

Steffens was indicted under the fourth and fifth sections of an act of Congress entitled "An Act to punish the counterfeiting of trade-marks and the sale or dealing in of counterfeit trade-mark goods," approved Aug. 14, 1876, 19 Stat. 141.

The first count in the indictment charges him with knowingly and wilfully having in his possession counterfeits and colorable imitations of the trade-marks of G. H. Mumm & Co., of Rheims, France, manufacturers and sellers of champagne wine.

The second count charges him with knowingly and wilfully selling counterfeited representations and colorable imitations of the trade-mark of said G. H. Mumm & Co.

Wittemann was indicted under the fifth section of that act. The indictment consists of six counts, and they charge: 1st, The counterfeiting and forging; 2d, the having in possession colorable imitations of; 3d, the buying: 4th, the selling; 5th, the offering for sale; and, 6th, the dealing in colorable imitations of the private trade-mark belonging to and used by the firm of Kunkleman & Co., of Rheims, France, manufacturers and dealers in wine known as the "Piper Heidsick" brand of champagne wine.

Johnson, McNamara, and Reeder were prosecuted under that act by a criminal information containing seven counts, of which the first, fourth, and sixth are founded upon a trade-mark consisting of the letters "O K," registered in the United States Patent Office by Charles F. O'Donnell, April 2, 1878, for use upon packages of whiskey, and respectively charge the defendants with counterfeiting, affixing a colorable imitation, and dealing in and selling packages of whiskey to which was attached a colorable imitation of said trade-mark; and the second, third, fifth, and seventh counts are founded upon another trade-mark, consisting of a seal and ribbon, the latter secured by the seal of a package containing whiskey, registered by Charles F. O'Donnell, May 21, 1878, and respectively charge the defendants with counterfeiting, making a colorable imitation, affixing a colorable imitation, and dealing in packages of whiskey to which was attached a colorable imitation of said trade-mark.

Sects. 4 and 5 of the act of 1876 are as follows: —

"SECT. 4. That any person or persons who shall, with intent to defraud any person or persons, knowingly and wilfully cast, engrave, or manufacture, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any die or dies, plate or plates, brand or brands, engraving or engravings, on wood, stone, metal, or other substance, moulds, or any false representation, likeness, copy, or colorable imitation of any die, plate, brand, engraving, or mould of any private label, brand, stamp, wrapper, engraving on paper or other substance, or trade-mark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this act.

"SECT. 5. That any person or persons who shall, with intent to defraud any person or persons, knowingly and wilfully make,

forge, or counterfeit, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any representation, likeness, similitude, copy, or colorable imitation of any private label, brand, stamp, wrapper, engraving, mould, or trade-mark, registered pursuant to the Statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this act."

Sect. 4937, Rev. Stat., is as follows: —

"Any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which by treaty or convention affords similar privileges to citizens of the United States and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark, by complying with the following requirements: —

"*First*, By causing to be recorded in the Patent Office a statement specifying the names of the parties, and their residences and places of business, who desire the protection of the trade-mark; the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated; a description of the trade-mark itself, with fac-similes thereof, showing the mode in which it has been or is intended to be applied and used; and the length of time, if any, during which the trade-mark has been in use.

"*Second*, By making payment of a fee of twenty-five dollars in the same manner and for the same purpose as the fee required for patents.

"*Third*, By complying with such regulations as may be prescribed by the Commissioner of Patents."

To each indictment there was a general demurrer. The judges of the Circuit Court were opposed in opinion upon the following question: "Can the act of Congress, approved Aug. 14, 1876, entitled 'An Act to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods,' under which this indictment is found, be upheld, wholly or in part, as a law necessary and proper for carrying into execution any of the powers vested in the Congress by the Constitution of the United States?"

To the information against Johnson, McNamara, and Reeder there was a general demurrer, and thereupon a question arose for decision whether the said act of Congress "is within the constitutional power of Congress, or whether the same is unconstitutional, null, and void;" and the opinions of the judges of the Circuit Court were opposed.

The Attorney-General for the United States.

The validity of the act of July 8, 1870, which provides for the registration of trade-marks, and gives remedies by civil actions for infringing them, was recognized by Mr. Justice Clifford, who delivered the opinion of the court in *McLean* v. *Fleming*, 96 U. S. 245. The first sentence of the opinion is as follows: —

"Protection for lawful trade-marks may be obtained by individuals, firms, or corporations entitled to the same if they comply with the requirements prescribed by the act of Congress; and the provision is, that a trade-mark duly registered as required shall remain in force thirty years from the date of such registration, subject to an exception not necessary to be noticed. 16 Stat. 210; Rev. Stat., sects. 4937, 4941."

Here it is clearly intimated that protection for trade-marks is rightfully provided by that act. If it is invalid, no such protection could be in that mode obtained; but if protection to trade-marks by civil remedies is within the power of Congress, so also are the statutes punishing as a crime the pirating upon property in them. But in that case, and in several others which are cited on the margin of page 955 of the Revised Statutes, the constitutionality of the act was not discussed. In them and others (*Smith* v. *Reynolds*, 10 Blatch. 85; *Smith* v. *Reynolds*, 13 id. 458; *Osgood* v. *Rockwood*, 11 id. 310; *Moorman* v. *Hodge*, 2 Saw. 78) it was assumed rather than directly affirmed.

In the sixth circuit Judge Swing pronounced the law to be constitutional. In the seventh circuit a contrary decision was made. In each case the question was argued and decided upon clause 8 of section 8, article 1, of the Constitution, and the opinion was advanced that it is the only provision by which the authority of Congress on the subject of trade-marks is conferred.

The argument drawn from the likeness which property in the use of trade-marks bears to that in patents and copyrights, and from the fact that Congress, in legislating upon these three matters, has, both in the original act and in the Revised Statutes, classed them together, demands careful consideration. Undoubtedly, in the legislative mind they were kindred subjects, and it was thought that the power of Congress over them might be derived from the same source.

I shall, however, not dwell upon this view of the question.

1. I maintain the constitutionality of the statute upon which the indictments and the information are found, upon the ground that it regulates commerce within the power given to Congress by clause 3 of section 8 of article 1 of the Constitution, which provides that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including 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." *Welton* v. *State of Missouri*, 91 U. S. 275. This is a full and clear statement of what is meant by "commerce," and of the extent of the power of Congress over it.

The purchase and sale of commodities, then, are included in the term "commerce," and the power of Congress over it embraces all the instruments, aids, and appliances by which it is prosecuted. True, such trade and intercourse must be foreign, or among the citizens of the different States, or with the Indian tribes; but if the instrumentalities employed as aids

to such trade and commerce are not local in their operation and are of such a nature as to admit of uniformity of regulation, the power of Congress not only applies to them, but is exclusive.

2. *Trade-marks* are important instrumentalities, aids, or appliances by which trade, especially in modern times, is conducted. They are the means by which manufacturers and merchants identify their manufactures and merchandise. They are the symbols by which men engaged in trade and manufactures become known in the marts of commerce, by which their reputation and that of their goods are extended and published; and as they become better known, the profits of their business are enhanced.

Hence the use of trade-marks has become universal, and in all trade and business of any extent they are *necessary* auxiliaries.

Among commercial nations there is a growing tendency to universal recognition of these emblems of commerce. Browne, Trade-Marks, sect. 302.

Their use as aids to the exchange of commodities in the great markets of the world is so generally recognized, and they are considered as so vitally important to the protection of commerce, that they have been made the subject of treaties between the United States and France, the German Empire, Belgium, Austria, Russia, and other powers. The English Merchandise Marks Act of 1862 affords the same protection to foreigners that it does to the subjects of Great Britain. Browne, Trade-Marks, p. 565.

3. The subject of trade-marks is not one of *local*, but of common, interest to all commercial nations. Their operation and the benefits derived from their use are not confined to particular localities, States, or countries. They not only admit, but in order to their efficiency require, uniformity of regulation.

4. Congress has endeavored to effect this uniformity, first, by providing for the registration of trade-marks, and, as remedies for the violation of the owners' rights in them, an action on the case for damages and a bill in equity to enjoin the offending party. Sects. 4937, 4941, 4942, Rev. Stat. But

these civil remedies proved inadequate to effectually prevent pirating upon trade-marks. They do not materially differ from those which previously existed.

Congress, then, following the examples of Prussia, France, and England (Browne, Trade-Marks, pp. 560–572), passed the act of Aug. 14, 1876, 19 Stat. 141. The offences therein defined are charged in the indictments and the information. Further specification is unnecessary; for the demurrers are general, and the ground of each is that the entire act is unconstitutional.

Its constitutionality in its application to the trade-marks of the *subjects of foreign countries* is the question presented by the indictments.

The purpose and the natural and reasonable effect of the acts are to protect the producer or the importer of foreign goods in his right of selling them in the United States, and thus carry out in good faith and enforce our treaty stipulations on the subject. The act is a regulation of foreign commerce.

The convention with France of the 16th of April, 1869 (16 Stat. 771), forbids the reproduction, in either of the two countries, of the trade-marks affixed to merchandise in the other, and gives the injured party an action for damages, just as if he were a citizen or subject of the country where the act of counterfeiting was committed.

It provides, in the second article, that the owners of trade-marks residing in either of the two countries, in order to secure their rights in the other, must deposit duplicate copies of their marks in the Patent Office at Washington, and in the clerk's office of the Tribunal of Commerce of the Seine at Paris.

Here is a mutual covenant concerning trade-marks. Whatever protection the laws of either country give to its own citizens or subjects is extended to the citizens or subjects of the other. Such is the intent of the treaty.

The law of France of June 23, 1857, provides not only a civil action, but also a criminal proceeding which prescribes severe penalties against those who counterfeit trade-marks, or in any way fraudulently deal in false representations of trade-marks. It declares that foreigners shall equally enjoy its benefits for

their products, if, in their countries, diplomatic conventions have established reciprocity of French marks. Browne, Trade-Marks, 569.

Congress, in order to afford an effective remedy for the evil, and extend the same protection to French importers that France gives to our producers and merchants in her markets, has enacted that the forger of trade-marks and the dealer in forged trade-marks shall answer at the bar of criminal justice in the courts of the United States.

The end is lawful, within the power of Congress; the means are appropriate.

But it is said that, in passing the statutes of Aug. 14, 1876, and July 8, 1870, Congress has exceeded its power, because in their application they cover cases arising wholly within the several States, and make acts committed within their jurisdiction — acts which are not directed against the operations of the general government — crimes against the United States; that they not only regulate foreign and inter-state commerce, but affect the domestic concerns of the several States.

The fraudulent dealing in trade-marks plainly interferes with and thwarts the power and duty of the United States to protect foreign and inter-state trade. Moreover, it is impossible to limit the effect of the wrong-doing within the confines of a State. It extends to all places where there is a market for the goods which are simulated by the false device.

But the answer to the objection is, that the subject of these statutes is a general interest of commerce upon which Congress has power to legislate. The operation of trade-marks is co-extensive with trade, and it is no objection to the law regulating them that it touches the internal concerns of a State.

In the *Wheeling Bridge Case* (18 How. 421), it was observed by the court: "It will not do to say that the exercise of an admitted power of Congress, conferred by the Constitution, is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise."

The power of Congress to tax imports is exclusive, and yet this constitutional provision very seriously limits the power of the States over their internal affairs.

It was held in *Brown* v. *Maryland* (12 Wheat. 419) that the States can in no way or manner tax the sale of imported goods before they are incorporated and mixed up with the mass of the property of the country.

Mr. Justice Strong, delivering the opinion of the court in *State Tax on Railway Gross Receipts* (15 Wall. 284), construes the ruling in *Brown* v. *Maryland* as applying to other persons than the importers, who sell foreign goods by unbroken bale or package. See also *Welton* v. *State of Missouri*, 91 U. S. 275.

Here it is very plain that, by this authoritative exposition of the Constitution, not only the power of a State over its internal commerce, but its right to tax property within its jurisdiction, is interfered with and limited.

So, where States, in the exercise of their power to legislate concerning the police, morals, or health of the community, have endeavored to regulate the sale of particular articles, as of spirituous liquors, their laws are invalid, so far as they affect the sale of imported goods by the importer while they are in the original package and not mixed up with the general mass of salable commodities. *License Cases*, 5 How. 504; *Commonwealth* v. *Kimball*, 24 Pick. (Mass.) 359.

In *License Cases*, the court decided that a State might regulate the sale of liquors in the original packages *as imported* from another State, *in the absence of legislation by Congress upon the same subject;* but when Congress exercised its power to regulate inter-state commerce, State laws, so far as they conflict with the action of Congress, must yield. Here, too, the power of the States over their internal concerns is materially diminished.

So, also, in regard to the regulation of pilotage. That is within the power of Congress. *Cooley* v. *Board of Wardens*, 12 How. 299. A general law regulating pilotage upon all the navigable waters of the United States materially affects the internal commerce of many States, and yet parties have been indicted and convicted for a violation of its provisions. *United*

States v. *Farnham*, 2 Blatch. 528; *United States* v. *Warren*, 4 McLean, 463; *United States* v. *Taylor*, 5 id. 242.

In the regulation of trade with the Indian tribes the action of the law, especially when the Constitution was adopted, was chiefly within a State; but the court asserted that "the power of Congress comprehends navigation *within the limits* of every State in the Union, so far as that navigation may be in any manner connected with commerce with foreign nations, or among the several States, or with the Indian tribes." *Gibbins* v. *Ogden*, 9 Wheat. 1.

In this connection I refer to *United States* v. *Holliday* (3 Wall. 407) and *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188.

Congress having power to legislate upon the subject of trade-marks as a general interest of commerce, it is submitted that the legislation of Congress, the purpose of which is to give them uniform protection throughout the country, is constitutional, however it may affect the internal affairs of the States.

If it be insisted by the defendants that the act by its terms can also be applied to trade-marks for goods not intended for inter-state or foreign commerce, the reply is, that, excluding from operation the provisions which are in that regard objectionable, a valid enactment, susceptible of being enforced in all proper cases, may remain. Where a law which is constitutional under certain limitations exceeds them, it may still be operative within its legitimate sphere, and be void only for the excess.

Mr. George Hoadly, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of what is known as the trade-mark legislation of Congress. The first two are indictments in the southern district of New York, and the last is an information in the southern district of Ohio. In all of them the judges of the circuit courts in which they are pending have certified to a difference of opinion on what is substantially the same question; namely, are the acts of Congress on the subject

of trade-marks founded on any rightful authority in the Constitution of the United States?

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sects. 77 to 84, inclusive, of the act of July 8, 1870, entitled "An Act to revise, consolidate, and amend the statutes relating to patents and copyrights." 16 Stat. 198. The part of this act relating to trade-marks is embodied in chap. 2, tit. 60, sects. 4937 to 4947, of the Revised Statutes.

It is sufficient at present to say that they provide for the registration in the Patent Office of any device in the nature of a trade-mark to which any person has by usage established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the act of Aug. 14, 1876 (19 Stat. 141), punishing by fine and imprisonment the fraudulent use, sale, and counterfeiting of trade-marks registered in pursuance of the statutes of the United States, on which the informations and indictments are founded in the cases before us.

The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.

These propositions are so well understood as to require neither the citation of authorities nor an elaborate argument to prove them.

As the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedies for their enforcement, if such power exist at all, must be found in the Constitution of the United States, which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the acts of Congress on this subject point to two clauses of the Constitution, in one or in both of which, as they assert, sufficient warrant may be found for this legislation.

The first of these is the eighth clause of sect. 8 of the first article. That section, manifestly intended to be an enumeration of the powers expressly granted to Congress, and closing with the declaration of a rule for the ascertainment of such powers as are necessary by way of implication to carry into efficient operation those expressly given, authorizes Congress, by the clause referred to, "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

As the first and only attempt by Congress to regulate the *right of trade-marks* is to be found in the act of July 8, 1870, to which we have referred, entitled "An Act to revise, consolidate, and amend the statutes relating to *patents* and *copyrights*," terms which have long since become technical, as referring, the one to inventions and the other to the writings of authors, it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution. It may also be safely assumed that until a critical examination of the subject in the courts became necessary, it was mainly if not wholly to this clause that the advocates of the law looked for its support.

Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the

arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like. The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its *use*, and not its mere adoption. By the act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualification or condition. If the symbol, however plain, simple, old, or well-known, has been first appropriated by the claimant as his distinctive trade-mark, he may by registration secure the right to its exclusive use. While such legislation may be a judicious aid to the common law on the subject of trade-marks, and may be within the competency of legislatures whose general powers embrace that class of subjects, we are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries.

The other clause of the Constitution supposed to confer the requisite authority on Congress is the third of the same section,

which, read in connection with the granting clause, is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The argument is that the use of a trade-mark — that which alone gives it any value — is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.

Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *Nathan* v. *Louisiana*, 8 How. 73. In *Paul* v. *Virginia* (8 Wall. 168), this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering. "They are not," says the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." On the other hand, in *Almy* v. *State of California* (24 How. 169), it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this

course because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty.

In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to any one who will consider the vast amount of argument presented to us assailing them as unconstitutional, and he will count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of

the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which it should be applied. If, for instance, the statute described persons engaged in a commerce between the different States, and related to the use of trade-marks in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trade-mark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in this statute. Its language is: "Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or Territory thereof," or any person residing in a foreign country which by treaty or convention affords similar privileges to our citizens, may by registration obtain protection for his trade-mark. Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "a statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," there is no hint that the goods are to be transported from one State to another, or between the United States and foreign countries. Sect. 4939 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration, but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. The remedies provided by the act

when the right of the owner of the registered trade-mark is infringed, are not confined to the case of a trade-mark used in foreign or inter-state commerce.

It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States* v. *Reese*, 92 U. S. 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude.

It was urged, however, that the general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the Chief Justice: "We are not able to

reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law. Cooley, Const. Lim. 178, 179; *Commonwealth* v. *Hitchings*, 5 Gray (Mass.), 482.

In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect.

While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the act of 1870, and the civil remedy which that act provides, it was because the criminal offences described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be

So certified to the proper circuit courts.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

HURT v. HOLLINGSWORTH.

In the courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the second section of the Process Act of May 8, 1792 (1 Stat. 276), which is substantially re-enacted in sect. 913, Rev. Stat. *So held*, in a case removed, under the act of Congress, to the Circuit Court from a court of Texas, where such a union is, by the laws of that State, allowed.

ERROR to the Circuit Court of the United States for the Eastern District of Texas.

The facts are stated in the opinion of the court.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the plaintiff in error.

Mr. James Lowndes, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was brought by the plaintiff in a district court of Texas to quiet his title to certain real property situated in Galveston, in that State. On application of the defendant it was removed to the Circuit Court of the United States.

The petition, which is the first pleading in a suit according to the practice which obtains in Texas, sets forth that the plaintiff is the owner of the premises; that he purchased them of one Molsberger and wife, in June, 1874; that those parties acquired them in December, 1865, and had subsequently, until the sale to the plaintiff, claimed and held them as a homestead; that in April, 1867, certain parties designated as Marsh, Denman, & Co. recovered judgment against Molsberger in the County Court of Galveston on a debt contracted in 1866, while the premises constituted the homestead of himself and family; and in October, 1873, under an execution issued thereon, the premises were sold by the sheriff of the county for the sum of $30 to the defendant, Hollingsworth, one of the members of that firm, and to him the sheriff executed a deed of the premises, which has been recorded in the county.

The petition avers that this deed is a cloud upon the title of the plaintiff, and prays that the cloud may be removed and his title quieted. The defendant filed in the Circuit Court an

answer to this petition, in which he admits that the plaintiff was in possession of the premises, and had obtained a deed of them from Molsberger and wife, who had purchased them in 1865, but denies that they constituted a homestead of Molsberger and family continuously from that time until the alleged sale to the plaintiff, or that they were such homestead when the sale was made by the sheriff to him.

The answer then avers that the defendant became the owner of the premises by his purchase; that the plaintiff wrongfully withholds the possession from him, and the rents and profits, which are of the value of $75 a month. He therefore prays that the title may be declared to be in him, and that he may have judgment for the possession of the premises and the value of the rents.

These pleadings were subsequently amended so as to show the value of the property and the amount of its rents, and in some other particulars not material to the question now presented.

The case was considered by counsel and treated by the court as an action at law, and by stipulation made at the December Term of 1875 the parties waived a jury trial and submitted "the matters therein, as well of facts as of law, to the court." The evidence was then heard; and at a subsequent term the court gave judgment that the plaintiff take nothing by his action, and that the defendant recover the title and possession of the property, and also the sum of $420, as damages for its use and occupation, and have a writ of possession.

This judgment was subsequently vacated and a rehearing granted, when a motion was made by the plaintiff to transfer the cause, it being one seeking equitable relief, from the law docket of the court, upon the ground that it had been improvidently placed there by the defendant, to the chancery docket, to be there proceeded with according to the rules and practice of the Circuit Court sitting in chancery; and also a motion to take from the files of the court so much of the answer as purported to be "a cross-suit, reconvention suit, or cross-bill," because the court, sitting as a law court, had no jurisdiction to grant in that suit the relief prayed by the defendant. These motions

were accompanied with a petition for leave to amend the bill of complaint. But the court considering that the case was on its law docket, and had been submitted for its judgment, refused to sustain the motions. In disposing of them it observed that it was a court both of law and equity, and had cognizance of both kinds of cases; that though the cause was an equity cause, the court had cognizance of it, and the question presented was, therefore, simply one of regularity of pleadings and proceedings; that the parties had waived all matters of mere form by going to final hearing on the merits and submitting the case to the court, and that their substantial rights had not been violated by this mode of proceeding. The court thereupon heard the evidence presented by the parties, which related principally to the point whether the premises had been abandoned as a homestead at the time of the sheriff's sale mentioned in the pleadings; and rendered a similar judgment to that previously entered. The case is brought here both on writ of error and on appeal, the plaintiff adopting both modes to obviate a possible objection, which otherwise might have been taken to our jurisdiction.

There would be great force in the observations of the court below, if the different causes of action presented by the parties could, by the usual forms of proceeding, either at law or in equity, be disposed of in one suit. It might then very well be said that as by stipulation the case had been submitted to the court for determination, it was too late to object to the form of the proceedings. If it was an equity case, then it was properly before the court; if it was a case at law, a jury having been waived, it was also properly there. In either view, the relief warranted by the facts would be administered. But here no such disposition could be made of the case presented by the petition and the one presented by the answer. The first is strictly a suit in equity seeking special relief, which only a court of chancery can grant. The second is an action at law for the recovery of real property, with the rents and profits. The two cases are entirely different in their nature, and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In the one case, if the allegations of the plaintiff be sustained,

the judgment must be declaratory and prohibitory, adjudging that the deed of the sheriff to the defendant constitutes a cloud upon his title, and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rent and profits.

In the Federal courts such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity, in the Circuit and District Courts of the United States, the forms and modes of proceeding shall be according to the principles, rules, and usages which belong to courts of equity. 1 Stat. 276, sect. 2; Rev. Stat., sect. 913. This requirement has always been held obligatory upon parties and the court whenever the question has been raised. *Thompson* v. *Railroad Companies*, 6 Wall. 134. A party who claims a legal title must, therefore, proceed at law; and a party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the act of Aug. 23, 1842. 5 Stat. 518, sect. 6. The case of *Hornbuckle* v. *Toombs*, reported in the 18th of Wallace, does not conflict with this view; it only decides that the Process Act of 1792 does not extend to proceedings in the courts of the several Territories, which may be regulated by their respective legislatures.

In this case there is nothing in the answer of the defendant which would render it good as a cross-bill, even had it been drawn in due form and filed as such bill by leave of the court, for it seeks legal and not equitable relief. Story, Eq. Pl., sect. 398.

We are of opinion, therefore, that the court below should have granted the motions of the plaintiff. So long as the Process Act, respecting the modes and forms of procedure in equity cases, remains in force, parties have a right to insist that its provisions, however variant from the practice of the State courts, or open to objection, shall be followed, and should be permitted to recede from a stipulation waiving them, improvi

dently made, as the one in this case evidently was, at any time before final hearing and judgment.

There is an additional reason for sending the case back, — that the evidence as to the abandonment of the homestead of the plaintiff is very unsatisfactory, and leaves great doubt on our minds whether the conclusion reached by the court below on this point was correct. We do not think that a homestead can be considered as abandoned because occupied by tenants, and the owner is temporarily residing elsewhere. According to the decisions of the Supreme Court of Texas, it would appear that, in order to work a forfeiture of the right to the homestead, the owner's cessation of occupancy must be with an intention of total relinquishment, shown by clear and decisive circumstances. The trifling sum at which the premises were suffered to be struck off would seem to indicate that at the sale little confidence was felt in the validity of the title which would be acquired. On the rehearing, this matter will receive a more full and careful consideration.

The judgment will be reversed, and the cause remanded with directions to the court below to allow the plaintiff to amend his petition, or bill of complaint, as he now designates it, and to strike out of the answer of the defendant his prayer for the possession of the premises and the value of the rents and profits; and it is

So ordered.

RICKER *v.* POWELL.

Upon a bill of foreclosure against A. and the parties to whom, after mortgaging the land, he respectively conveyed separate parcels thereof, at different times, the only question raised was as to the order in which the court should direct the parcels to be sold to satisfy the debt. From the decree rendered June 5, 1875, finding the sum due, and prescribing such order, B., one of the defendants, appealed. The decree was affirmed. Thereupon C., another defendant, filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court on the appeal, and for newly discovered evidence; but, although the decree was in full force, he neither offered to pay the same or any part thereof, nor alleged any reason for not doing so. *Held*, that leave to file the bill rested in the discretion of the court below, and was properly refused.

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. Melville W. Fuller* and *Mr. W. C. Goudy* for the appellant, and by *Mr. Edward S. Isham*, *Mr. Julius Rosenthal*, and *Mr. A. M. Pence* for the appellee.

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

This is an appeal from an order of the Circuit Court refusing the appellant leave to file a bill of review in that court. The facts are as follows: —

On the 8th of April, 1869, one H. H. Walker mortgaged to Powell, the appellee, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ sec. 5, T. 38, N. R. 14 E., forty acres, to secure a note for $40,500, payable twelve months after date, with interest at the rate of ten per cent per annum. The land was afterwards subdivided into blocks, and sold and conveyed at different times to different purchasers. On the 23d of July, 1874, Powell filed a bill in equity in the Circuit Court for the Northern District of Illinois to foreclose this mortgage, making all persons parties who held title to the land under conveyances by the mortgagor. Among other parties were the appellant, Ricker, as owner of block No. 14; one Orvis, as owner of the south one hundred feet of block No. 16; and Rogers, Greenbaum, & Foreman, having a claim, by way of mortgage or deed of trust, on the north two hundred and one feet of block 16. Ricker, in his answer, claimed that his block 14 should not be sold until after block 18 and the two portions of block 16, above described, had been exhausted. The several questions presented were litigated between the defendants, there being no defence as against Powell, the mortgagee; and on the 5th of June, 1875, a decree was rendered finding due him the sum of $14,853.33, and establishing his lien on the whole forty acres, but directing that the property be sold in the following order, to wit: 1. The north two hundred and one feet of block 16, subject to the claim thereon of Rogers, Greenbaum, & Foreman. 2. The south one hundred feet of block 16.

3. Block 14. 4. The interest of Rogers, Greenbaum, & Foreman in the north two hundred and one feet of block 16. The estate of Greenbaum and others was not defined in the decree, but in their answer it was described as a deed of trust to Rogers, executed by one Kinney, to secure a note of $12,000 given to Samuel J. Walker, bearing date Nov. 25, 1872, payable three years after date, with interest at the rate of eight per cent per annum, and owned by Greenbaum and Foreman.

From this decree Orvis, as owner of the south one hundred feet of block 16, appealed to this court, and the case was docketed here Sept. 23, 1875. The appeal came on for hearing at the last term, and the errors assigned were, in substance, that block 18 and the north two hundred and one feet of block 16, without any reservation in favor of Greenbaum and others, should have been sold before the south one hundred feet of block 16. Ricker did not appeal, but he appeared by counsel and filed a brief on the hearing of the appeal of Orvis. Early in the term the decree of the Circuit Court was affirmed, so far as the order of the sale was concerned. *Orvis* v. *Powell*, 98 U. S. 176. Later, a rehearing was granted and further arguments filed, but on the second hearing the same decree of affirmance was entered. The final mandate was sent down from here May 15, 1879, and on the 21st of the same month Ricker petitioned the Circuit Court for leave to file a bill of review, on the ground of errors of law apparent on the face of the record, and which are the same as those presented in this court on the appeal of Orvis; on the ground of fraud and surprise in the entry of the original decree, he having been led to suppose that the decree would be entered for the sale of the north two hundred and one feet of block 16, without any reservation in favor of Greenbaum and others, and not knowing that any thing had been done to the contrary until he got the printed record in December, 1877, or January, 1878, when it was too late for him to appeal; and also on the ground of having discovered, since the original decree, evidence to show that when he, Ricker, bought block 14, the mortgagor was the owner of the note now held by Greenbaum and Foreman, and that he did not transfer it until September or October, 1873, and then only as collateral security for an antecedent

debt which he owed of $9,000 or $9,500. No offer was made to perform the decree, so far as Powell was concerned, and the decree itself still remains unsatisfied.

Upon this showing the Circuit Court refused leave to file the bill of review, and this appeal from that refusal has been taken.

Without intending to decide that an appeal will lie to this court from an order of the Circuit Court refusing leave to file a bill of review for newly discovered matter, we are satisfied the refusal in this case was right. There is no dispute with Powell either as to the amount due him or as to his right to have the mortgaged property sold. The only controversies in the case are between the defendants as to the order in which their respective interests in the property shall be subjected. In these controversies Powell has no concern. His security is ample, and it is of no importance how he gets the money, which is his due, provided he gets it. He has already been kept out of it nearly five years because of the disputes between the different parties in interest as to their rights as between themselves. The delay thus far he has been compelled to submit to, because the parties were entitled to what was done as a matter of right. Now, however, they are asking a favor, for a bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Rubber Company* v. *Goodyear*, 9 Wall. 805; Story, Eq. Pl. 421 *c*; 2 Daniell, Ch. Pr. (4th ed.) 1577. "It may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause, unadvisable." Story, Eq. Pl., sect. 417; *Griggs* v. *Gear*, 8 Ill. 2.

As the decree stands, a very considerable portion of the mortgaged property must be sold before that of Ricker can be reached. If that sells for enough to pay the debt, the bill of review would be unnecessary. What it actually is worth, or what it will be likely to bring at the sale, nowhere appears.

The rule is well settled, subject, however, to some excep

tions, that "before a bill of review . . . can be filed the decree must be first obeyed and performed. . . . Thus, if money is directed to be paid, it ought to be paid before the bill of review is filed; though it may afterwards be ordered to be refunded." 2 Dan. Ch. Pr. (4th ed.) 1582; Story, Eq. Pl., sect. 406. Chancellor Kent thus states the rule and the reason of it in *Wiser* v. *Blachly*, 2 Johns. Ch. 488: "In the first place, the party asking for a bill of review must generally show that he has performed the decree; especially if it be . . . a decree for the payment of money, and he must likewise pay the costs, and nothing will excuse the party from this duty but evidence of his inability to perform it. *Williams* v. *Mellish*, 1 Vern. 117; *Fitton* v. *Macclesfield*, id. 264; Cooper, Eq. Pl. 90; Note to *Bishop of Durham* v. *Liddell*, 2 Bro. P. C. 63. This appears to be a settled rule, laid down both in the ancient and modern books; but the petitioners have paid no attention to this rule, for there is no offer to perform any part of the decree or even to bring the money into court, or any pretext of poverty, want of assets, or other inability to do it. There is wisdom in the establishment of such a provision, and it ought to be duly enforced. Its object is to prevent abuse in the administration of justice, by filing of bills of review for delay and vexation, or otherwise protracting the litigation, to the discouragement and distress of the adverse party." These words of this learned chancellor are peculiarly applicable to the facts of this case. The decree, so far as Powell is concerned, is for money, and that it be paid to him. There is no pretence of any performance of this decree, or any offer to perform. The money is all due, and ought to be paid. The effort on the part of Ricker is to increase the liability of the first piece of property to be sold, not with any view to protect the interests of Powell, but only his own. Orvis, whose property stands second in the order of sale, is in no position now to insist that the interest of Greenbaum and Foreman should be sold before his property, because that question was settled here on his appeal. The dispute now is between Greenbaum and Foreman and Ricker as to whether their property or his should be sold first. The true way is to let the sale go on according to the decree until the property of Ricker is reached. Then let him pay Powell

the balance remaining due, and, if he chooses and can get the necessary leave, file his bill of review to reverse that part of the decree which puts the sale of the interest of Greenbaum and Foreman after his, and thereby charge what he may be compelled to pay on them instead of himself. He makes no such offer in his bill, and fails entirely to give any reason why he does not. Clearly, under these circumstances, he was not entitled to the leave he asked, and his petition was properly denied.

It is contended, however, that the right to file a bill of review can only be denied when the bill is for newly discovered matter *alone*, and that as this bill is for errors of law, as well as newly discovered matter, the refusal of leave was equivalent to the denial of a strict legal right, which did not in any manner depend on the discretion of the court. The proposition may, with equal propriety, be stated the other way, to wit, that the right to file a bill of review without leave exists only when the bill is brought for error of law alone, and as this bill is for newly discovered matter as well as error of law, it can only be filed on leave, which rests in the sound discretion of the court. The application was for leave to file the bill as a whole, and not in parts; and if as a whole it required leave, the part which, if it stood alone, could be put on file without, must stand or fall with the incumbrances that have been attached to it. This bill, as a whole, could only be filed with leave, and consequently as Ricker has, by the form of proceedings adopted, voluntarily waived his strict legal right to file for errors of law without leave, he must abide the rules applicable to cases where leave is required.

As to the errors of law assigned, the bill is evidently bad, because the decree was rendered more than two years before the petition for leave to file was presented (*Thomas* v. *Harvie's Heirs*, *supra*); but there is nothing now to prevent Ricker from asking leave to file another bill for the newly discovered matter, if he performs the decree as to Powell. Or he may wait until the property has been sold, which by the decree must be subjected before his, and then, on paying the balance remaining due, apply for leave to bring in the newly discovered evidence against Greenbaum and Foreman, and have their rights

determined according to the facts as they shall thus be made to appear. But however that may be, upon the application as made below the leave was properly refused, and the decree to that effect is consequently

Affirmed.

ELASTIC FABRICS COMPANY *v.* SMITH.

1. Where letters-patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and praying for an injunction and an account, and the court below, by its decree, sustained their validity and awarded him costs, but neither damages nor profits, and the defendant appealed, this court, as the only question now involved is that of costs, affirms the decree without examining the merits.
2. Where such letters had been reissued in separate divisions, and the patentee filed in the Patent Office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below, — *Held*, that sect. 4922, Rev. Stat., has no application to the case, and that he is entitled to costs.

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

This is a bill in equity, filed Nov. 19, 1868, by William Smith against the Glendale Elastic Fabrics Company, wherein he alleges that he is the original and first inventor of certain new and useful improvements in corded and elastic fabrics, for which letters-patent of the United States No. 9653, dated April 5, 1853, were, in due form, issued to him; that the letters, after they were extended, March 28, 1867, for seven years, were finally reissued in three parts, — reissue No. 2848, Jan. 14, 1868, division A, for improvements in weaving; reissue 3014, June 30, 1868, division B, for improvements in woven fabrics; and reissue No. 2844, Jan. 14, 1868, division C, for improvements in looms for weaving; that the company has infringed the rights secured to him by divisions A and C. He therefore prays for an injunction and an account.

The company denies the allegations of the bill as to novelty and infringement, and claims that the reissues were illegal.

Smith, Jan. 22, 1870, filed in the Patent Office a disclaimer alleging that the specifications and claims of division B are too broad, and include that whereof he is not the inventor.

The court below, on the cause being set down for hearing, adjudged that the letters as reissued in division A and division C were valid; that Smith was the original and first inventor of the improvements therein described; that he recover of the company the profits received or made by it from the use, manufacture, or sale of the patented improvement; that a master take and report an account of such profits; and that an injunction be awarded.

The master reported that the company had made no profits, and the court, Jan. 27, 1876, passed a decree against the company for costs of suit. The company thereupon appealed.

Mr. Benjamin Dean for the appellant.
Mr. R. P. Lowe for the appellee.

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

For all practical purposes, except costs, the appellant was successful in the court below. While the validity of the appellee's patent was sustained, it was a fruitless victory to him, because the patent expired before the determination of the suit, and the court found that he was not entitled to recover from the appellant either profits or damages. As the decree stands, it sustains an expired patent, and does no more. When it was rendered against him, the appellant was left at liberty to use the patented machine in any way he chose, and he has not been required to pay any thing for the use he made of it while the patent was in force. The appeal, therefore, presents only a moot case except as to costs.

We think the disclaimer as to the reissued patent, division B, had no effect on the costs in this case, because the question presented for decision was whether, notwithstanding that disclaimer, the other divisions of the reissue should be sustained. The statute as to costs after a disclaimer (Rev. Stat., sect. 4922), therefore, has no application to this suit, and the appeal is practically reduced to the single question whether, if the decree below should be reversed, the appellee ought to have

his costs in that court, and, if so, how much. No appeal lies from a mere decree respecting costs and expenses. *Canter* v. *The American and Ocean Insurance Companies*, 3 Pet. 307. As this case comes within the reason of that rule, we affirm the decree below without examining the merits.

Decree affirmed

RAILROAD COMPANY *v.* TROOK.

Where a judgment for the recovery of money, affirmed in the Supreme Court of the District of Columbia, is brought here for re-examination, the amount thereof, without adding interest or costs, determines the value of "the matter in dispute," under the act of Feb. 25, 1879 (20 Stat. 320), and, if it does not exceed $2,500, this court has no jurisdiction.

MOTION to dismiss a writ of error to the Supreme Court of the District of Columbia.

Trook, in an action in the court below against the Baltimore and Potomac Railroad Company, recovered judgment, Feb. 19, 1877, for $4,000 and costs of suit. A motion for a new trial was then made on exceptions taken during the progress of the cause, and on account of excessive damages. Trook entered a *remittitur* of $1,500, and the judgment was ultimately affirmed at a hearing in general term. The company then removed the case here by writ of error, which Trook moves to dismiss, on the ground that this court, under the act of Feb. 25, 1879 (20 Stat. 320), has no jurisdiction, as the "matter in dispute exclusive of costs" does not exceed "the value of $2,500."

Mr. James G. Payne in support of the motion.

Mr. Enoch Totten, contra.

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

In cases brought here by writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed without adding interest

or costs. The judgment in this case, after the $1,500 had been remitted to avoid a new trial, did not exceed $2,500. Such being the case, under the rule established in *Railroad Company* v. *Grant* (98 U. S. 398), our jurisdiction has been taken away.

The motion to dismiss will be granted, each party to pay his own costs; and it is

So ordered.

LANSDALE *v.* DANIELS.

A settler upon unsurveyed public lands in California, who filed no declaratory statement after the return of the plat of the survey to the proper local land-office, could not, under the act of March 3, 1853 (10 Stat. 244), acquire by his settlement a right of pre-emption.

ERROR to the Supreme Court of the State of California.

The facts and the assignment of errors are stated in the opinion of the court.

Mr. Rodney Mason for the plaintiff in error.

Mr. W. W. Cope and *Mr. Walter Van Dyke, contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Pre-emption rights of the kind in controversy are regulated by the act of March 3, 1853 (10 Stat. 244), from which it appears that unsurveyed as well as surveyed lands, not exempted by the same act, are subject to the pre-emption laws, with all the exceptions, conditions, and limitations expressed in such, unless otherwise herein provided. Provision is also made for the appointment of a surveyor-general and of a register and receiver, with the same powers and duties as conferred and prescribed under the prior pre-emption laws. Official surveys were to be made, and the same section which gives the right to pre-empt the lands provides that, where unsurveyed lands are claimed, the usual notice of such claim shall be filed within three months after the returns of the plats of surveys to the land-office.

Proceedings in the nature of an action of ejectment were

instituted by the plaintiff to recover certain lands situated in Humboldt County, California, and damages for their detention. Service was made; and the defendant appeared and filed what is called in the State practice an answer and cross-complaint, in which he admits possession, but denies that it is wrongful, and sets up a pre-emption title to the lands.

Complete title to the lands is claimed by the plaintiff under a patent from the United States, issued to him as a pre-emptor. On the other hand, the defendant claims that he was justly and legally entitled to the patent, which was wrongfully issued to the plaintiff; and the object of the cross-complaint is to establish a trust in favor of the defendant, and to compel the plaintiff to convey the lands to the defendant.

Every allegation of the cross-complaint being denied by the plaintiff, he demurred to the same, and showed for cause as follows: 1. That it does not appear by the allegation of the same that the defendant filed the required notice of his claim in the land-office for the district within three months after the plats of the survey of the lands were returned to the said land-office. 2. That it appears that all the matters in controversy had previously been determined and adjudicated by a competent tribunal in an issue respecting the title to the same property between the same parties. 3. That it does not appear that the defendant ever made the proof required by law before the register and receiver of the land-offices, prior to the day appointed for the commencement of the sale of the land. 4. Because the cross-complaint shows that the defendant did not in person occupy the land for nearly a year before the cross-complaint was filed.

Hearing was had; and the court of original jurisdiction sustained the demurrer and rendered judgment for the plaintiff, which, on appeal, was affirmed by the Supreme Court. Being dissatisfied with the judgment, the defendant sued out a writ of error, and removed the cause into this court.

Errors assigned here are as follows: 1. That the court below erred in sustaining the demurrer to the cross-complaint. 2. That the court erred in affirming the judgment of the subordinate State court. 3. That the court erred in holding that the declaratory statement of the defendant was a nullity because it

was filed before the plats of survey were returned into the land-office by the surveyor-general.

Sufficient appears to show that the land was unsurveyed, and that the plaintiff made entry and settlement of the land in controversy on the first day of November, 1853, before the plats of survey were made; that the defendant made entry and settlement on the same quarter-section the 22d of February, 1854, the land being still unsurveyed. Nothing is exhibited in the record to enable the court to ascertain the precise date of the survey, but it appears that the defendant filed his notice of claim or declaratory statement prior to the return of the plats of survey to the local land-office, the record showing that the declaratory statement of the defendant was filed on the twentieth day of February, 1856, and that the plats of the surveys of the land were not returned into the local land-office until the 26th of April following.

Congress has provided that where unsurveyed lands in that State are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of plats of surveys to the land-officer, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands.

Declaratory statements under the original act might be made within three months after the return of the plats of surveys to the local land-offices, and it was effectual as a step to secure the right, if it was made within one year from the passage of the act, which last provision was amended by a subsequent act, and extended to settlements made prior to and within two years after the passage of the amendatory act. 12 Stat. 410.

Due settlement of the quarter-section in controversy was made by the plaintiff more than four months before the defendant entered upon it and commenced his settlement, but he did not file the usual notice of claim or declaratory statement until the 11th of October, 1858, more than two years after the amendatory act went into operation. Authority to file such a declaratory statement within three months after the plats of survey are returned into the local land-offices is expressly given by the act of Congress, but there is no authority given to file

before that time; from which it appears that the declaratory statement filed by the defendant was premature. Attention to that subject was called on the trial of the case in the court below, and the Supreme Court of the State held that the statement of the defendant, inasmuch as it was filed without authority of law, was a nullity, and this court adopts that conclusion as correct.

System and order are essential in administering the land-offices, and if a party may anticipate the time for such an act as prescribed by law for two months, it is not perceived why he may not for two years, or even for a longer period, which would necessarily introduce confusion, uncertainty, and irregularity of practice in the local offices of the Land Department For these reasons the court is of the opinion that the declara tory statement filed by the defendant is inoperative and without any legal effect. *Daniels* v. *Lansdale*, 43 Cal. 41; 1 Lester's Land Laws, 400; Copp's Land Laws, 420.

He filed his declaratory statement more than two months before the return of the plats of survey, and in direct violation of the law upon the subject, which required it to be filed within three months after such return, as appears from the explicit language of the act; nor can the court relieve the defendant from the consequences of his failure to comply with the express requirement.

Opposed to that is the suggestion that the statement remained in the local land-office when the plats of survey were returned there; but that circumstance will not remove the difficulty, as it was made and filed without authority of law, and was in every sense an unofficial document not belonging to the office. Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.

Attempt is made to show that the plaintiff failed to comply with the requirements of the pre-emption laws as to the settlement, occupancy, and cultivation of land entered for pre-emption; but the court is of the opinion that the defence in that regard is wholly unsustained. Nothing of moment is alleged in the answer to support the alleged defect, except that the

plaintiff purchased a dwelling-house, instead of erecting the one which he occupied. His entry and occupancy of the tract are admitted; and the court is of the opinion that it is immaterial whether he built the dwelling-house himself or hired an agent to erect it for him, or whether he purchased it after it was built by another, provided it appears that he was the lawful owner of the dwelling-house, and made the entry and settlement in good faith, and continued to occupy and cultivate the land, as required by the pre-emption laws. Enough appears to show that the dwelling-house was there on the land, and that it was owned, possessed, and occupied by the plaintiff as his home more than three months before the defendant entered and attempted to make his settlement. 1 Lester's Land Laws, 424.

Suppose that is so, still the defendant insists that he was entitled to the patent because the plaintiff did not file his declaratory statement until more than two years after the plats of the survey of the land were returned into the local offices. Grant that, but it only shows that both parties settled upon the land while it was unsurveyed, and that each was to some extent in fault in filing his declaratory statement, the difference being that the defendant filed his before he had any right to file it under the pre-emption act, which rendered it a nullity, and that the plaintiff did not file the required notice of claim until the time allowed by the amendatory act had expired. Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim. *Johnson* v. *Towsley*, 13 Wall. 72, 91.

Tested by that rule, it is clear that the equity of the plaintiff is superior to that of the defendant, as the latter never filed any other notice of claim than that which preceded the return of the plats of survey into the local land-offices.

Other defences failing, the defendant contends that the plaintiff failed to comply with the requirements of the pre-emption laws in other respects; but the court is of the opinion

that the defence in that regard is not made out, it appearing that he had a dwelling-house thereon, of which he was the lawful owner, and that his occupancy was continuous, either in person or by his tenant. 5 Stat. 455, sect. 10; 1 Lester's Land Laws, 424.

Beyond doubt, the declaratory statement of the defendant was a nullity, as it was filed at a time when the act of Congress gave it no effect; and it is equally clear that the notice of claim was not seasonably filed by the plaintiff, but the entry and settlement of the plaintiff were first made, — from which it follows that the equity, as between him and the defendant, is decidedly in his favor, the universal rule in such cases being that in the adjustment of such controversies the superior equity must prevail. Story, Eq. Jur. (9th ed.) sect. 64 *d*. *Qui prior est in tempore potior est in jure.* Jeremy, Eq. Jur. 285, 286; *Boone* v. *Chiles*, 10 Pet. 177; Adams's Equity (ed. 1872), 148.

Nor does the plaintiff rely entirely upon the proposition that his is the superior equity, which of itself is sufficient to show that the judgment below must be affirmed; but it also appears that the parties were fully heard before the Land Department, where the decision was in his favor, and that he now holds the patent for the land; from which it follows that the legal title is in the plaintiff.

Neither of the parties complied strictly with the law in filing the declaratory statement; but inasmuch as the plaintiff holds the legal title and the superior equity, it is clear that the defendant has no such standing in court as will justify a court of equity in interfering in his behalf.

Complaint is made by the defendant of the decision of the Land Department in granting the patent to the plaintiff, but it is too clear for argument that no case is made to warrant the court here in reversing that decision. *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 id. 530.

Reference to these authorities is sufficient to show that the defendant is not entitled to the relief asked; but if the law were otherwise, it would not benefit the defendant, as he does not show what questions were litigated before the land-officers, nor does the record contain any specification as to what the

rulings of the officers were in regard to any particular point. It appears that there was a contest between the parties there, and that the case was decided in favor of the plaintiff; out the grounds of the decision are not stated. Such being the state of the pleadings, it is impossible to say that any error of law was committed by the tribunal.

Viewed in any light, it is clear that there is no error in the record, and the assignment of errors must be overruled.

Judgment affirmed.

UNITED STATES v. CURTIS.

CURTIS v. UNITED STATES.

The United States, in an action against the sureties of a paymaster in the army, assigned as the breach of the conditions of his official bond that he did not, when thereunto required, refund $3,320.02, with interest. He rendered his account Nov. 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account at the Treasury Department, that sum was found to be due at said date. No demand therefor was made of his personal representatives, and the sureties had no notice of the claim before the service of the writ in the action. The adjustment was the only evidence of the sum due. *Held*, that the United States is entitled to recover that sum, but with interest only from the date of such service.

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

This was an action of debt, brought by the United States on a joint and several bond in the penal sum of $20,000, executed May 30, 1862, by Oliver Holman and his sureties, James O. Curtis and Joshua T. Foster, conditioned that said Holman, a paymaster in the army, should faithfully discharge his duties as such; that he should regularly account, when thereunto required, for all moneys received by him, and "refund at any time when thereunto required any public moneys remaining in his hands unaccounted for." The only breach assigned in the declaration is that he did not refund when thereunto required the sum of $3,320.02, with interest.

Holman, although named in the writ, was not living when

it was sued out. Curtis and Foster were duly served, and by counsel entered their appearance.

It appears from an agreed statement of facts that Holman went out of office Sept. 30, 1865, and on that day rendered a final account, showing nothing due to the United States or to himself. One credit in that account is for "$2,658 stolen, as per report to paymaster-general, Aug. 7, 1865."

On a final adjustment of the account made March 18, 1872, after the death of Holman, the second auditor found that there was due to the United States $3,320.02. No part of this amount has been paid. It does not appear that any demand therefor was made of Holman's personal representatives, and the sureties had notice of the existence of the claim only by the service of the writ. To enable them to petition for relief in the Court of Claims under the act of May 9, 1866 (14 Stat. 44), the cause was continued from term to term. That court, finding that Holman was not without fault or neglect, dismissed a petition, wherein they prayed for a decree declaring that the amount of the funds stolen should be entered as a credit in the settlement of the account. The sureties then made default, but appeared at the hearing on the assessment of damages, when the agreed statement was filed. The court thereupon entered judgment in favor of the United States for the said sum of $3,320.02, with interest thereon at the rate of six per cent per annum from Oct. 15, 1872.

Each party removed the case here; the United States assigning for error that interest should have been computed from Nov. 30, 1865, and the defendants, that the court erred in awarding against them any sum other than one merely nominal as damages.

Mr. Assistant Attorney-General Smith for the United States.

1. It was the duty of Holman when he went out of office, Nov. 30, 1865, to pay to the United States the moneys then due and in his hands. He and his sureties were bound to know the law in that regard, and such knowledge is equivalent to a demand. He had no right to credit himself with the amount of funds stolen from him (*United States* v. *Prescott*, 3 How. 578; *Muzzy* v. *Shattuck*, 1 Den. (N. Y.) 233; *State* v. *Harper*, 6 Ohio St. 607; *State* v. *Township*, 28 Ind. 86; *Han*

cock v. *Hayward*, 12 Cush. (Mass.) 112; *Commonwealth* v. *Comly*, 3 Pa. St. 374; *Halbert* v. *State*, 22 Ind. 125); and the accounting officers had no authority to allow such a credit. *Farmington* v. *Stanley*, 60 Me. 472; *Porter* v. *Stanley*, 47 id. 515; *Angel* v. *Pownal*, 3 Vt. 461; *Horn* v. *Whittier*, 6 N. H. 94; *Carlton* v. *Bath*, 22 id. 559.

2. For not paying over the moneys at that date, he and his sureties are liable. The contract of the latter is not distinguishable from his. He engaged to do certain things, and for not doing them was liable. The sureties engaged that he should do them; and for his not doing them they became liable. The same default or neglect that charges him must charge them. *Seaver* v. *Young*, 16 Vt. 662; *United States* v. *Cushman*, 2 Sumn. 436; *Berg* v. *Radcliff*, 6 Johns. (N. Y.) Ch. 302; *Shaw* v. *McFarlane*, 1 Ired. (N. C.) L. 216; *Hobbs* v. *Middleton*, 1 J. J. Marsh. (Ky.) 176.

3. Interest runs from that date. *Dodge* v. *Perkins*, 9 Pick. (Mass.) 368; *Wood* v. *Robbins*, 11 Mass. 506; *Gay* v. *Gardiner*, 54 Me. 477; *Buzzell* v. *Snell*, 25 N. H. 474; *National Lancers* v. *Lovering*, 30 id. 511; *Whiteworth* v. *Hart*, 22 Ala. 343; *Williams* v. *Sherman*, 7 Wend. (N. Y.) 109, 112; *Still* v. *Hunt*, 20 id. 51; *Van Rensselaer* v. *Jewett*, 2 N. Y. 139, 140; *Adams* v. *Fort Plain Bank*, 36 id. 261; *Stacy* v. *Graham*, 14 id. 492; *Lynch* v. *De Viar*, 3 Johns. (N. Y.) 303, 310; *Clark* v. *Barlow*, 4 id. 183; *Honore* v. *Murray*, 3 Dana (Ky.), 31; *Elkin* v. *Moore*, 6 B. Mon. (Ky.) 462; *Sims* v. *Gondelock*, 7 Rich. (S. C.) 23; *Kennedy* v. *Barnwell*, id. 124; *Barr* v. *Hazelton*, 10 Rich. (S. C.) Eq. 61, 62; *Palmer* v. *North*, 35 Barb. (N. Y.) 282, 294; *Vermont & Canada Railroad Co.* v. *Vermont Central Railroad Co. et als.*, 34 Vt. 1; *Stevenson* v. *Maxwell*, 2 Sandf. (N. Y.) Ch. 273; *Bassett* v. *Sanborn*, 9 Cush. (Mass.) 68; *Cooper* v. *Rainey*, 4 Minn. 532; *Leake* v. *Lawrence*, 11 Paige (N. Y.), 80; *Evans* v. *State*, 36 Tex. 323.

4. The United States has the right of every creditor whose moneys are wrongfully withheld. When it becomes party to a contract, its relation to the other contracting parties is the same as that subsisting between individuals. *United States* v. *Barker*, 12 Wheat. 559; *United States Bank* v. *Planters' Bank*, 9 id. 904; *United States* v. *Ames*, 1 Wood. & M. 76; *United*

States v. *Bank of Metropolis*, 15 Pet. 377; *The Floyd Acceptances*, 7 Wall. 666; *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569.

Mr. Thomas H. Talbot, *contra*.

1. The writ did not make the requisite demand upon Holman or his personal representatives. It ran against neither, and there was, in the absence of a demand, no breach of the bond.

For the purpose of ascertaining the sum due in equity and good conscience, the failure of the defendants to plead does not waive proof as to a demand, for no defect or admission in the previous pleadings can deprive either party of the right to an equitable adjustment of all claims secured by the bond. *Merrill* v. *MacIntire*, 13 Gray (Mass.), 157; *Attleborough* v. *Hatch*, 97 Mass. 533. If, then, that failure will serve to justify any judgment for the United States, it must be merely for nominal damages.

2. If this court should hold that upon the facts disclosed by the record the sureties are liable for the principal sum, it is submitted that interest thereon should not be awarded. The liability of the sureties must be kept within the strict limits of the terms of the contract, and cannot be enlarged by implication. *Bank of Brighton* v. *Smith*, 12 Allen (Mass.), 243. And it did not arise if, when required, Holman should refund public moneys remaining in his hands unaccounted for. No such requirement was made Nov. 30, 1865, from which date the government contends that interest should be computed.

They had also bound themselves that he should, for all moneys officially received by him, "regularly account." This he did at the close of his service, and the account which he then rendered showed nothing due from or to the government, and no moneys in his hands unaccounted for.

His next duty was to refund, when required, any moneys which a revision of his accounts should show to be in his hands "unaccounted for." That is, he was to respond to a demand for any balance found due from him upon the adjustment of his account at the treasury. Until this adjustment, — and none was made before his death, — no public moneys remained in

his hands "unaccounted for," and no demand was thereafter made of his representatives.

If, however, the service of the writ is a demand upon the sureties, interest prior thereto should not be allowed.

MR. JUSTICE MILLER, after stating the facts, delivered the opinion of the court.

To the error assigned by the defendants it is sufficient to say that, having been served with the writ, and appeared by counsel, and having thereafter suffered a voluntary default, that default was a confession of indebtedness on account of the breach of the bond assigned; namely, the failure of Holman, their principal, to pay over the moneys in his hands when thereunto required, and of such demand as imposed upon his sureties the obligation to pay. There remained only the question of the amount due from him on account of moneys in his hands, and of this the auditor's statement of account was evidence which was uncontradicted. There is, therefore, no error of which they can complain.

The United States, however, asserted a right to interest on the amount found due by the auditor from the date at which Holman ceased to be paymaster, namely, Nov. 30, 1865.

Without attempting to decide any other case but this, we are of opinion that the breach of the bond on which the defendants were sued did not occur until Holman, his legal representatives, or his sureties, were required to refund moneys in his hands; that is, until some notice was given that a definite sum in his hands had by the proper accounting officer been found to be due to the United States. Of course, until there was a breach of the condition of the bond, which rendered him or his sureties liable, there could be no right to interest on account of such breach.

The agreed statement shows that no such statement was made or rendered to Holman in his lifetime, or any demand to refund. Nor does it appear that any such statement was rendered to his executors, or a demand made of them or of the sureties, except by the service of the writ.

We are, therefore, of opinion that the earliest moment at which any one became liable on account of the breach of the

condition of the bond now sued on was the service of the writ on the defendants, and that such service was a sufficient demand. The court properly allowed interest on that basis.

Judgment affirmed.

HATCH *v.* OIL COMPANY.

A. & B. agreed, by a contract in writing, to manufacture for C., at a stipulated price, a quantity of staves, and to pile them on lands adjoining their mill, which were leased to him. The contract provided that, on the staves being counted from week to week, A. & B. were to be entitled to a certain percentage of the price of the number ascertained; that upon such piling and counting the delivery should be deemed complete, and the staves were thenceforth to be absolutely and unconditionally the property of C. Before the day when all were to be furnished, and full payments made, a creditor of A. & B. caused his execution to be levied upon the staves which had been counted and piled, most of them being then upon the leased lands and the remainder upon a contiguous tract. The stipulated percentage had also been paid. The lease and contract were not recorded nor filed, but the contract was made in good faith. *Held*, that the title to the staves was in C., and they were not subject to the execution.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The Standard Oil Company of Cleveland brought replevin against Alonzo S. Hatch for a quantity of staves whereof it claimed to be the owner, which he, as sheriff of Lapeer County, Michigan, had seized under and by virtue of certain attachments and executions sued out against the property of John J. and Alfred E. Merritt.

There was a verdict in favor of the company, and judgment having been rendered thereon, Hatch sued out this writ of error.

The assignment of errors is set out in the opinion of the court.

The facts giving rise to the litigation are substantially as follows: —

An agreement in writing was entered into March 11, 1874, between the company, an Ohio corporation, and said Merritts,

who were residents of said county, whereby the latter sold to the company one million of oil-barrel staves, to be sawed of certain dimensions, and manufactured from good, sound, white oak. They were to be delivered on board cars in Cleveland, Ohio, on or before the first day of June, 1875. The company was to receive them as fast as they were inspected, and pay therefor the sum of $30 per thousand.

Aug. 28, 1874, before the staves were furnished, the parties entered into a new contract, providing that, subject to certain modifications thereinafter mentioned, the former contract was to continue, and that said Merritts shall make the staves, and, as fast as they are sawed, deliver them properly piled in some convenient place, to be agreed upon by the parties, on land in Deerfield, Lapeer County, controlled by the company; that the company shall furnish a man to count the staves from week to week, who, when they shall be so piled and counted, shall give the Merritts a certificate of the amount piled, upon the presentation of which to the company it shall pay $17 a thousand as part of the purchase price of the staves; that upon the piling and counting of them, as provided in the contract, "the delivery of the same shall be deemed complete, and said staves then become and thenceforth be the property of the second party absolutely and unconditionally;" that the Merritts, "as agents of the Standard Oil Company," at their own expense shall, on or about the fifteenth day of August, 1875, begin to draw, ship, and forward the staves to the company at the rate of not less than one hundred thousand per month; that the staves shall be allowed to remain piled for the period of three months before the company shall have the privilege of calling for the shipment of the same, but that it shall be the privilege of the company to insist that they shall remain piled for the period of eight months before the shipment; that the whole quantity shall be delivered by Jan. 1, 1876; that if the shipment of them shall be delayed beyond the period of eight months, and not at the request of the company, then the Merritts shall pay interest, and in addition thereto the cost of insuring; that the company shall have the privilege of calling for the shipment direct from the saw; that the company shall pay the balance of the contract price, deducting interest therefrom at ten per

cent per annum on the advances of $17 per thousand from the time paid until the staves shall be received at Cleveland, and also the cost of insuring them against loss by fire after delivery at Lapeer, the amount of said insurance to be $18 per thou sand; that if they shall be destroyed by fire before delivery at Cleveland, the loss above said $18 per thousand to fall upon the Merritts; that if the latter shall fail to draw, ship, and forward the staves as agreed, then the company shall be authorized to procure the same to be done, and deduct the necessary expenses from the balance of the contract price, also ten per cent interest on advances and insurance premium paid by them; and that if any balance of the contract price then remains due to the Merritts, the company shall pay the same; but if the advances upon that price, interest, insurance, and the cost and expenses of shipment exceed the balance due upon such price, the Merritts, on demand, shall pay the same.

The Merritts leased, Aug. 28, 1874, to the company a tract of land adjoining their mill, and shortly thereafter began to manufacture the staves and pile them on that tract. One Donely was employed by the company to count them. His certificates of the number were from time to time given, and advanced payments were, to the sum of $15,148, made thereon by the company. Its agent, accompanied by one of the Merritts, made, July 10, 1875, a count of the staves, the number being seven hundred and eighty thousand. About fifty thousand of them were piled upon land immediately adjoining that tract. After they had been counted, Hatch made the levies in question.

The contracts and lease were made in good faith, but neither was recorded or filed in any public office.

At their dates, and during the transactions under them, the statute of Michigan contained the following provisions, to wit: —

"4703: SECT. 7. Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall

be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

"4706: SECT. 10. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides."

The chief controversy below was, whether, under the contract, the title to the staves in controversy, at the time when they were seized by Hatch, had vested in the company as vendee or as mortgagee.

Mr. Ashley Pond for the plaintiff.

1. The interest of the company in the staves at the time they were seized by Hatch upon process against the Merritts was that of a mortgagee, the legal title remaining in the Merritts as owners.

2. Up to that time there had been no delivery to the company, and no actual and continued change of possession, within the meaning of sect. 4703 of the statutes of Michigan.

3. There being no such change of possession, actual notice of the unfiled mortgage would not render the instrument valid against creditors. Such has been the uniform ruling where similar statutes have been enacted. *Tyler* v. *Strang*, 21 Barb. (N. Y.) 198; *Farmers' Loan & Trust Co.* v. *Hendrickson*, 25 id. 484; *Stevens* v. *Railroad Company*, 31 id. 590; *Robinson* v. *Willoughby*, 70 N. C. 358; *Bevans* v. *Bolton*, 31 Mo. 437. Were the law otherwise, there was no proof of such notice to Hatch or to creditors.

4. Assuming that the contract operated as a sale, and not as a mortgage, the title to the fifty thousand staves not piled

upon the land covered by the lease had not, at the time they were seized, passed from the Merritts to the company.

Mr. F. H. Canfield, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Contracts for the purchase and sale of chattels, if complete and unconditional and not within the Statute of Frauds, are sufficient, as between the parties, to vest the property in the purchaser, even without delivery; the rule being that such a contract constitutes a sale of the thing, and that its effect is if not prejudicial to creditors, to transfer the property to the purchaser against every person not holding the same under a *bona fide* title for a valuable consideration without notice. *The Sarah Ann*, 2 Sumn. 211; *Gibson* v. *Stevens*, 8 How. 384, 399; 2 Kent, Com. (12th ed.) 493; *Leonard* v. *Davis*, 1 Black, 476–483.

Nine hundred and forty-four thousand white-oak barrel-staves, of the value of $17,500, were attached by the defendant as sheriff of the county, under certain processes mesne and final, which he held for service against the manufacturers of the staves, to secure certain debts which they owed to their creditors. No irregularity in the proceedings is suggested, but the plaintiffs claimed to be the owners of the staves by purchase from the manufacturers, and they brought replevin to recover the property. Service was made, and the defendant appeared and demanded a trial of the matters set forth in the declaration. Issue having been joined between the parties, they went to trial, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Errors assigned in the court are as follows: 1. That the court erred in instructing the jury that as soon as the staves were piled and counted, as provided in the second agreement, the title to the same vested in the plaintiff company as vendee. and in refusing to instruct the jury that the only interest the plaintiffs acquired in the staves before they were delivered was as security for advances in the nature of a mortgage interest. 2. That the court erred in refusing to instruct the jury that if there was no actual delivery of the property and change of

possession the agreement of sale was void as against the creditors of the manufacturers, because not recorded as required by statute. 3. That the court erred in refusing to instruct the jury that if the evidence did not show that the fifty thousand staves not piled on the leased land were not counted, the title to that parcel did not pass to the plaintiffs for any purpose, and that the defendant, as to that parcel, was entitled to their verdict. 4. That the court erred in refusing to instruct the jury that under the agreement no title to any of the staves passed to the plaintiffs until they were actually placed upon the leased land and were counted by the designated person, and in instructing the jury that the title to the staves piled near the leased land passed to the plaintiffs. 5. That the court erred in refusing to instruct the jury that no title to any staves passed to the plaintiffs other than those contracted to be sold by the first agreement, and that if the jury find that there was any portion of the staves replevied not of that description, that as to such portion the plaintiffs are not entitled to recover. 6. That the court erred in excluding the testimony offered by the defendant, as set forth in the record.

Sufficient appears to show that the manufacturers of the staves, on the day alleged, contracted with the plaintiffs to sell them one million of white-oak barrel-staves of certain described dimensions, to be delivered as therein provided, for the price of $30 per thousand, subject to count and inspection by the plaintiffs, who agreed to receive and pay for the same as fast as inspected. But before the staves had been furnished, to wit, on the 28th of August in the same year, the parties entered into a new agreement in regard to the staves, in which they refer to the prior one, and stipulate that it is to continue in operation, subject to modifications made in the new contract, of which the following are very material to the present investigation: 1. That the manufacturers shall make and deliver the staves properly piled in some convenient place, to be agreed between the parties, on land in Deerfield, to be controlled by the plaintiffs, and that the delivery shall be made as fast as the staves are sawed. 2. That the plaintiff shall furnish a man to count the staves from week to week as the same shall be piled. 3. That when the staves shall be so piled and

counted, the person counting the same shall give the manufacturers a certificate of the amount, which, when presented to the plaintiffs, shall entitle the party to a payment of $17 per thousand as part of the purchase price. 4. That upon the piling and counting of the staves as provided, "the delivery of the same shall be deemed complete, and that said staves shall then become and thenceforth be the property of the plaintiffs absolutely and unconditionally."

Other material modifications of the first agreement were made by the second, some of which it is not deemed necessary to consider in disposing of the case.

Early measures were adopted to perfect the arrangement, as appears from the fact that the manufacturers, October 4 in the same year, leased to the plaintiffs a small tract of land to be used for piling and storing the staves; and the case shows that all the staves except fifty thousand were piled on that site, the fifty thousand staves being piled on land owned by the manufacturers, about one hundred or one hundred and fifty feet distant from the pile on the leased tract, on which were certain buildings owned and occupied by the lessors, the mill where the staves were manufactured being situated on the same section a little distant from the other buildings. None of the staves were manufactured when the contracts were made.

It was admitted by the plaintiffs that the lease was never filed in the clerk's office and that it was never recorded in the office of the county register of deeds. Certain admissions were also made by the defendant, as follows: That the parties to the contracts acted in good faith in making the same, and that the contracts and lease were duly executed; that all the staves seized were manufactured by the said contractors, and that all except fifty thousand of the same were piled on the leased tract.

Nothing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract. As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely

proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say, that whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law, the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances.

Where the specific goods to which the contract is to attach are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement. Reported cases illustrate and confirm that proposition, and many show that where the goods to be transferred are clearly specified and the terms of sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer even without actual payment or delivery. 2 Kent, Com. (12th ed.) 492; *Tome* v. *Dubois*, 6 Wall. 548, 554; *Carpenter* v. *Hale*, 8 Gray (Mass.), 157; *Martineau* v. *Kitching*, Law Rep. 7 Q. B. 436, 449; Story, Sales (4th ed.), sect. 300.

Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject cannot be entertained if the terms of bargain and sale, including the price, are explicit; but when the thing to be sold is not specified, or if when specified something remains to be done to the same by the vendor, either

to put it into a deliverable state or to ascertain the price, the contract is only executory. In the former case there is no reason for imputing to the parties any intention to suspend the transfer, inasmuch as the thing to be sold and the price have been specified and agreed by mutual consent, and nothing remains to be done. Quite unlike that, something material remains to be done by the seller in the latter case before delivery, from which it may be presumed that the parties intended to make the transfer dependent upon the performance of the things yet to be done.

Suppose that is so, still every presumption of the kind must yield to proof of a contrary intent, and it may safely be affirmed that the parties may effectually agree that the property in the specific thing sold, if ready for delivery, shall pass to the buyer before such requirements are fulfilled, even though the thing remains in the possession of the seller.

Where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, Bailey, J., said the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. *Simmons* v. *Swift*, 5 B. & C. 857.

Sales of goods not specified stand upon a different footing, the general rule being that no property in such goods passes until delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the same and to pay the stipulated price, the parties, says Parke, J., are thus in the same situation as they would be after a delivery of goods under a general contract, for the reason that the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. *Dixon* v. *Yates*, 5 Barn. & Adol. 313, 340; Shep. Touch. 224.

When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something

remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer, the contract is merely an executory agreement, unless it contains words warranting a different construction, or there be something in the subject-matter or the circumstances to indicate a different intention. Benjamin, Sales (2d ed.), 257; Blackburn, Sales, 151; *Young* v. *Matthews*, Law Rep. 2 C. P. 127–129; *Logan* v. *LeMesurier*, 6 Moore P. C. C. 116; *Ogg* v. *Shuter*, Law Rep. 10 C. P. 159–162; *Langton* v. *Higgins*, 4 H. & N. 400; *Turley* v. *Bates*, 2 H. & C. 200–208.

Exactly the same views are expressed by the Supreme Court of the State as those maintained in the preceding cases. Speaking to the same point, Cooley, C. J., says, when, under a contract for the purchase of personal property, something remains to be done to identify the property or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong, that by the understanding of the parties the title is not to pass until such act has been fully accomplished. Such a presumption, however, is by no means conclusive; for if one bargains with another for the purchase of such property, and the parties agree that what they do in respect to its transfer shall have the effect to vest the title in the buyer, he will become the owner, as the question is merely one of mutual assent, the rule being, that if the minds of the parties have met, and they have agreed that the title shall pass, nothing further, as between themselves, is required, unless the case is one within the Statute of Frauds. Consequently, it was held by the same court that if one purchases gold bullion by weight, and receives delivery before it becomes convenient to weigh it, and on the understanding that the weighing shall be done afterwards, the bullion would become the property of the buyer and be at his risk, unless there were some qualifying circumstances in the case. *Wilkinson* v. *Holiday*, 33 Mich. 386–388; *Lingham* v. *Eggleston*, 27 id. 324, 328; *Ortman* v. *Green*, 26 id. 209, 212.

Decisions of other States are to the same effect, of which the following are examples: *Pacific Iron Works* v. *Long Island Railroad Co.*, 62 N. Y. 272, 274; *Groff* v. *Belche*, 62 Mo. 400–402; *Morse* v. *Sherman*, 106 Mass. 430, 433; *Riddle* v. *Varnum*, 20

Pick. (Mass.) 280, 283; *Chapman* v. *Shepard*, 39 Conn. 413–419; *Fuller* v. *Bean*, 34 N. H. 290–300.

Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore* v. *Supple*, 11 Moore P. C. C. 551; Benjamin, Sales (2d ed.), 280; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Calcutta Co.* v. *DeMattos*, 32 Law J. Rep. N. S. Q. B. 322–338.

"There is no rule of law," says Blackburn, J., in the case last cited, "to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual." S. C. 33 id. 214; 11 W. R. 1024, 1027.

Support in some of the cases cited is found to the theory that the terms of the bargain and sale in this case, inasmuch as they indicate that the intention of the sellers was to appropriate the staves when manufactured to the contract, are sufficient to vest the property in the buyer when the agreed sum to be advanced was paid even without any delivery; but it is quite unnecessary to decide that question in view of the evidence and what follows in the second contract between the parties.

Provision was made that a convenient place should be designated by the parties where the staves should be piled as fast as they should be sawed. Such a place was provided to the acceptance of both parties, and the plaintiffs furnished a man as agreed to count the same from week to week as the staves were piled. Enough appears to show that all the staves, except as aforesaid, were piled and delivered at that agreed place.

In a contract of sale, if no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some

other place is required by the nature of the article or by the usage of the trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case. Decided cases to that effect are numerous; but the rule is universal, that if a place of delivery is prescribed as a part of the contract the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere. Story, Sales (4th ed.), sect. 308.

Where, by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place. *Savage Manuf. Co.* v. *Armstrong*, 19 Me. 147.

So when the intention of the parties as to the place of delivery can be collected from the contract, and the circumstances proved in relation to it, the delivery should be made at such place, even though some alterations have been made in the place designated. *Howard* v. *Miner*, 20 id. 325–330.

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous, and decisive. *Hyde* v. *Lathrop*, 3 Keyes (N. Y.), 597; *Macomber* v. *Parker*, 13 Pick. (Mass.) 175, 183.

In an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained nothing further for him to do, he need not show an acceptance by the defendant. *Nichols* v. *Morse*, 100 Mass. 523.

Even when a place of delivery is specified, it does not necessarily follow that the title does not pass before they reach the designated place, as that may depend upon the intention of the parties; and whether they did or did not intend that the title should vest before that is a question for the jury, to be determined by the words, acts, and conduct of the parties and all the circumstances. *Dyer* v. *Libbey*, 61 Me. 45.

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. *Burrows* v. *Whitaker*, 71 N. Y. 291–296; *Graft*

v. *Fitch*, 58 Ill. 373; *Russell* v. *Carrington*, 42 N. Y. 118, 125; *Terry* v. *Wheeler*, 25 id. 520, 525.

Beyond controversy, such must be the rule in this case, because the contract provides that upon the piling and counting the staves as required by the instrument the delivery of the same shall be deemed complete, and that the staves shall then become and henceforth be the property of the plaintiffs absolutely and unconditionally.

Except the fifty thousand before named, all the staves were so piled and counted; and the case shows that the person designated to count the same approved fourteen certificates specifying the respective amounts of the several parcels delivered, and that the plaintiffs paid on each the $17 per thousand advance as agreed, amounting in all to $15,148.

Personal property may be purchased in an unfinished condition, and the buyer may acquire the title to the same though the possession be retained by the vendor in order that he may fit it for delivery, if the intention of the parties to that effect is fully proved. *Elgee Cotton Cases*, 22 Wall. 180.

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied. Benjamin, Sales (2d ed.), 263; *Rohde* v. *Thwaites*, 6 B. & C. 388.

Examples of the kind are numerous in cases where the goods are not specified, and the decided cases show that if the seller subsequently selects the goods and the buyer adopts his acts, the contract which before was a mere agreement is converted into an actual sale and the property passes to the buyer. One hundred quarters of barley out of a bulk in a granary were agreed to be purchased by the plaintiff, he having agreed to send his own sacks, in which the same might be conveyed to an agreed place. He sent sacks enough to contain a certain part of the barley, which the seller filled, but, being on the eve of bankruptcy, he refused to deliver any part of the quantity sold, and emptied the barley in the sacks back into the bulk in the granary. Held, in an action brought to recover the whole amount, that the quantity placed in the sacks passed to the

purchaser, as that part was appropriated by the bankrupt to the plaintiff. *Aldridge* v. *Johnson*, 7 E. & B. 885; *Browne* v. *Hare*, 3 H. & N. 484; s. c. 4 id. 821; *Tregeles* v. *Sewell*, 7 id. 573.

Stipulations in respect to the forwarding and shipping the staves are also contained in the second agreement; but it is not necessary to enter into any discussion of that topic, as it appears that the manufacturers, if they did any thing in that regard, were to act as the agents of the plaintiffs, and if they failed to transport the same to the place of shipment seasonably, the plaintiffs were authorized to do it at their expense. Nor is it necessary to discuss the stipulations as to insurance, as it is clear that they contain nothing inconsistent with the theory that the property vested in the plaintiffs as soon as the staves were piled and delivered at the agreed place of delivery.

Proof of a satisfactory character was exhibited that much the greater portion of the staves were piled upon the leased site, and that the residue were piled on land adjoining, and within a hundred or a hundred and fifty feet from the larger pile. Witnesses examined the staves piled there several times, and one of them testified that he was there July 10, 1875, with one of the sellers, and made a thorough count of the staves, the number counted being 780,000, and he states that he counted the staves in both piles, and that there were no other white-oak staves on the premises.

Taken as a whole, the evidence shows that the parties treated both piles of the staves as delivered under the contract, the one as much as the other, and that they regarded both as properly included in the adjustment of the amounts to be advanced. When the agent of the plaintiffs went there, as before explained, with one of the sellers, it is certain that they counted both piles, and it is clear that in view of the evidence and the circumstances the jury were warranted in finding that the property in all the white-oak staves piled there passed to the plaintiffs when they were piled and delivered at that place, neither party having objected to the place where the smaller parcel was piled.

Actual delivery of the staves having been proved, it is not necessary to make any reply to the defence set up under the

State statute in respect to the sale of goods unaccompanied by a change of possession. Objection is also made that the lease of the premises designated as the place of delivery was not recorded, which is so obviously without merit that it requires no consideration.

Viewed in the light of these suggestions, it is obvious that the first five assignments of error must be overruled.

Exception was also taken to the ruling of the court below in excluding certain testimony offered by the defendant to show that the staves were not cut and made at the time some of the certificates were given to secure the advance, and to show that the staves included in the small pile were never in fact counted, and that no certificate specially applicable to them was ever given. Responsive to the objection of the defendant, the court below remarked, that, if the staves were subsequently piled there to the satisfaction of the plaintiffs, the title passed, it appearing that the certificates were given and the advance paid, which is all that need be said upon the subject, as it is plain that the ruling is without just exception.

Judgment affirmed.

BROWNSVILLE *v.* CAVAZOS.

1. By the laws of Mexico in force in 1826, a pueblo or town, when recognized as such by public authority, became entitled to certain lands, which to the extent of four square leagues, embracing its site and the adjoining territory, were to be measured and assigned to it.
2. By the Constitution of Tamaulipas, one of the States of Mexico, in force in 1826, the land of an individual could not be expropriated — that is, divested of its private character — for an object of common recognized utility, without previous compensation, the amount of which could be estimated only by arbiters appointed by him and the State. If such compensation was not made, though the failure to make it was caused by his refusal to appoint an arbiter, his title was not divested, and he and his grantees could recover the land after the jurisdiction over the country had been transferred by the treaty of Guadalupe Hidalgo.
3. By the law of Texas, a judgment against a plaintiff in an action for the possession of lands is conclusive, unless he commence a second action within a year. *Held*, that, in an action for the same lands commenced within the year by the former defendant against the grantees of the former plaintiff,

the latter are not precluded by that judgment from setting up their claim to them.

4. Where, up to the commencement of the action, a mixed possession of the land, and a continued litigation respecting it, existed, and there was no actual occupation of a large portion of it, — *Held*, that no prescription could be maintained by either party, and that the case must be determined on the documentary evidence of title.

ERROR to the Circuit Court of the United States for the Eastern District of Texas.

The facts are stated in the opinion of the court.

Mr. Thomas J. Durant for the plaintiff in error.

Mr. James R. Cox for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action for the possession of certain real property in Brownsville, a city of Texas, situated on the left bank of the Rio Grande, opposite the town of Matamoras. Previous to the revolution which separated Texas from the Republic of Mexico, Brownsville constituted a portion of Matamoras, which was recognized as a town in 1826 by a decree of the congress of Tamaulipas, one of the States of Mexico. By the laws of Mexico in force at the time, pueblos or towns, when recognized as such by public authority, became entitled for their use and benefit, and the use and benefit of their inhabitants, to certain lands embracing the site of such pueblos or towns and adjoining territory, to the extent of four square leagues. This right was held by the cities and towns of Spain for a long period before her conquests in America, and was recognized in her laws and ordinances for the government of her colonies here. Laws of the Indies, in White's Recop., vol. ii. 44; *Townsend* v. *Greeley*, 5 Wall. 326; *Grisar* v. *McDowell*, 6 id. 363; *The Pueblo Case*, 4 Sawyer, 563. By them provision was made for the measurement of the lands, and their assignment to the pueblos or towns, when once they were officially recognized. If any portion of the lands which fell within the four square leagues, laid off in the usual way in a square or oblong form, had previously become vested in private proprietorship, authority was sometimes given to take the necessary proceedings to divest the property of its private character — to expropriate it, as it was termed — and subject it to the uses of the town

Such was the case here. The four square leagues measured off and assigned to Matamoras crossed the Rio Grande and embraced the site of the present city of Brownsville, which was then the private property of one Dona Maria Francisca Cavazos. The premises were a part of a tract called the Espiritu Santo tract, granted by the Spanish government, in 1781, to one De la Garza. The grant was recognized as valid by the legislature of Texas in 1852, when it relinquished to the heirs and assignees of the grantee all the right and interest of the State therein. For the expropriation of the premises thus embraced within the limits of the land assigned to the municipality proceedings were taken soon after the town was established, in 1826. For some years immediately preceding their institution, Madam Cavazos was seised of the Espiritu Santo tract by regular deraignment of title from the grantee; and so continued until her death in 1835, unless she was divested of that portion assigned to the town by the proceedings for its expropriation. She devised the tract to three parties, one of whom is the defendant, Dona Josefa Cavazos, who, on partition with the others, became seised of that part which includes the premises in controversy, portions of which she conveyed to persons from whom the other defendants derive their title to the parcels which they severally claim.

The principal inquiry, therefore, presented for our consideration relates to the validity of the proceedings taken for the expropriation of the premises assigned to Matamoras as common lands — or *ejidos*, as they are termed in the Spanish language — on the left bank of the Rio Grande. And on this point we can add nothing to the clear and satisfactory exposition of the law contained in the opinion of the presiding jus tice at the circuit. We can do little more than repeat his argument and adopt his conclusions. *The City of Brownsville* v. *Cavazos*, 2 Woods, 293.

After the separation of Mexico from the mother-country, the several States composing the republic formed new constitutions of government, retaining the old Spanish laws so far as they were applicable to their new condition. The State of Tamaulipas, which embraced territory on both sides of the Rio Grande, in 1825 adopted a constitution containing an article

which declared that "neither the Congress nor any other authority shall be able to take the property, even that of the least importance, of any private individual. When it shall become necessary for an object of a common recognized utility to take the property of any person, he shall first be compensated upon the examination of arbiters appointed by the government of the State and the interested party."

Under this article, in order to divest the title of Madam Cavazos to the property taken, it became necessary to make to her compensation; and its amount could only be determined by arbiters, of whom one was to be chosen by her. But she declined to appoint an arbiter, or to participate in the proceedings. She desired to retain the farm occupied by her, from which she drew her support, and specially wished that it should be reserved from the *ejidos* or common lands. Various efforts were made for more than a year to induce her to act in the matter, but she persistently refused. Finally, in October, 1827, the Congress of the State interfered, and by its decree declared that the government, in the exercise of its powers, would see that the civil authorities of Matamoras compelled her to obey the Constitution and laws; that if, on being notified a second and third time, she should refuse to appoint an arbiter for the appraisement of her lands, which were to be taken for the town, the common council should proceed to their occupation and survey without further citation to her; and that should she or her heirs afterwards ask for indemnification, and be willing to name an arbiter, a new measurement should be made if desired, and the land she asked should be given to her.

It is upon this decree that the plaintiff, The City of Brownsville, relies to sustain its case, contending that the decree was an adjudication *in rem* for the expropriation of the property without compensation to Madam Cavazos, if she persisted in her refusal to name an arbiter, reserving, however, to her the right to claim compensation at a subsequent period upon complying with the law. On the other hand, the defendants insist that the decree merely authorized the use of the lands without expropriation until indemnification to her should be provided, as proposed by the government.

The presiding justice at the circuit was of opinion that the

court was not at liberty to question the validity of this decree, but must regard it as an act of the supreme authority of the State, in its dealings with its citizens, and that the inquiry of the court was, therefore, limited to its meaning and effect. This doctrine may, perhaps, be subject to some qualification, as the Congress of Tamaulipas was restrained by a written constitution. But assuming that even a partial expropriation — a temporary possession of private property without compensation, in the case of an obstinate owner refusing to appoint an appraiser of its value — was permissible, we are of opinion that the position of the defendants is the only tenable one, and for several reasons.

In the first place, absolute expropriation was forbidden by the Constitution of Tamaulipas, without previous compensation. Until that was made, private ownership of the property was not divested. The State could have resorted to coercive measures to compel the owner to appoint an arbiter to act with its own appointee in estimating the amount to be paid. The decree states that the government would use its powers for that purpose, but it does not appear that any such measures were adopted. Its efforts did not go beyond a solicitation to her to act in the matter, and a summons in 1834 to all owners of lands within the *ejidos* to attend at the capital, "so that hearing the attorney-general of finance the indemnification to all might be agreed upon." Madam Cavazos declined to attend upon this summons, giving her old age as an excuse, but stating that she would receive her indemnification in money, and submit to whatever the government might order. It does not appear what action was then taken by the government. There is no evidence that any money was ever paid to her for the property, or that any mode was ever devised for appraising its value, other than that prescribed by the Constitution.

In the second place, the action of the Congress of Tamaulipas in 1848 upon this subject is persuasive, if not conclusive, evidence of the intent and meaning of the decree.

By the treaty of Guadalupe Hidalgo, ratified on the 30th of May, 1848, the Rio Grande was acknowledged to be the boundary between Mexico and the United States, when, of course, the jurisdiction of Tamaulipas over the premises in controversy

ceased. But rights of private property previously existing in the territory east of the Rio Grande were in no respect affected. If they had arisen before the independence of Texas, their validity was to be determined by the laws of Mexico or Tamaulipas then in force. The authorities of Matamoras, claiming the *ejidos* under the decree in question, and believing that after the treaty it would be difficult to enforce contracts with respect to the lands east of the Rio Grande, proposed to sell those now in controversy to various parties from the United States. Thereupon one John Treanor, representing the Cavazos family, and particularly Dona Josefa, one of the defendants in this suit, applied to the congress of Tamaulipas for protection, —in effect asking that the municipality be restrained from making the contemplated sale, on the ground that it possessed no just claim to the property, and that such action would be of serious injury to the owners. To this application the common council of Matamoras replied by setting up the claim of the city. The matter was then presented to the congress, and referred to a committee, who gave to the subject extended consideration, and finally made an elaborate report to the effect that compensation had never been made to the owners of the property; that such compensation was an indispensable requisite to its expropriation; and as such expropriation could not now be made in consequence of the change of government over the country, they were entitled to receive back their lands, and were not confined to compensation; and that the alienation of the lands by the city under these circumstances would not be subjecting them to a public use, but disposing of them for purposes of speculation; adding, that the right of expropriation had another and more noble origin, its object being not to increase the public revenues, but to provide for the well-being of the community. The committee further suggested that the alienation might produce complications with the government of the United States, as the latter would probably contend that, if the lands belonged to the municipality, they must be considered as public property. The congress therefore passed a resolution to the effect that as article thirteen of the ancient Constitution of the State and article seventy-one of the then existing Constitution prescribed that in no case

could an expropriation be established without previous compensation, and as this had not been made for the *ejidos* situated on the left bank of the Rio Grande, the corporation of Matamoras had not acquired any property in them, and that in consequence they were preserved to their ancient owners. This resolution bears date the 20th of October, 1848. As between the city of Matamoras and the applicants it is conclusive; the congress had jurisdiction of these parties; neither questioned its power, and both accepted its judgment as a finality.

Although this resolution may not bind the State of Texas, or previous purchasers or alienees of Matamoras, it is entitled to the highest consideration and respect as a decision touching the law of Tamaulipas, and as an interpretation given to its Constitution upon the expropriation of private property, and to its own previous legislation. It accords with the obvious and natural meaning of the decree of 1827, which only proposed to allow the city to occupy the lands in advance of compensation, and it is supported by all the attendant and subsequent circumstances of the transaction. We therefore adopt it as at once a just and reasonable disposition of the matter.

This conclusion renders it unnecessary to inquire as to the possible interpretation which the language of the charter of Brownsville might receive, or what rights that city might have had, if Matamoras had held property on the east bank of the Rio Grande which, upon the independence of Texas, passed either to her successor or to the State.

It remains only to consider the pleas of *res judicata* and prescription interposed by the plaintiff in bar of the title set up by the defendants.

It appears that certain parties by the name of Basse and Ford, under whom some of the defendants trace their title, brought suit for the property now claimed against the city of Brownsville, which resulted in a judgment of dismissal in June, 1872; and a new suit under the law of Texas was not brought by them within one year afterwards. By that law a judgment against a plaintiff in an action for the possession of real property — or an action of trespass to try the title, as it is termed in the law — is conclusive unless he commence a second action for the property within a year. But the answer to the objec-

tion that the judgment here is conclusive against the defendants is, that before the year elapsed, and indeed within ten days after the dismissal, the city commenced the present suit for the same property, in which all their rights were again brought into litigation. The law which gives to the dissatisfied party a right within one year to re-litigate a second time a controversy respecting land in Texas, does not bar him or his grantees from setting up his or their claim, if within the required period a similar suit respecting the same land is commenced against him or them by the former defendant. The object of allowing a second litigation of the same title, and of requiring such litigation to be speedily instituted, is equally accomplished.

As to the plea of prescription, we agree with the court below that, under the circumstances, the mixed possession of the parties, their continued contest and litigation from 1854 to the present time, and the absence of actual possession by either of a large portion of the property, no prescription can be claimed, and that the case must be determined on the documentary evidence of title.

We are satisfied with the conclusions reached by the Circuit Court, and its judgment is in all respects

Affirmed.

MOORE *v.* SIMONDS.

1. Where the record shows who are the members of a partnership, in the name of which an appeal has been taken, — *Held*, that the defect may, under sect. 1005, Rev. Stat., be cured by an amendment substituting their names.
2. A mortgage of a vessel of the United States is not, as against the parties, and such persons as have actual notice thereof, rendered invalid by the failure to record it.

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

Motion to dismiss the appeal and to affirm the decree below.

The facts are stated in the opinion of the court.

Mr. Richard De Gray in support of the motion.

Mr. Charles B. Singleton, contra.

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

Technically, this appeal should have been taken in the names of the individual members of the commercial firm of John T. Moore & Co., instead of in the name of the firm, and because of such an irregularity an appeal was dismissed in the case of *The Protector*, 11 Wall. 82. That case was decided before the act of June 1, 1872 (17 Stat. 197, sect. 3, now sect. 1005, Rev. Stat.), allowing amendments of writs of error in certain cases, and it does not appear that the defect could have been remedied by reference to any thing in the appeal papers. Here, however, sect. 1005 was in force when the appeal was taken, and the bond shows that the firm in whose favor the appeal was allowed was composed of John T. Moore and John T. Moore, Jr. We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for that reason we will not dismiss the appeal. But on looking into the record we find that the only question involved is whether the lien of the appellants' mortgage on the steamboat "John T. Moore" is superior to that of another mortgage in favor of Swift's Iron and Steel Works and Dennis Long. From the findings of fact it appears that the last-named mortgage was executed Jan. 27, 1871; that it was signed and acknowledged by the owner of the boat in the presence of two witnesses, one of whom was a notary public; that the witnesses attested the execution of the mortgage, but the notary did not sign officially; that there was no other or further acknowledgment of the mortgage before a notary; and that this mortgage was not recorded in the office of the collector of customs where the boat was permanently enrolled. The mortgage to Moore & Co., the appellants, was executed Jan. 3, 1872, and was duly recorded in accordance with the act of Congress; but when it was taken, Moore & Co. had actual notice of the existence of that to the appellees. Upon this state of facts the court below held that the mortgage of the appellants was inferior in lien to that of the appellees; and this was so clearly right, that we are not inclined to hear an argument upon the question.

The act of Congress relied on by the appellants is now found in sects. 4192 and 4193 of the Revised Statutes. These, so far as they are material to the present inquiry, are as follows: —

"SECT. 4192. No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. . . .

"SECT. 4193. . . . But no bill of sale, mortgage, hypothecation, or conveyance or discharge of mortgage, or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds."

To our minds, there is no doubt that Congress only intended to require that a mortgage on a vessel should be acknowledged for the purpose of authenticating it for record, and that as between the parties, and as against persons having actual notice thereof, it was valid without acknowledgment or record. As this was the decision of the court below, we deny the motion to dismiss, and grant that made under Rule 6, to affirm.

Decree affirmed.

PAVING COMPANY *v.* MULFORD.

A bill filed in the Supreme Court of the District of Columbia by A. against B. and C., alleging that each held certificates of indebtedness belonging to him, was, on final hearing, dismissed, and he appealed. *Held*, that, as the recovery, if any, must be against the defendants severally, and as the amount claimed from each does not exceed $2,500, this court has no jurisdiction.

MOTION to dismiss an appeal from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. A. S. Worthington in support of the motion.

Mr. William A. Cook, *contra*.

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

This was a suit in equity brought by the Ballard Paving Company against Michael Mandle and sundry persons who

claimed to have purchased from him certain certificates of the Auditor of the Board of Public Works of the District of Columbia, which it was alleged were the property of the company. Mulford and Campbell, the appellees, were two of the defendants, but they were proceeded against as holders of separate and distinct certificates. Their liability as set forth in the bill was several only. There was no pretence of a joint obligation, and it is conceded that in no event could there be a recovery against either of them separately for more than $2,500. On the hearing, the bill was dismissed as to these defendants, and the paving company has appealed.

We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into the suit, the proceeding is, in fact, against each of the several purchasers to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each as in case of separate suits. The recovery, if any, must be against each defendant separately for the amount he may personally be found accountable. Such being the case, the value of the matter in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. *Seaver* v. *Bigelows*, 5 Wall. 208; *Rich* v. *Lambert*, 12 How. 347; *Oliver* v. *Alexander*, 6 Pet. 143; *Stratton* v. *Jarvis*, 8 id. 41. In such cases, the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction.

Appeal dismissed.

CLARK *v.* TRUST COMPANY.

1. If duly advertised, and fairly and properly conducted, a trustee's public sale of lands to a corporation which was the payee of the note secured by the deed of trust will not be set aside merely upon the ground that they brought a grossly inadequate price, and that he then and at the date of the deed was the actuary of the corporation, if the deed was made to him as an individual, and he, as such, and not in his official capacity, accepted and executed the trust thereby conferred.
2. Where a trustee's sale is valid, the title passing thereunder should be conveyed to the purchaser by a deed properly made and acknowledged.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

The cause was argued by *Mr. Samuel Shellabarger* and *Mr. J. D. Bigelow* for the appellant, and by *Mr. Enoch Totten* for the appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The preliminary question in this case involves the validity and effect of the sale made at public auction by Eaton, or rather by the auctioneer under his directions and as his agent.

McGhan and wife, by indenture dated Aug. 15, 1864, and duly acknowledged on 18th November, 1864, conveyed the premises in controversy to Edward Clark, in trust for the sole use and benefit of Mrs. McGhan, for and during her natural life, permitting her to use and occupy the same, and to receive and apply the rents and profits thereof, and in trust also to sell and convey absolutely in fee-simple or by way of mortgage, to such person or persons and for such use and purposes as Mrs. McGhan should in writing request and direct, her then or any future coverture notwithstanding. The indenture also contained a provision that, upon the death of Mrs. McGhan, the premises, or so much thereof as remained undisposed of, should be conveyed to the husband, his heirs or assigns.

By an indenture executed and duly acknowledged on 20th June, 1870, McGhan and his wife, together with Clark, the trustee, conveyed the property to Daniel Eaton, of the city of Washington, in trust to secure the payment of a debt due from McGhan and wife to the Freedman's Savings and Trust

Company, for the sum of $10,000, evidenced by their joint and several promissory note to that company, of like date with the indenture, and payable twelve months thereafter to the order of the company, with interest at the rate of ten per cent per annum, interest payable half-yearly. That conveyance was in part upon these trusts: 1. To permit Mrs. McGhan and husband to occupy the premises, and the rents and profits to have and apply to their sole use and benefit, until default be made in the payment of the note or interest thereon, or any proper charge or expense in and about the property; and, upon payment of the note, interest, and costs, to release and reconvey the premises to Clark, the trustee, for Mrs. McGhan; 2. Upon default in any of the said respects (quoting from the deed itself), "to sell the said piece or parcel of ground and premises at public auction upon such terms and conditions, and at such time and place, and after such previous public advertisement, as the said party of the second part or his heirs in the execution of this trust shall deem advantageous and proper, and to convey the same in fee-simple to the purchaser or purchasers thereof at his, her, or their cost or expense; and of the proceeds of said sale or sales first to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent out of the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to the said Louisa McGhan, her heirs or assigns."

On or about April 5, 1872, the note held by the company being unpaid, and interest to the amount of $1,400 having accrued thereon, Eaton, the trustee, made public advertisement that he would sell the mortgaged property at public auction to the highest bidder, at a designated hour, on April 24, 1872, giving the terms of such proposed sale. The sale was postponed from time to time until July 1, 1872, when it took place, the Freedman's Savings and Trust Company, by one of its officers, becoming the purchaser at the price of $13,000.

We find in the record a writing signed by Eaton, purporting to be an indenture executed July 1, 1872, whereby, in consideration of the sum of $13,000 in hand paid, he conveyed to the purchaser the property so sold at public auction.

It purports to have been "signed, sealed, and delivered in presence of — Brainerd H. Warner," and to have been acknowledged before said Warner as a notary public for the District of Columbia. As printed in the transcript, that writing shows no seal attached to the signature of Eaton, and the certificate of acknowledgment before the notary is without date. That writing was placed upon record on the 4th of February, 1873; but, for the want of a seal to Eaton's signature, complainants claim that it was ineffective for any purpose. Subsequently to that sale, the Freedman's Savings and Trust Company commenced proceedings in ejectment against McGhan and wife and Clark, to recover possession of the property. The defendants in that action failing to appear, judgment by default was entered against them on Nov. 7, 1872, and, under a writ of possession, McGhan and wife were ejected and the company put in possession of the property.

In 1873, Bradley purchased the same property from the company, and subsequently sold and conveyed it to Shepherd. Eaton died on the 16th of February, 1873, and McGhan died on Oct. 27, 1874.

In this action, commenced April 5, 1875, by Mrs. McGhan, and by Clark, as trustee in the deed already referred to, it is sought to redeem the property sold by Eaton under the deed of June 20, 1872. To that end the complainants, among other things, prayed that the deed from Eaton to the Freedman's Savings and Trust Company, and the subsequent conveyance under which Bradley and Shepherd (who are alleged not to have been *bona fide* purchasers) claim, be declared null and void, and the notes given by Bradley to that company be cancelled; that an accounting be had of the rents, issues, and profits of the premises, and that the amount thereof be applied on account of the said note of $10,000; and that the lease of the premises may be decreed to inure to the benefit of the complainants.

The court below having dismissed the bill, this appeal has been prosecuted, and the assignments of error present several propositions of law for our consideration. But, in the view we take of the case, it is only necessary to determine the preliminary question already stated, in reference to the validity and

effect of the sale at public auction by Eaton, the trustee, on the 1st of July, 1872.

That sale is attempted to be impeached upon several grounds, viz.: —

1. That a proper opportunity was not afforded to persons desirous to purchase the property to bid at the sale; that, had there been, the property would have brought at least $2,000 more.

Upon a careful examination of all the evidence, we find nothing of a positive, substantial character sustaining this position. While there is some little conflict in the evidence as to what occurred upon the occasion of the sale, the overwhelming preponderance of testimony shows that the sale was duly advertised, and was fairly and properly conducted.

2. It is next contended that relief should be given because the price which the property brought was grossly inadequate. That fact alone does not constitute a sufficient reason to impeach the genuineness or validity of the sale. Besides, the inadequacy was not such as to shock the conscience, or raise a presumption of fraud or unfairness. Hill, Trustees, 152, note; *Lessee of Cooper* v. *Galbraith*, 3 Wash. C. C. 546; *Hubbard* v. *Jarrell*, 23 Md. 66.

3. The sale is assailed upon the further ground that Eaton, at the date of the deed to him, as well as when the sale was made, was the actuary of the Freedman's Savings and Trust Company, and that consequently no sale made by him, under the authority conferred by the deed of June 20, 1870, would cut off the equity of redemption.

Touching this objection, it is sufficient to say that the deed was not made to Eaton in his capacity as an officer of the company, nor did he act in that capacity when exerting the authority conferred upon him. The fact that he held official relations to that company did not incapacitate him from accepting the trust set out in the deed of June 22, 1870, or discharging the duties thereby imposed. It is true that his relations to the company would make it the duty of the court to scrutinize very closely all that he did in the execution of the trust; but we find nothing in the evidence to justify the belief that he acted otherwise than honestly and faithfully in the discharge of his

duty. The evidence does not justify the charge that *he* bid off the property for the company.

What we have said leads to the conclusion that the sale of July 1, 1872, was a valid sale, which the purchaser was entitled to have consummated by a conveyance executed and acknowledged in proper form. It is, therefore, of no consequence in this suit to inquire whether the writing executed by Eaton to the company, in pursuance of the sale made at public auction, was or was not sufficient to pass the title from him.

If he was bound, as we hold that he was, to have executed a sufficient conveyance, the court should not, by granting the relief asked, defeat the sale altogether. An ineffectual attempt, upon the part of Eaton, to consummate the sale does not authorize a decree setting aside the sale, which, as we have said, was in conformity to the deed, and was free from fraud or imposition, or such inadequacy of price as, upon recognized principles of equity, constitutes ground for relief.

Decree affirmed.

HINCKLEY *v.* RAILROAD COMPANY.

A receiver appointed by a State court in a suit which, under the act of March 3, 1875 (18 Stat. part 3, 470), was subsequently removed to the Circuit Court of the United States, reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities. *Held*, that the Circuit Court had authority to require him to account for the fund, and that he is chargeable with interest on so much thereof as he on receiving deposited in a bank to his credit as receiver, and then withdrew and deposited on his private account in another bank, he declining to explain the transaction, when he was examined as a witness by the master to whom the court had referred his accounts.

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

The facts are stated in the opinion of the court.

Mr. G. W. Kretzinger for the appellant.

Mr. R. Biddle Roberts for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The main features of this case, as presented here on appeal, are embodied in the following statement signed by counsel: —

"To obviate the necessity of examining a large part of the very voluminous record filed in this cause, the following statement is agreed upon between the counsel of the parties to this branch of the case.

"Levi P. Morton *et al.*, the holders of sundry bonds issued by the Gilman, Clinton, and Springfield Railroad Company, secured by a deed of trust made to Thomas A. Scott and Hugh J. Jewett, as trustees, filed a bill in the Circuit Court of McLean County, State of Illinois, seeking a foreclosure of the trust-deed and a sale of the property for their benefit.

"Shortly prior to the filing of this bill, Joseph J. Kelly had filed a bill as a stockholder of said railroad in the same court, and Francis E. Hinckley, a citizen of Chicago, had been appointed receiver, and continued to discharge the duties of such officer pending the proceedings in both cases against the road.

"On June 23, 1875, Thomas A. Scott and Hugh J. Jewett, the trustees named in the deed of trust, came into said Circuit Court of McLean County, and became parties to the said suit of Morton *et al.* against the railroad; and from that time the litigation was carried on in their names, the receiver still acting in both cases, and reporting to the Circuit Court of McLean County.

"On the thirteenth day of December, 1875, the said cause was removed to the Circuit Court of the United States for the Southern District of Illinois, under the provisions of the act of Congress of March 3, 1875.

"Prior to this, on Aug. 12, 1875, the property was ordered to be turned over to the trustees under the provisions of the mortgage, by order of the Circuit Court of McLean County, and the receiver directed to settle his accounts up to that date; and his accountability as such receiver ceased from the twenty-eighth day of August, 1875, the property having at that time been handed over by him to the agent of the trustees as aforesaid.

"The subsequent proceedings in the Circuit Court of the United States for the Southern District of Illinois aforesaid

were carried to completion, the sole parties then in court being the trustees and their *cestuis que trust*, and the said Gilman, Clinton, and Springfield Railroad Company and its receiver, all other parties having been dismissed from the record. The final decree having been had, and the road having been sold by virtue thereof and a deed for the same duly executed and approved by the said court, and no appeal ever having been prayed."

The remainder of the record before us consists solely of the proceedings in the Circuit Court of the United States against Hinckley as receiver, to bring him to account, resulting in a decree against him for $18,776.25, from which this appeal is taken.

The first appearance of appellant in the Circuit Court of the United States, as far as this record discloses, is by a report made to that court entitled as of the case of *Joseph J. Kelly et al.* v. *The Gilman, Clinton, and Springfield Railroad Company.* In this paper, after showing a balance of $12,799.78, in his hands as receiver, he proceeds to state sundry liabilities of that fund, for which he asks of the court an order that he may pay them. This report was filed March 23, 1876, and on that day an order was made that he pay the sum so admitted to be in his hands into court. It seems, however, that after this the whole matter of the receiver's account was referred to a master, on whose report, after exceptions by the receiver, the decree was rendered which is now under review.

The chief reliance of counsel in this court for a reversal of the decree is upon the proposition that Hinckley was never receiver of any other court but the McLean Circuit Court of Illinois, in the suit in which Kelly and others were plaintiffs, and that he could be called to account only by the court to which he was responsible in that suit.

But the agreed case shows that, shortly after his appointment as receiver in the Kelly suit, the foreclosure suit of Levi P. Morton and others, bondholders, was commenced in the same court, and afterwards adopted by Scott and Jewett, trustees for said bondholders, and that thereafter "the litigation was carried on in their names, the receiver still acting in both cases, and reporting to the Circuit Court of McLean County."

This is also stated in a previous paragraph.

We can reach no other conclusion from this agreement, in the absence of the record of the McLean Circuit Court on the subject, than that Mr. Hinckley was receiver in the principal case, which was removed into the Federal court. There is other evidence that it was so understood by Hinckley. The order of removal was made Dec. 13, 1875, and on the 23d of March, 1876, we find him reporting, without objection, to that court, and asking for orders in the nature of instructions as to the disposition of the money in his hands. For aught that appears, this report was his own voluntary act, as well as his duty.

Nor does any such objection appear in the exceptions to the master's report, nor was any exception taken to the order of reference.

It does not appear from this record that the Kelly suit was prosecuted any further after the removal of the foreclosure suit into the Federal court, nor do we know enough of its character to decide whether any thing of it was left after the order of removal, or whether its subject-matter was not necessarily removed with the other suit.

No attempt to bring Hinckley to account in the State court is shown.

Being voluntarily in the United States court, in a suit where the funds in his hands might properly be distributed, at least under supposable circumstances, and having money in his hands as receiver in the suit removed into that court, we can see no want of authority to make him account for these funds.

It is also urged that since the agreed facts show that the road had been finally sold and conveyed under the mortgage, the trustees had no right to the money in the receiver's hands. The sufficient answer to this is, that the decree from which this appeal is taken, merely orders the appellant to pay the money into court, and makes no order for its distribution. In that Mr. Hinckley has no interest, and when made it will be for other parties to contest it if they desire.

Two objections are taken by appellant to the statement of the account by the master. The first is that for nearly two

years' service the master allowed him only $10,000, whereas he ought to have allowed him $1,000 per month.

The principal witnesses of appellant to sustain this exception are two gentlemen who were themselves receivers of other roads, and thought they rightfully received $900 in one case and $1,000 in the other, per month. Perhaps they were the best judges of the value of their own services; but such is not always the case, and as there is conflicting testimony, and as this is the first time we have been called on to review the allowance made to railroad receivers by the circuit courts, we do not see that the economical administration of insolvent companies will be promoted, or that justice requires a higher standard of compensation than these courts generally give, to whose discretion the subject must be largely remitted.

Appellant also complains that he is wrongfully charged with $4,300 for the use of the money held by him as receiver. It does not very clearly appear how much of this money he so used, or how long he held it. But it does appear that the money as received was deposited in a bank at Springfield to his account as receiver, and that most of it was drawn from there on his check, and deposited to his private account with a bank in Chicago; and when on his examination as a witness he was asked to give explanations of this matter, and to state what sums he had so deposited, he declined to answer. Appellant was dealing with a trust fund. It was his duty to keep this money separate from his own. And if he used a bank for the custody of it, he should have had the account so kept as to show the fund to which it belonged. It was also his unquestionable duty, when called on in a proper case for accounting, as this was, to give all the information he had on the subject. His refusal to answer proper questions is wholly unjustifiable, and leaves his conduct open to criticism as to his motive.

As he had it in his power to furnish the facts on which a just and true account could be stated, and refused to do so, we do not in this appeal feel authorized to reverse the finding of the master and the decree of the Circuit Court.

Decree affirmed.

DOW *v.* JOHNSON.

1. On the trial of an action at law, when the judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; but the judgment rendered conformably thereto may, without regard to its amount, be reviewed on a writ of error, upon their certificate stating such question.
2. An officer of the army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government.
3. When any portion of the insurgent States was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. Their continued enforcement was not for the protection or the control of officers or soldiers of the army.
4. A district court of Louisiana — continued in existence after the military occupation of the State by the United States, and authorized by the commanding general to hear causes between parties — summoned a brigadier-general of the army of the United States to answer a petition filed therein, setting forth that a military company had, pursuant to his orders, seized and carried off certain personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war, or martial law, or by the superiors of that officer. Judgment by default was rendered April 9, 1863, against him for the value of the property. When sued in the Circuit Court of the United States, upon the judgment, he pleaded that the property was taken to supply the army. *Held*, on demurrer to the plea, that the State court had no jurisdiction of the cause of action, and that the judgment was void.

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

The facts are stated in the opinion of the court.

The case was argued by *The Attorney-General* and *Mr. E. B. Smith*, Assistant Attorney-General, for the plaintiff in error, and by *Mr. Thomas J. Durant* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The defendant in the court below, the plaintiff in error here, Neal Dow, was a brigadier-general in the army of the United States during the late civil war, and in 1862 and 1863 was

stationed in Louisiana in command of Forts Jackson and St. Philip, on the Mississippi River, below New Orleans. These forts surrendered to the forces of the United States in April, 1862. The fleet under Admiral Farragut had passed them and reached New Orleans on the 25th of the month, and soon afterwards the city was occupied by the forces of the United States under General Butler. On taking possession of the city, the General issued a proclamation, bearing date on the 1st of May, 1862, in which, among other things, he declared that until the restoration of the authority of the United States the city would be governed by martial law; that all disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, would "be referred to a military court for trial and punishment;" that other misdemeanors would be subject to the municipal authority, if it desired to act; and that civil causes between parties would "be referred to the ordinary tribunals." Under this proclamation, the Sixth District Court of the City and Parish of New Orleans was allowed to continue in existence, the judge having taken the oath of allegiance to the United States.

In January, 1863, General Dow was sued in that court by Bradish Johnson, the plaintiff in this case. The petition, which is the designation given in the system of procedure in Louisiana to the first pleading in a civil action, set forth that the plaintiff was a citizen of New York, and for several years had been the owner of a plantation and slaves in Louisiana, on the Mississippi River, about forty-three miles from New Orleans; that on the 6th of September, 1862, during his temporary absence, the steamer "Avery," in charge of Captain Snell, of Company B of the Thirteenth Maine Regiment, with a force under his command, had stopped at the plantation, and taken from it twenty-five hogsheads of sugar; and that said force had plundered the dwelling-house of the plantation and carried off a silver pitcher, half a dozen silver knives, and other table ware, the private property of the plaintiff, the whole property taken amounting in value to $1,611.29; that these acts of Captain Snell and of the officers and soldiers under his command, which the petition characterized as "illegal, wanton, oppressive, and unjustifiable," were perpetrated under a

verbal and secret order of Brigadier-General Neal Dow, then in the service of the United States, and in command of Forts Jackson and St. Philip, who, by his secret orders, which the petition declared were "unauthorized by his superiors, or by any provision of martial law, or by any requirements of necessity growing out of a state of war," wantonly abused his power, and inflicted upon the plaintiff the wrongs of which he complained; and therefore he prayed judgment against the General for the value of the property.

To this suit General Dow, though personally served with citation, made no appearance. He may have thought that during the existence of the war, in a district where insurrection had recently been suppressed, and was only kept from breaking out again by the presence of the armed forces of the United States, he was not called upon by any rule of law to answer to a civil tribunal for his military orders, and satisfy it that they were authorized by his superiors, or by the necessities growing out of a state of war. He may have supposed that for his military conduct he was responsible only to his military superiors and the government whose officer he was.

Be that as it may, or whatever other reason he may have had, he made no response to the petition; he was therefore defaulted. The Sixth District Court of the Parish of New Orleans did not seem to consider that it was at all inconsistent with his duty as an officer in the army of the United States to leave his post at the forts, which guarded the passage of the Mississippi, nearly a hundred miles distant, and attend upon its summons to justify his military orders, or seek counsel and procure evidence for his defence. Nor does it appear to have occurred to the court that, if its jurisdiction over him was recognized, there might spring up such a multitude of suits as to keep the officers of the army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks. The default of the General being entered, testimony was received showing that the articles mentioned were seized by a military detachment sent by him and removed from the plantation, and that their value amounted to $1,454.81. Judgment was thereupon entered in favor of the plaintiff for that sum, with interest and costs. It bears date April 9, 1863.

Upon this judgment the present action was brought in the Circuit Court of the United States for the District of Maine. The declaration states the recovery of the judgment mentioned, and makes *profert* of an authenticated copy. To it the defendant pleaded the general issue, *nul tiel record*, and three special pleas. The object of the special pleas is to show that the District Court had no jurisdiction to render the judgment in question, for the reason that at the time its district was a part of the country in insurrection against the government of the United States, and making war against it, and was only held in subjection by its armed forces. It is not important to state at length the averments of each of these pleas. It will be sufficient to state the material parts of the second plea and a single averment of the third. The second plea, in substance, sets up that as early as February, 1861, the State of Louisiana adopted an ordinance of secession, by which she attempted to withdraw from the Union and establish an independent government; that from that time until after April 9, 1863, the date of the judgment in question, she was in rebellion against the government of the United States, making war against its authority; that in consequence the military forces of the United States engaged in suppressing the rebellion took forcible possession of that portion of the State comprising the district of the Sixth District Court of New Orleans, and held military occupation of it until long after April 9, 1863, during which time martial law was established there and enforced; that the defendant was then a brigadier-general in the military service of the United States, duly commissioned by the President, and acting in that State under his orders and the articles of war; that by the general order of the President of July 22, 1862, military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas were directed, in an orderly manner, to seize and use any property, real or personal, which might be necessary or convenient for their several commands as supplies, or for other military purposes; that the defendant, in the performance of his duty as a brigadier-general, was in command of troops of the United States in Louisiana; and that the troops by his order seized from the plaintiff, then a citizen of that State, certain chattels

necessary and convenient for supplies for the army of the United States, and other military purposes; and that for that seizure the action was brought in the Sixth District Court of New Orleans against him, in which the judgment in question was rendered; but that the District Court had no jurisdiction of the action or over the defendant at its commencement, or at the rendition of the judgment.

The third plea also avers that, for the purpose of suppressing the rebellion and restoring the national authority, the government of the United States, through its proper officers, declared and maintained martial law in Louisiana, from May 1, 1862, until long after the 9th of April, 1863, and deprived all the courts in that State, including the Sixth District Court of New Orleans, of all jurisdiction, except such as should be conferred on them by authority of the officer commanding the forces of the United States in that State, and that no jurisdiction over persons in the military service of the United States, for acts performed in the line of their duty, was by such authority conferred upon that court.

To the first plea, that of *nul tiel record*, the plaintiff replied that there was such a record, of which he prayed inspection; and the record being produced, the court found in his favor. To the special pleas the plaintiff replied that the District Court had lawful jurisdiction over parties and causes of action within its district at the time and place mentioned, and to render the judgment in question. To the replication the defendant demurred; and upon the demurrer two questions arose, upon which the judges in the Circuit Court were opposed in opinion, namely: 1st, whether the replication is a good and sufficient reply to the special pleas; and, 2d, whether the Sixth District Court, at the time and place mentioned, had jurisdiction of the parties and cause of action, to render the judgment in question.

By statute, when the judges of the Circuit Court are opposed in opinion upon any question arising on the trial of a cause, the opinion of the presiding justice prevails, and judgment is entered in conformity with it. Here the presiding justice was of opinion that the replication was a sufficient reply to the special pleas, and that the District Court had jurisdiction over the parties and the cause, and to render the judgment in question.

Accordingly, the plaintiff had final judgment upon the demurrer, which was entered for $2,659.67 and costs; and the defendant has brought the cause here by writ of error on a certificate of division of opinion.

The important question thus presented for our determination is, whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

But before proceeding to its consideration there is a preliminary question of jurisdiction to be disposed of. The act of Feb. 16, 1875, "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," provided, that whenever by the laws *then in force* it was required that the matter in dispute should exceed the sum or value of $2,000, exclusive of costs, in order that the judgments and decrees of the circuit courts of the United States might be re-examined in the Supreme Court, such judgments and decrees thereafter rendered should not be re-examined in the Supreme Court, unless the matter in dispute should exceed the sum or value of $5,000, exclusive of costs. 18 Stat. 315. It is therefore contended that a judgment cannot be reviewed by this court, upon a certificate of division of opinion between the judges of the Circuit Court, if the judgment be under $5,000; and the judgment in the present case is under that amount. We do not think, however, that this conclusion is warranted by the language of the act in question. That act makes no change in the previous laws, except as to amounts necessary to give the court jurisdiction, when the amount is material. Where before $2,000 was the sum required for that purpose, afterwards $5,000 was the sum. But before that act questions arising in the progress of a trial could be brought to this court for determination upon a certificate of division of opinion, without reference to the amount in controversy in the case. The original act of 1802, allowing this mode of procedure, was always held to extend our appellate jurisdiction to material questions of law arising in all cases, criminal as well as civil, without

regard to the amount in controversy or the condition of the litigation. Its defect consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect the first section of the act of June, 1872, was passed, requiring the case to proceed notwithstanding the division, the opinion of the presiding justice to prevail for the time being; and this feature is retained in the Revised Statutes. Sects. 650, 652, 693. The benefit of the certificate can now be had after judgment upon a writ of error or appeal. That is the only material change from the original law. We have no doubt, therefore, of our jurisdiction in this case.

This brings us to the consideration of the main question involved, which we do not regard as at all difficult of solution, when reference is had to the character of the late war. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. It was waged between people occupying different territories, separated from each other by well-defined lines. It attained proportions seldom reached in the wars of modern nations. Armies of greater magnitude and more formidable in their equipments than any known in the present century were put into the field by the contending parties. The insurgent States united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements; and to them belligerent rights were accorded by the Federal government. This was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict. The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions or dispositions. Commercial intercourse and correspondence between them were prohibited, as well by express enactments of Congress as by the accepted doctrines of public law. The enforcement of contracts previously made between them was suspended, partnerships were dissolved, and the courts of each belligerent were

closed to the citizens of the other, and its territory was to the other enemy's country. When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman* v. *Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in the 7th of Cranch. Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed. Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the

bombardment unnecessary and cruel. Would it be pretended that he could call the commanding general, who ordered it, before a local tribunal to show its necessity or be mulcted in damages? The owner of supplies seized or property destroyed would have no difficulty, as human nature is constituted, in believing and affirming that the seizure and destruction were wanton and needless. All this is too plain for discussion, and will be readily admitted.

Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country. As a necessary consequence of such occupation and domination, the political relations of its people to their former government are, for the time, severed. But for their protection and benefit, and the protection and benefit of others not in the military service, or, in other words, in order that the ordinary pursuits and business of society may not be unnecessarily deranged, the municipal laws — that is, such as affect private rights of persons and property, and provide for the punishment of crime — are generally allowed to continue in force, and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

If, now, we apply the views thus expressed to the case at bar, there will be no difficulty in disposing of it. The condition of New Orleans and of the district connected with it, at the time of the seizure of the property of the plaintiff and the entry of the judgment against Dow, was not that of a country

restored to its nominal relations to the Union, by the fact that they had been captured by our forces, and were held in subjection. A feeling of intense hostility against the government of the Union prevailed, as before, with the people, which was ready to break out into insurrection upon the appearance of the enemy in force, or upon the withdrawal of our troops. The country was under martial law; and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the District Court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the general government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service.

If private property there was taken by an officer or a soldier of the occupying army, acting in his military character, when, by the laws of war, or the proclamation of the commanding general, it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution, or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the government for redress. But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the neces-

sities or convenience of the army, though the owner of property taken in such case may have had a just claim against the government for indemnity.

The case of *Elphinstone* v. *Bedreechund* is an authority, if any were needed, that a municipal court has no jurisdiction to adjudge upon the validity of a hostile seizure of property; that is, a seizure made in the exercise of a belligerent right. There it appeared that a city of India had been captured by the British forces, and a provisional government established, which subsequently held undisturbed possession of the place. Several months after its occupation, the members of the provisional government seized the private property of a native, under the belief that it was public property intrusted to his care by the hostile sovereign. The native had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but had been permitted to reside under military surveillance in his own house in the city, where the seizure was made. At the time, there were no hostilities in the immediate neighborhood, and the civil courts were sitting for the administration of justice; but the war was not at an end throughout the country, and there was a feeling of great hostility on the part of the people of the place, which was only prevented from breaking out into insurrection by the presence of an armed force. In these respects the position of the place was similar to that of New Orleans and the adjacent country under the command of General Butler. The property seized consisted of gold coin, jewels, and shawls; and the owner having died, an action for their value was brought by his executor against the members of the provisional government who ordered the seizure, and judgment was rendered against them in the Supreme Court of Bombay. That court appeared to be controlled in its decision by the fact that for some months before the seizure the city had been in the undisturbed possession of the provisional government, and that civil courts, under its authority, were sitting there for the administration of justice. But on appeal to the Privy Council the judgment was reversed. "We think," said Lord Tenterden, speaking for the Council, "the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had

both to the time, the place, and the person; and, consequently, that the Municipal Court had no jurisdiction to adjudge upon the subject, but that, if any thing was done amiss, recourse could only be had to the government for redress." 1 Kn. 361. Here, the special pleas allege that the articles of property taken by the military detachment under General Dow were seized by his order, as necessary and convenient supplies for the occupying army. It was a hostile seizure, as much so as that of the property in the case cited, being made, like that one, in the exercise of a belligerent right, upon the propriety or necessity of which the Municipal Court had no authority to adjudge.

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. It follows that, in our judgment, the District Court of New Orleans was without jurisdiction to render the judgment in question, and the special pleas in this case constituted a perfect answer to the declaration. See *Coleman* v. *Tennessee*, 97 U. S. 509; *Ford* v. *Surget*, id. 594; also *Le-Caux* v. *Eden*, 2 Doug. 594; *Lamar* v. *Browne*, 92 U. S. 187; and *Coolidge* v. *Guthrie*, 2 Amer. Law Reg. N. S. 22.

We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of *Mitchell* v. *Harmony*, reported in the 13th of Howard; on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our govern-

ment. The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law, — the law of war, — and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty.

Our decision upon the questions certified to us is, that the replication is not a good and sufficient reply to the special pleas; and that the Sixth District Court of New Orleans, at the time and place mentioned, had not jurisdiction of the parties and cause of action to render the judgment in question. The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded with directions to that court to enter final judgment for the defendant on the demurrer to the replications; and it is

So ordered.

MR. JUSTICE SWAYNE dissented from the opinion of the court on the point relating to the jurisdiction of this court, but concurred therewith on the remaining questions involved in the case.

MR. JUSTICE CLIFFORD and MR. JUSTICE MILLER dissented.

MR. JUSTICE CLIFFORD. Officers and soldiers in the military service are not amenable, in time of war, to process from the civil tribunals for any act done in the performance of their duties: but if the injurious act done to person or property was wholly outside of the duty of the actor, and was wilfully and wantonly inflicted, for the mere purpose of oppression or private gain, the party by whom or by whose orders it was committed may be answerable in the ordinary courts of justice, except when the civil tribunals are silenced by the exigencies of military rule or martial law. *Luther* v. *Borden*, 7 How. 1, 46.

Private property, in case of extreme necessity, in time of war

or of immediate and impending public danger, may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner and without antecedent compensation. Extreme cases of the kind may doubtless arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or to supply food or clothing to a suffering or famishing army destitute of such necessaries and without other means of such supplies.

Such emergencies in the public service have and may hereafter occur in time of war, and in such cases no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency; but the public danger must be imminent and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or a resort to any other source of supply.

Exigencies of the kind do arise in time of war or impending public danger; but it is the emergency only that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. *United States* v. *Russell*, 13 Wall. 623.

Public convenience authorizes the exercise of the right of eminent domain, subject to the condition that due provision is made for compensation; and public necessity, in time of war or impending public danger, may authorize the taking of private property without any such provision, to supply for the moment the public wants, to the extent of the public exigency, which cannot be supplied in any other way. 2 Kent, Com. (12th ed.) 338.

Nothing but the emergency will warrant the taking; and it is settled law in this court that the officer who makes the seizure cannot justify his trespass merely by showing the orders of his superior, the rule being that an order to commit a trespass can afford no justification to the person by whom it is executed. *Mitchell* v. *Harmony*, 13 How. 115.

Support to all the principles before enunciated is found in the very able opinion of the court, given by Chief Justice Taney, in which he fully admits that private property may be

taken by a military commander to prevent it from falling into the hands of the enemy, and that it may also be taken, in certain extreme cases, for public use without just compensation. Reasonable doubt upon that subject cannot be entertained; but he proceeds to show, what is equally plain, that it cannot be done in the first case unless it appears that the danger was immediate and impending, nor in the second, unless it appeared that the necessity and urgency were such as would not admit of delay. *Farmer* v. *Lewis*, 1 Bush, 66.

Where a trader during war is engaged in trading with a portion of the enemy country that has been reduced to subjection, and his trading there is permitted and encouraged by the invading army, his goods cannot be seized on the ground that he is engaged in an unlawful trade with the enemy. In such a case, the officer seizing the property becomes liable for the abuse of his authority, and the owner of the goods is entitled to recover in trespass for the damage suffered. *Harmony* v. *Mitchell*, 1 Blatch. 548.

Judgment was rendered, April 9, 1863, against the defendant in the Sixth District Court of New Orleans, in an action of trespass for the unlawful taking and conversion of the goods and chattels of the plaintiff described in the schedule annexed to the writ. Payment of the judgment being refused, the plaintiff brought an action of debt on the same against the defendant in the Circuit Court for the Maine District, where the defendant resides. Service was made, and the defendant appeared and pleaded *nul tiel record* and three special pleas, as follows: 1. That the court which rendered the judgment had no jurisdiction of the case, for the reason that the military forces of the United States, prior to the rendition of the judgment, took forcible possession of New Orleans, and held such military possession of the locality. 2. That the said court had no jurisdiction of the case, for the reason that he, as a military commander, seized the goods and chattels mentioned as supplies for the army. 3. That the said court had no jurisdiction of the case, for the reason that he was a military officer, and that in taking the goods and chattels he acted in obedience to the orders of his superior officers.

These pleas, containing as they did new special matters, prop-

erly concluded with a verification, which made it necessary for the replication, if in the general form as now allowed, to tender an issue to the country. Instead of adding the *similiter*, the defendant filed a general demurrer to the replication; and the objection now is, that the replication is defective in form, it being too general to amount to a traverse of the new matters set forth in the special pleas.

Two answers to that may be given: 1. That the form accords with that given by the most approved text-writers upon the subject. Stephen, Plead. (9th Am. ed.) 60; 1 Chitty, Plead. (16th ed.) 606. 2. That the demurrer should have been special, in order to avail the defendant. 1 Chitty, Plead. (16th ed.) 694; Stephen, Plead. (9th ed.) 40.

Hearing was had, and the court, both judges concurring, found in favor of the plaintiff, that there is such a record as that set forth and described in the declaration.

Two questions also arose under the demurrer of the defendant to the replication of the plaintiff filed to the three special pleas. Those questions are as follows: 1. Whether the replication is a good and sufficient reply to the three special pleas of the defendant. 2. Whether said Sixth District Court at the time and place aforesaid had jurisdiction of the parties and the cause of action alleged in the declaration.

Certificates of division of opinion between the judges of the Circuit Court under a former act gave the Supreme Court jurisdiction of the questions certified, but the universal rule was that the Supreme Court would only consider the single question or questions certified. *Ogle* v. *Lee*, 2 Cranch, 33.

Nothing could come before the court under such certificate except the single question or questions certified here by the circuit judges, in respect to which they were divided in opinion. *Ward* v. *Chamberlain*, 2 Black, 430–434; Rev. Stat., sect. 652.

Jurisdiction acquired in that mode of proceeding was limited to the points certified, and could not be extended by a certificate of division to any thing except what would be open to revision here under a writ of error or appeal. *Davis* v. *Braden*, 10 Pet. 286; *Packer* v. *Nixon*, id. 408; *Wayman* v. *Southard*, 10 Wheat. 1, 66.

Both of those questions were certified at the time and were duly entered of record; and the act of Congress provides that whenever such a difference occurs, the opinion of the presiding justice shall prevail and be considered the opinion of the court for the time being. Pursuant to that statutory regulation, the presiding justice proceeded to state that he was of the opinion: 1. That the replication of the plaintiff is a good and sufficient reply to the three special pleas pleaded by the defendant. 2. That the said Sixth District Court of New Orleans did, at the time and place aforesaid, have jurisdiction of the parties and the cause of action to render the judgment set forth and described in the declaration.

Having sustained the replication as a sufficient reply to the three special pleas, he overruled the demurrer to the replication and adjudged the special pleas bad, and rendered judgment for the plaintiff in the amount of the prior judgment and lawful interest.

Errors assigned in this court are as follows: 1. That the court erred in finding that there is such a record as that mentioned in the declaration. 2. That the court erred in ruling that the replication is a good and sufficient reply to the three special pleas. 3. That the court erred in ruling that the Sixth District Court had jurisdiction of the parties and the cause of action. 4. That the court erred in the rendition of the judgment.

Before discussing those matters, it becomes necessary to determine the preliminary question whether this court, under existing laws, has jurisdiction to re-examine the judgment of the Circuit Court in this case. Prior to the act of the 16th of February, 1875, all judgments or decrees of the circuit courts in civil actions at common law or suits in equity, where the matter in dispute exceeded the sum or value of $2,000, exclusive of costs, might be re-examined in the Supreme Court by a writ of error or appeal. 1 Stat. 84; 2 id. 244; 17 id. 196.

Alterations of great moment in the mode of removing certain final judgments and decrees from the Circuit Court to the Supreme Court had been made before the passage of that act; but the Congress on that day enacted that "such judgments and

decrees hereafter rendered shall not be re-examined in the Supreme Court, unless the matter in dispute shall exceed the sum or value of $5,000, exclusive of costs." 18 id. 316.

Beyond all doubt, the exclusion of jurisdiction to the Supreme Court is universal in respect to all judgments and decrees of the Circuit Court where the matter in dispute does not exceed the sum or value of $5,000. Words more fitting to express such an intent, or more effectual to that end, cannot be found in our language, and it is equally clear that they will admit of no exception unless they are emasculated of their universal meaning; and yet it is suggested that the final judgment or decree of a circuit court may still, if the record contains a certificate of the judges of the Circuit Court that they were opposed in opinion upon any point in the case, be re-examined in this court even though the matter barely exceeds the sum or value of $500, exclusive of costs, which is the smallest amount cognizable in the Circuit Court in civil actions at common law or in suits in equity.

When our judicial system was organized, jurisdiction was given to the circuit courts, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. More than ninety years have elapsed since that provision was enacted, and yet no alteration has been made in it as to the amount required to give the circuit courts jurisdiction in suits of a civil nature at common law or in equity. 1 id. 78; 18 id. 470; Rev. Stat., sect. 629.

Judges of the Circuit Court are required to certify, at the request of either party or their counsel, any division of opinion occurring between them on the trial or hearing of such a suit, and the provision is that such certificate shall be entered of record. Id., sect. 652.

Beyond doubt, either party may require such a certificate to be entered if any such division of opinion occurred in any civil action or suit in equity cognizable in the Circuit Court, no matter if the amount in controversy only exceeds by one cent,

exclusive of costs, the sum or value of $500. Provision is made that in admiralty causes the Circuit Court shall find and state the facts and conclusions of law separately, but the requirement does not extend to suits in equity; from which it follows that, if the opinion just read is correct, the Supreme Court must re-examine the facts as well as the law in every such final decree brought here, even though the amount in dispute barely exceeds $500, merely because the record contains such a certificate of division of opinion, in spite of the express enactment of Congress that such final decrees shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of $5,000.

Certificates of the kind, both in civil and criminal cases, when made before judgment, as directed by the original act, were certified under the seal of the Circuit Court to the Supreme Court, and their effect was to suspend all proceedings in the cause which would prejudice the merits, until the mandate of the Supreme Court went down and was filed. 2 Stat. 159.

Mere points were sent up under the sixth section of that act, nor was the proceeding any bar in a civil suit to a writ of error or appeal, subsequent to the final judgment or decree, to remove the whole case into the Supreme Court for re-examination. Matters of difference of opinion between the judges of the Circuit Court in criminal cases are still required to be certified here before judgment or sentence in that mode of procedure, without any change whatever. Every day's experience proves that proposition; but regulations of a very different character have been provided where the difference of opinion occurs in civil actions or suits in equity. 17 Stat. 196; Rev. Stat., sects. 650–652.

Whenever such a difference of opinion shall occur between the judges of the Circuit Court in a civil action or suit in equity, the provision is that the opinion of the circuit justice or circuit judge shall prevail, and be considered the opinion of the court for the time being; but when the final judgment or decree in such action or suit shall be entered, it is made the duty of the judges, in case such a difference of opinion occurred in the trial or hearing, to make the required certificate of the same, — in which event it is provided that either party may remove

such final judgment or decree into the Supreme Court, on writ of error or appeal.

Like the original act, the Revised Statutes require that the points in difference shall be stated by the judges and certified, and that such certificate shall be *entered of record* without any requirement, as in the original act, that it shall be certified under the seal of the Circuit Court to the Supreme Court at their next session. Evidently no such proceeding is required, as it is not contemplated that the certificate of division will ever come before the Supreme Court for re-examination unless the final judgment or decree is removed here by writ of error or appeal. Id., sect. 652.

Existing laws require that final judgments in civil actions shall precede the writ of error or appeal to remove the cause into this court for re-examination, no matter whether the questions for revision are raised in the record by a bill of exceptions, a certificate of division of opinion, an agreed statement of facts, or by demurrer, or even by a special finding of the court, or by a special verdict. Jurisdictional limitation, prior to the passage of the act of the 16th of February, 1875, was that the matter in dispute must exceed the sum or value of $2,000, exclusive of costs; but that act raised the minimum of jurisdiction from $2,000 to $5,000, as already explained, in all civil actions, the same section providing that the certificate of division of opinion in criminal cases shall be made as before, and be certified under the seal of the Circuit Court to the Supreme Court. 18 Stat. 316; Rev. Stat., sect. 650.

Circuit-court judgments or decrees in civil actions or suits in equity, in order that they may be re-examinable in the Supreme Court, must be final, and the matter in dispute must exceed the sum or value of $5,000, exclusive of costs; and they must be removed into the Supreme Court by writ of error or appeal, and they cannot be removed here in any other way which will give this court jurisdiction to reverse or affirm the judgment or decree. Id., sect. 691; 18 Stat. 316.

Power to re-examine any judgment or decree of the Circuit Court is not given to the Supreme Court unless the case comes within that category, the act of Congress now in force providing that such judgments and decrees, entered after the act

went into operation, "shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of $5,000, exclusive of costs."

Prior to the act of June 1, 1872, the certificate of division of opinion gave the Supreme Court jurisdiction to decide the questions in difference without regard to the amount in dispute, as it applied both to civil and criminal cases, and in both had the effect to suspend action prejudicial to the merits until the decision of the Supreme Court was received. It preceded final judgment or decree, and was certified to the Supreme Court under the seal of the Circuit Court. Such certificates in criminal cases are still required to be certified in that way, and still give the Supreme Court jurisdiction of the points certified, wholly irrespective of the merits or of any other question in the case. 17 id. 196.

Since the passage of that act, the proceeding in civil cases and suits in equity is altogether different, the office of the certificate of division of opinion, like that of a bill of exceptions, being merely to raise the questions in the record, the requirement that it shall be certified under the seal of the Circuit Court to the Supreme Court at its next session being entirely omitted in the new regulation.

Bills of exception are required to place on the record what rested in parol, and they are allowed in the Circuit Court irrespective of the amount in dispute; but a writ of error will not lie to remove the cause into the Supreme Court unless the amount in dispute exceeds the sum or value of $5,000, exclusive of costs. Where the amount in dispute is less than that amount, the review takes place on a motion for new trial in the Circuit Court.

Differences of opinion between the circuit judges may be certified by them when they sit together, irrespective of the amount, and the effect is that the certificate becomes part of the record; and if the amount in dispute is sufficient to give the Supreme Court jurisdiction, the cause may be removed here by writ of error or appeal for re-examination; but if the amount in dispute is insufficient for that purpose, then the only remedy for the losing party is a motion for new trial in the Circuit Court.

Other modes for raising questions for review in appellate courts are well known: as, for example, it may be done by an agreed statement of facts, or by demurrer to the declaration or a material pleading, or by a special finding of the court, or by a special verdict, — in all of which cases the final judgment or decree may be removed into the Supreme Court by writ of error or appeal, if the matter in dispute exceeds the sum or value of $5,000, exclusive of costs; but if the amount in dispute does not exceed that amount, the act of Congress is peremptory that it shall not be re-examined in the Supreme Court.

Under the original act the judges of the Circuit Court were required to make the certificate and cause it to be certified to the Supreme Court before final judgment was rendered, but under the new act the final judgment in civil cases is required to precede the certificate; nor is there any requirement that the difference of opinion shall ever be certified to the Supreme Court under the seal of the Circuit Court. 17 Stat. 196.

None of these propositions, it is believed, can be successfully controverted; and, if not, it follows to a demonstration that this court has no jurisdiction of the case to reverse or affirm the decree of the Circuit Court, it appearing that the judgment of the Circuit Court was only for the sum of $2,650.67. It seems absurd to hold that jurisdiction exists in such a case, when the act of Congress provides that judgments and decrees of the circuit courts shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of $5,000, exclusive of costs.

Suppose I am wrong in this, then it becomes necessary to re-examine the question whether the Sixth District Court of New Orleans had jurisdiction of the cause of action and of the parties at the time the judgment described in the declaration was rendered.

It appears that the plaintiff, who was a loyal citizen of New York, owned a valuable plantation in the parish of Placquemines, situated on the right bank of the Mississippi River, about forty miles from New Orleans, and that the defendant, at the time of the service of the writ and of the rendition of the judgment, was a military officer in the service of the United States, stationed at the Parapet, near the city; that on the 5th

of September, 1862, a small military detachment, acting under the verbal and secret orders of the defendant, landed at the plantation of the plaintiff, and wrongfully, as alleged, took therefrom and from his dwelling-house there situated the goods and chattels mentioned in the schedule annexed to the petition for redress, of the value of $1,611.29. Redress being refused, the plaintiff instituted the present suit to recover the value of the property wrongfully seized and detained. Personal service having been made, and the defendant having neglected and refused to appear, he was defaulted. Testimony was taken as to the circumstances of the seizure and as to the value of the property converted; and the court, after due consideration, rendered judgment in favor of the plaintiff for the sum of $1,454.81. Execution issued, and the sheriff returned that the defendant could not be found. Satisfaction of the execution being refused, the plaintiff, on the 30th of March, 1866, instituted the present action of debt to recover the amount of that judgment.

Apart from the technical defences already considered, the only defence is that the Sixth District Court of New Orleans had no jurisdiction of the parties or of the cause of action to render this judgment. Attempt is made to maintain that defence solely upon the ground that, inasmuch as the defendant was a military officer in the service of the United States, he was not amenable to civil process from a court of justice for the taking of the goods and chattels of the plaintiff at the time and place when and where the same were seized and carried away.

Support to that defence is attempted to be drawn from the fact that the State, on the 26th of January, 1861, passed an ordinance of secession and joined the rebellion; that war between the Confederacy and the United States ensued; and that the war, at the time the action was commenced and the judgment rendered, was still flagrant and not ended. Military officers, it is contended, are not subject to civil process under such circumstances, even though the acts which are the subject of complaint constitute an abuse of power and were perpetrated without authority.

War undoubtedly followed secession, and it is equally true that, prior to May 1, 1862, New Orleans was occupied by the

Confederate forces. Rebel dominion in the city, from the passage of the secession ordinance to the date last mentioned, was complete. Vice-Admiral Farragut reached New Orleans on the 25th of April, and as flag-officer he demanded the surrender of the city; but the surrender was not made. Transports conveying the troops under the command of Major-General Butler arrived on the first day of May. Certain proceedings followed, which are fully detailed in a prior decision. Suffice it to say, that this court decided in that case that the military occupation of the city by the Union forces became complete May 1, which is the date of the proclamation published by General Butler. *The Venice*, 2 Wall. 258–274. There was no hostile demonstration then nor any subsequent disturbance, and this court unanimously determined that all the rights and obligations resulting from such occupation and from the terms of the proclamation might properly be regarded as existing from that date.

Two clauses of the proclamation may be referred to as evidencing the intent and public import of the document: 1. That "all the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." 2. That "all foreigners who have not made oath of allegiance" to the Confederacy "will be protected in their persons and property as heretofore."

Wherever the national forces were successful in re-establishing the national authority, the rights of persons and of property were immediately respected and enforced. Persons of intelligence everywhere will see that that proclamation was framed in the same spirit and with the same intent as that which actuated Congress in passing the first act to suppress insurrection. 12 Stat. 257, sect. 5.

Authority was given to the President by that act, under certain conditions, to declare by proclamation that the inhabitants of a State or part of a State were in a state of insurrection; and the provision was, that when that was done all commercial intercourse between such insurrectionary district and the rest of the United States should cease and be unlawful so long as such condition of hostility should continue. *The Reform*, 5 Wall. 628.

Certain States and parts of States were declared to be in insurrection in the proclamation made by the President, Aug. 16, 1861, and in that document he expressly exempted from that condition all districts or parts of districts which might from time to time be occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents. Intercourse for commercial purposes was not prohibited with such places or districts while so occupied and controlled. They were not regarded as in actual insurrection, or their inhabitants as subject to treatment as enemies. 12 Stat. 1262.

Commercial intercourse was never wholly interdicted, and the regulations were framed in the same spirit of forbearance towards the places and districts where the national authority was re-established. "As far as possible," said Chief Justice Chase, "the people of such parts of the insurgent States as came under the national occupation and control were treated as if their relations to the national government had never been interrupted." *The Venice*, *supra*.

Sufficient appears in the Code of Practice of the State to support the proposition that the district courts of Louisiana were, before the rebellion, courts of general jurisdiction, as it provides that their jurisdiction extends over all civil causes where the amount in dispute exceeds fifty dollars; and this court, in construing that provision, held that its legal import was to render those tribunals courts of general jurisdiction in all civil causes not embraced within the exception. *Fournequet* v. *Perkins*, 7 How. 160, 169; *White* v. *Cannon*, 6 Wall. 443–450.

Judgment in this case was rendered in the Sixth District Court of New Orleans, which was established before the rebellion and had jurisdiction in all civil causes. Rev. Stats. (La.), title Judiciary, sect. 72.

Enough appears to show that the Sixth District Court was created by statute more than fifteen years before the insurrection, and that it was in the full exercise of its jurisdiction when the secession ordinance was passed; that it was never abolished or suspended by any military or other order or power; that it was kept open subsequent to the proclamation of General Butler, the judge and clerk being in attendance from day to day,

as business demanded. "Civil causes between party and party," said the proclamation, "will be referred to the ordinary tribunals." After General Shepley was appointed military governor, in August following, the Sixth District Court held its regular sessions at the time and place fixed by the State statute. Early after the capture of the city the judge took the oath of allegiance and resumed the proper functions of his office, with the recognition and approbation of the military authorities. From the moment the judge of the Sixth District Court took the oath of allegiance, as required by the commanding general, June 14, 1862, the court continued in the exercise of all its powers, the same as before the rebellion, and was the only court that did, until General Shepley, in the fall of that year, appointed judges in the first, second, and third judicial districts.

Military conquerors of foreign states in time of war may doubtless displace the courts of the conquered country, and may establish civil tribunals in their place for administering justice; and in such cases it is unquestionably true that the jurisdiction of suits of every description is transferred to the new tribunals. *United States* v. *Rice*, 4 Wheat. 246; *Cross* v. *Harrison*, 16 How. 164. But that concession proves nothing in this case, as it is universally conceded that the mere occupancy of the territory does not necessarily displace the local tribunals of justice. *Pepin* v. *Lachenmeyer*, 45 N. Y. 27–33. They were not displaced in this case, but suffered to continue in the exercise of their judicial powers, with the recognition and approbation of the military commander.

Important differences exist between a foreign war waged for conquest, and a civil war waged to restore insurrectionary districts to their allegiance to the rightful sovereign. Nor could the commander of the department, after the date of the proclamation of General Butler, seize private property as booty of war, or make any order confiscating it. *Planters' Bank* v. *Union Bank*, 16 Wall. 483.

On the 17th of August in the same year, General Butler, as the commander of the department, issued an order requiring the banks of the city to pay over to the chief quartermaster of the army all money in their possession belonging to hostile corporations or hostile official persons. Payments were made

by the defendant bank, pursuant to that order, of a large amount deposited by the plaintiff bank. Reimbursement having been refused, the plaintiff bank brought suit to recover the amount, and judgment was ultimately rendered in favor of the plaintiff in the sum of $24,713. Exceptions were filed by the defendant, and the cause was removed into this court, where the judgment was affirmed.

Two points were ruled by this court: 1. That the order was one which the commanding general had no authority to make, and that it was wholly invalid. 2. That payment to the chief quartermaster did not satisfy the debt.

In disposing of the case, Mr. Justice Strong remarked, that the city of New Orleans was then in the quiet possession of the United States forces; that it had been captured fifteen months before that time, and that undisturbed possession had been maintained ever after its capture; that the order was not an attempt to seize the property *flagrante bello*, nor was it a seizure for the immediate use of the army; that it was an attempt to confiscate private property, which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war.

Concede all that, and still the defendant rests his defence on the proposition of his third special plea, that the Sixth District Court had no jurisdiction over the person of the defendant, because he was a military officer in the army of the United States, acting under the orders of his superiors. But this is not the case of a foreign war in which the courts of the enemy assumed jurisdiction over an officer of the invading army. Nothing of the kind is pretended, and if it were, it could not be supported for a moment. Instead of that, the United States, throughout the active hostilities, were engaged in putting down the insurrection and in suppressing the rebellion, with a view to the re-establishment and complete restoration of the national authority. Throughout the whole period of the civil war the government maintained that the ordinances of secession were void, and that they did not and could not have the effect to take a State out of the Union or to annul its constitution or laws.

War followed insurrection, but all know that as soon as the military forces of the United States wrested any portion of the national territory from the rebellious authorities, and acquired full and complete control of it, the normal condition of affairs became restored, as indicated in the first act of Congress upon the subject, and the proclamation of the President, which soon followed the passage of that act.

Towns, provinces, and territories, says Halleck, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminy; and the original sovereign owner, on recovering his dominion over them, whether by force of arms or by treaty, is bound to restore them to their former state. In other words, he acquires no new right over them, either by the act of recapture or of restoration. . . . He rules not by any newly acquired title which relates back to any former period, but by his antecedent title, which, in contemplation of law, has never been devested. Halleck, Int. Law, 871.

When a town, reduced by the enemy's arms, is retaken by those of her own sovereign, says Vattel, she is restored to her former condition, and reinstated in all her rights. Vattel (ed. by Chitty), 395.

Pressing emergency in time of war may authorize the seizure of private property before providing for compensation, but, to justify the taking without the consent of the owner, the necessity must be apparent, leaving no available alternative.

Four months before the marauding expedition, acting under the verbal and secret orders of the defendant, entered the plantation and dwelling-house of the plaintiff, during his temporary absence, and seized the goods and chattels mentioned, the city of New Orleans had fallen into the undisturbed possession of the Union forces under the command of General Butler, who never authorized the defendant to perpetrate the acts of plunder charged in the declaration. Evidence of necessity in this case is wholly wanting, without which the acts charged in the declaration cannot be justified. *Sellards* v. *Zomes*, 5 Bush, 90.

Beyond doubt, he might have appealed to the commanding

general for an order that the suit should be discontinued; but he did not, and it may be that his reason for not doing so was that he knew if he did a court of inquiry would be ordered. Public order was fully restored in the city, and the courts were open, and every person was in the full enjoyment of the protection promised in the military proclamation issued four months before, when the Union forces entered the city. Process in due form of law was issued, and personal service having been made, the defendant, if he had any defence, was bound to appear and plead it.

Actual insurrection in that locality had ceased, and the military control of the Union forces was substantial, complete, and permanent; and, being such, it drew after it the full measure of protection to persons and property consistent with the fact that the war outside and in other localities had not terminated. Rebel authority was replaced by the national authority, and all the inhabitants were in the enjoyment of the protection and rights promised in the military proclamation then in force.

Hostilities having ceased in that locality, the defendant was not engaged in any active military operations. His military duties did not prevent his attendance at the court to make his defence. No evidence is exhibited in the pleadings showing any condition of affairs, military or civil, excusing the defendant from refusing to obey a judicial summons; and if the court had no jurisdiction, he should have appeared and so pleaded. Having neglected to do that at the time, he cannot now attack the judgment collaterally in a suit brought upon it in another jurisdiction. When the jurisdiction has attached, the judgment is conclusive for all purposes and is not open to inquiry upon the merits; and if conclusive in the State where it was pronounced, it is equally conclusive everywhere in the courts of the United States. 2 Story, Const., sect. 1813; *Christmas* v. *Russell*, 5 Wall. 290, 302; *Mills* v. *Duryee*, 7 Cranch, 483.

It is not even suggested that the military authorities ever interfered to prevent the suit, and, as matter of fact, it is known that no such interference ever took place. Instead of that, the clear inference is that the defendant preferred to submit to the jurisdiction of the court where the suit was brought,

rather than subject himself to a military court of inquiry; and, if so, it was his own choice, and he cannot now be permitted to attack the judgment which was rendered in consequence of his own negligence to appear and plead his defence.

Confirmation of the proposition that it was the duty of the defendant to appear and plead his defence is derived from the act of Congress passed for the protection of those prosecuted for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done under and by virtue of any order of the President or under his authority, or under color of any law of Congress, the provision being that "such defence may be made by special plea or under the general issue, in the insurrectionary districts in which the national authority had been restored *by undisputed possession and control.*" 12 Stat. 756, sect. 4.

By the fifth section of the same act it is provided that all civil suits and criminal prosecutions of the character described in the fourth section, in which final judgment may be rendered in the Circuit Court, may be carried by writ of error to the Supreme Court, whatever may be the amount of the judgment. At the date of the rendition of the judgment in question the United States had undisturbed possession and control of the territory embraced within the jurisdiction of the Sixth District Court, which was fully recognized by the military governor of the State as a tribunal having full jurisdiction of all civil causes arising within the judicial district. If the defendant could be justified, under the fourth section of that act, for the alleged trespass charged against him, the same section made it his duty to appear and answer to the judicial summons, and make his defence by plea.

Reported cases, in great numbers and of high authority, support the proposition that a military officer, except when war is flagrant or when the courts are silenced by the exigencies of military rule or martial law, is subject to judicial process for the abuse of his authority or for wrongful acts done outside of his military jurisdiction. *Mortyn* v. *Fabrigas*, 1 Cowp. 161, 175.

Trespass for false imprisonment was brought in that case against the Governor of Minorca, charging that he, the governor, had beat and wounded the defendant, and imprisoned him for

the space of ten months, without reasonable or probable cause Plea, the general issue. Trial in the Common Pleas, and verdict for the plaintiff in the sum of £3,000. Exceptions were filed by the defendant, and he sued out a writ of error and removed the cause into the King's Bench, where Lord Mansfield gave the opinion of the court, all the other judges of the court concurring. He held that trespass would lie for an abuse of power, and he supported the conclusion of the court by stating a case that occurred in early time, while he was at the bar, in which a captain in a train of artillery sued the military governor of Gibraltar, who had confirmed the sentence of a court-martial by which the plaintiff had been tried and sentenced to be whipped. His Lordship brought the action, and he says that the governor was ably defended, and, he added, that nobody ever thought that the action would not lie.

Two other cases were mentioned by that great magistrate, which were tried before him in the circuit, one of which was a suit against a military captain, and the other was a suit against an admiral in the navy, both of which resulted in favor of the plaintiff. Errors were assigned in the principal case, and the report shows that the questions were elaborately argued, and that the judgment of the lower court was unanimously affirmed. *McLaughlin* v. *Green*, 50 Miss. 453–462; *Bellamonte Case*, 2 Salk. 625; *Way* v. *Yally*, 6 Mod. Rep. 195.

Examples of the kind in the courts of the parent country are quite numerous, and in every case the alleged wrong-doer was put to his justification; and if it appeared that the wrongful act was done without lawful authority, the plaintiff recovered compensation for the injury. 1 Smith, Lead. Cas. (7th ed.), par. II. 1035.

Where the captain of a company imposed a fine upon a soldier, and issued a warrant for its collection, under which the soldier was imprisoned, and it appeared that the statute conferred no authority upon the captain to issue warrants for the collection of fines in such cases, it was held, in an action of trespass brought by the soldier against the captain, that the plaintiff was entitled to recover. *Mallory* v. *Bryant*, 17 Conn. 178; 6 Waite, Actions and Defences, 49.

Acts of military officers within the scope of their jurisdiction

are protected, while such as are in excess of their jurisdiction are actionable. Id. 107.

When and where the civil power is suspended, the President has a right to govern by the military forces, but in all other cases the civil power excludes martial law and government by the war power. *Griffin* v. *Wilcox*, 21 Ind. 370; 7 Waite, Actions and Defences, 314.

A soldier cannot justify on the ground that he was obeying the orders of his superior officer, if such orders were illegal and not justified by the rules and usages of war, and such that a person of ordinary intelligence would know that obedience would be illegal and criminal. *Riggs* v. *State*, 3 Cold. (Tenn.) 87; *Wise* v. *Withers*, 3 Cranch, 331, 337; *Commonwealth* v. *Palmer*, 2 Bush (N. Y.), 570.

It follows that the military commander, after the capture of New Orleans, had no right to seize private property as booty, or to confiscate it, for the reason that hostilities had ceased and the courts were open. *Planters' Bank* v. *Union Bank*, 16 Wall. 483; 7 Waite, Actions and Defences, 315.

Without proof of a direct order from the commandant of the place, the defendant cannot justify his acts as having been authorized by his superior officer, even if that would afford a justification; for, as Dr. Lushington said in a celebrated case, if the act which he did was in itself wrongful and produced damage to the plaintiff, he, the plaintiff, must have the same remedy by action against the wrong-doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. Agents in such cases are responsible for their tortious acts; but the government is morally bound to give them indemnity, the rule being, as the court held in that case, that "the right to compensation in the party injured is paramount to that consideration." *Rogers* v. *Dutt*, 13 P. C. C. 209, 236; *Wilson* v. *Franklin*, 63 N. C. 259.

It is not to be questioned, said Phelps, J., that, if a military officer transcend the limits of his authority and take cognizance of a matter not within his jurisdiction, his acts are void, and will afford no justification to those who act under him. *Darling* v. *Bowen*, 10 Vt. 148, 151. Conclusive support to that proposition, if any be needed, is found in several Eng-

lish cases of undoubted authority. *Warden* v. *Bailey*, 4 Taunt. 65–87.

During the argument, reference was made to the military order of the 16th of August, 1862, which purported to authorize commanders in certain States to seize property, real and personal, necessary or convenient for their commands or other military purposes; but it is clear that that order had no application in localities within the peaceable possession of the Union forces, for several reasons, either one of which is sufficient to show that it is a mere afterthought: —

1. It could not apply to New Orleans, because if it did it would contradict and supersede the proclamation of General Butler, in which he promised that all the rights of property of whatever kind should be held inviolate.

2. Because it has been solemnly decided by this court that a military commander of that district, after the said proclamation, could not seize private property as booty of war. *Planters' Bank* v. *Union Bank*, *supra*.

3. Because the record shows that the whole district had been restored to the Union, and that all the inhabitants were in cheerful submission to the Federal Constitution.

4. Because there was no more necessity for seizing private property as supplies than there would have been if the Union forces had been encamped in any one of the great loyal cities of the North.

Concede the correctness of these suggestions, and two conclusions follow: 1. That this court has no jurisdiction to reverse or affirm the judgment of the Circuit Court. 2. That, if this court has such jurisdiction, then the judgment of the Circuit Court should be affirmed.

Attention was not called to the question of jurisdiction in the court below; nor is it probable that the result would have been different if it had been, as the universal practice in the Circuit Court is to favor appeals and render every facility to promote a re-examination of the judgment, unless the right has been denied by some express decision of the Supreme Court, or by some explicit and unambiguous congressional regulation.

MR. JUSTICE MILLER. Concurring with my brother CLIFFORD that this court is without jurisdiction, because the amount in controversy does not exceed $5,000, I am content to rest that point on what he has said.

I also believe that the judgment of the Circuit Court should be affirmed, for a single reason, which I will state in as few words as possible.

It is apparent that, very soon after the capture of New Orleans by our forces, the administration of justice as between individuals was remitted to the civil courts. The proclamation of General Butler shows that it was his purpose that such rights as required for their determination judicial proceedings should be asserted in the ordinary tribunals, with as little interruption and as little interference by the military authority as possible. Evidence of this is to be found in the fact that, without any change in the judge, who had taken the oath of allegiance, the Sixth District Court of New Orleans was continued in the exercise of all its functions, which, under the proclamation, included the adjudication of "civil causes between party and party." It exercised jurisdiction both by the general law of Louisiana and the express proclamation of the commanding general. The locality was a part of the United States. The parties were citizens of the United States. No active military operations were then carried on within that city or against it; and for the very reason that its possession had been perfectly secured by the loyal forces, the civil courts were restored to the exercise of their ordinary functions in cases between man and man, or, as the proclamation expresses it, between party and party. The condition, therefore, was very different from that when military forces invade and occupy a foreign country, which, before any treaty of peace, or the declaration of any purpose to annex it to the territory of the conqueror, is held in armed hostility to its former sovereign, and solely by the strong hand. In such a case, submission of the inhabitants can only be maintained by the military power; and to subject that power to the jurisdiction of the courts of the subjugated country is to abdicate all control over it.

But in New Orleans it was far otherwise. Our military forces were rightfully there, and in their own country, among

citizens of the United States, subject to the same paramount authority, and owing allegiance to the same government. Those citizens had been only a few months in insurrection, and they were invited to submit themselves again to the same laws, and to have their contested rights decided by the same courts, and, in this case, by the same judge.

In this condition of affairs, Johnson, who was a resident and citizen, against whose loyalty no charge is made, filed in that court his petition, in due form of law, setting forth that certain persons had, with force and violence, committed a trespass on his home, and taken therefrom personal property of the value of several thousand dollars, and charging Dow with being guilty of this trespass.

The usual process of summons was personally served on Dow, and on his failure to appear or answer, either by himself or attorney, a default was entered, and a judgment rendered for the value of the property taken. This judgment remaining in full effect, the plaintiff, to enforce the payment of it, brought the present suit in the Circuit Court of the United States for the District of Maine, where Dow resides.

The defence — the only defence which could be relied on — is the alleged total and absolute want of jurisdiction in the Sixth District Court over the case.

But surely that court did have jurisdiction of an action of trespass. The plaintiff was not only competent to sue, but entitled to a remedy in that court, if the cause of action was such as he declared. It is not denied that the trespasser, had he not been a member of the military forces of the United States, would have been liable to suit, and bound to answer. But it is said that because Dow was an officer of those forces he was not bound to answer.

When a proper plaintiff brings an actionable case before a court which has jurisdiction of it, and due service of process is made, I hold it to be a principle of universal prevalence that the question of the defendant's personal exemption from such process or jurisdiction must, by plea or some other appropriate mode, be brought before the court. I know of no exceptions to this rule, which is laid down by all the works on pleading, from Chitty to the present time. There is no other way in

which the court can know of the exemption if it be not unnecessarily stated in the plaintiff's pleading. The court, as the case stands, has jurisdiction, and must pronounce the judgment of the law. If the party sued deems proper for any reason to stay away or remain silent, he does so at the peril of having a judgment rendered against him which cannot be assailed collaterally.

Much is said of the evil of dragging military officers into the courts under such circumstances. But the military power can make such general orders as will protect itself against an abuse of the right which it has expressly recognized. So, the idea that Dow ought not to have been compelled to leave his post at Fort St. Philip, to defend this suit in New Orleans, is of little force. If he had to be found at the fort for service of process, he could easily have employed a lawyer to put in his plea in abatement that he was acting under military authority, and therefore not liable to the suit.

Every man is liable to be sued wrongfully or without cause, but he is, by the very genius of our laws, bound to submit to this evil and make defence. Why should not this class of men, who of all others possess most despotic power, be required to show the authority by which they exercise it?

If I am not mistaken in these principles, I see no escape from their controlling influence in the case before us. It is too well settled to admit of controversy, that a judgment rendered by a court, having jurisdiction of the parties and the subject-matter of the suit, can only be impeached by some direct proceeding to avoid it, and that when an action on it is brought in any other court, no defence can be interposed which should have been made in the former suit. General Dow could not, therefore, set up in the Circuit Court as a bar to the judgment the same matters that he should have pleaded in the court which rendered, and was bound to render it.

It is impossible in discussing this matter that memory should fail to recall a very famous case of historical interest, involving many of the same principles, which occurred about half a century before this, and of which the same city was the theatre.

During what has been called the siege of New Orleans, at the close of the last war with Great Britain, the commanding

general of our forces declared martial law in that city. This was unpleasant to many citizens, and to others who claimed to be foreigners domiciled there at the time. Some of these becoming restive under its restraints, made publications of a seditious character in the newspapers, for which they were arrested by order of General Jackson. When Judge Hall, of the proper civil court, issued a *habeas corpus* for their release, the general tore up the writ and sent the judge by force beyond his lines. Within a very few days after this, the victory of the 8th of January, 1815, was achieved, and on the receipt of the news of the treaty of peace the declaration of martial law was revoked. Judge Hall, on resuming his judicial functions, issued a process against General Jackson for contempt of court in his action in reference to the writ of *habeas corpus*.

That distinguished man, though in the midst of the adulation consequent on the great victory, did not act as the defendant in this case did, by paying no attention to the process, but came to the court in citizen's dress, attended only by a single member of his military family and with his legal adviser. He offered to read the same paper which his counsel had read against issuing the process for contempt, and, when the court declined to hear it, submitted himself to its judgment. At this there was such a demonstration of ill-feeling in the crowded court-room that the judge said he could not proceed, and would adjourn the court. But the noble defender of the city declared that he was equally ready to defend the court, and begged that the judge would proceed without fear to do what he might think his duty required. A fine of $1,000 was entered up against the general, which he paid at once, and used his authority, which was needed, to disperse the mob, who were inclined to violence against the judge.

I confess I have always been taught to believe that Judge Hall was right in imposing the fine, and that General Jackson earned the brightest page in his history by paying it, and gracefully submitting to the judicial power. Such I believe is the judgment of history and of thoughtful judicial inquirers; though a grateful country very properly refunded to her favorite general the sum he had paid for a necessary but unauthorized exercise of military power. I have no doubt that General

Dow had good reasons for all he did, and I think he would have acted more wisely if, respecting the courts in the proper exercise of their functions, he had made his defence at the right time before the appropriate tribunal.

SAVINGS BANK *v.* WARD.

A., an attorney-at-law, employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate, "B.'s title to the lot" (describing it) "is good, and the property is unincumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing by way of security therefor a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. is insolvent. *Held*, 1. That there being neither fraud, collusion, or falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate. 2. That usage cannot make a contract where none was made by the parties.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. R. Ross Perry for the plaintiff in error.

Mr. Joseph H. Bradley and *Mr. John J. Johnson* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Attorneys employed by the purchasers of real property to investigate the title of the grantor prior to the purchase impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. Addison, Contr. (6th ed.) 400.

Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule

being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. Addison, Torts (Wood's ed.), 615.

Pursuant to that rule of law the plaintiffs sued the defendant, and alleged as the cause of action that they retained and employed him to examine and ascertain the title of the possessor of certain premises situate in the city of Washington and described in the declaration, and to report to them the nature and extent of his title to the same; and they allege that he, the defendant, accepted the employment, and reported to them that the title of the possessor of the premises was good and unincumbered.

Their theory as alleged in the declaration is that they procured that report with a view to the making of a loan, and they allege that upon the faith and credit of it they loaned the sum of $3,500 to the pretended owner of the premises, and accepted as security for the same a trust-deed of the property, whereas the borrower of the money was insolvent and had no title whatever to the premises, as fully and explicitly appears by a prior deed of conveyance duly recorded.

Process was duly served, and the defendant appeared and pleaded the general issue, which was duly joined by the plaintiffs. Continuance followed, and at the opening of the next term the parties went to trial, and the verdict and judgment were in favor of the defendant. Exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Six errors are assigned in this court, of which three will be separately examined. They are as follows: 1. That the court erred in ruling that some privity of contract, arising from an actual employment of the defendant by the plaintiffs, is necessary to enable the latter to maintain the action. 2. That the court erred in holding that the evidence introduced did not establish such a privity of contract between the parties as entitled the plaintiffs to recover. 3. That the court erred in instructing the jury that upon the whole evidence the verdict should be for the defendant.

Evidence was introduced by the plaintiffs tending to prove

that the defendant is an attorney-at-law doing business in the city, and that he held himself out to the public as a person skilled in the examination of titles to real estate situated in the District of Columbia. That the claimant of the lot described in the transcript employed the defendant, in his professional character, to examine his title to that lot, and to report to him the condition of the same, and that the defendant, pursuant to that employment, reported to his employer that his title to the lot is good and that the property is unincumbered, the report being signed by the defendant and his son.

It is not pretended by the plaintiffs that they ever employed the defendant to examine the title to the lot, and it appears that the report was made at the sole request of the claimant of the lot, without any knowledge on the part of the defendant as to the purpose for which it was obtained. All that is conceded by the plaintiffs; but they gave evidence to show that the claimant of the lot presented the certificate to certain brokers, and employed them to negotiate a loan upon the property in his favor for $3,500, on the faith of that certificate. Detailed statement is given in the transcript of the steps taken by the brokers to obtain the required loan, the substance of which is that they required the party to give a negotiable note for the amount, payable in one year, with ten per cent interest, and that he and his wife should execute a trust-deed of the lot to them as trustees to secure the payment of the note when due.

Preliminaries being arranged, the brokers applied to the plaintiffs for the loan and obtained the same, giving the note and deed of trust with the certificate as security for the payment. Before accepting the papers, the plaintiffs, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and that the certificate as to the title should be continued to the date of the transaction.

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant, the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers.

Payment of the note was not made at maturity, and when it was attempted to sell the premises under the trust-deed, it was discovered that the certificates were untrue, and that the grantors, on the 13th of March previous, had conveyed the premises in fee-simple, by deed duly executed and recorded.

Attorneys-at-law are officers of the court, admitted as such by its order; but it is a mistake to suppose that they are officers of the United States, as they are neither elected nor appointed in the manner prescribed by the Constitution for the election or appointment of such officers. *Ex parte Garland*, 4 Wall. 333, 378.

When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible. *Bowman* v. *Tallman*, 27 How. (N. Y.) Pr. 212, 274.

If he fails in any of these respects he may, and sometimes does, not only forfeit all claim for compensation, but may also render himself liable to his client for any damage he may sustain from such neglect. Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the cove-

nants in the instrument of conveyance, where the property is sold.

Where the relation of attorney and client exists there is seldom any serious difficulty in determining whether the client has or has not a cause of action, or its nature and extent if one exists. Criterions of standard character are established in legal decisions by which every such controversy may be determined; but in the case before the court the defendant was never retained or employed by the plaintiffs, nor did they ever pay him any thing for making the certificates, nor did he ever perform any service at their request or in their behalf.

Neither fraud nor collusion is alleged or proved; and it is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same or to whom they were to be presented. None of those matters are controverted; but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition; but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skilful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages; but if he is injured, the true rule is that the attorney is liable for the

want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.

Both parties concur in these suggestions; but the defendant insists that, in order that such a liability may arise, there must be some privity of contract between the parties to enable the plaintiffs to maintain the action; that inasmuch as the defendant was never retained or employed by the plaintiffs, and never rendered any service at their request or in their behalf, he cannot be held liable to them for any negligence or want of reasonable care, skill, or diligence in giving to a third party the certificates in question.

Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. Sh. & Redf. Negl., sect. 215. Conclusive support to that rule is found in several cases of high authority. *Fish* v. *Kelly*, 17 C. B. N. S. 194.

Argument to show that the direct question was involved in that case is unnecessary, as the affirmative of the proposition sufficiently appears in the head-note, which is as follows: That an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of the deed.

Although the inquiry was addressed directly to the defendant, and the case shows that the answer was given to the person making it, the court held, Erle, C. J., giving the opinion, that there was no relation between the parties from which any contract could be implied, nor any relation between the parties from which any duty could arise. Mention is then made of the fact that the defendant was the solicitor of the trustees of a certain estate, and that the plaintiff was a workman in the employ of the trustees, from which the court deduced the conclusion that the parties did not stand in such a relation to each other as to make it any part of the duty of the defendant

to give the plaintiff any professional advice. His answer was entirely erroneous; but the court decided that he could not be held responsible, unless it could be shown that at the time he made it he knew it to be false.

Sufficient appears even in that case alone to show that the ruling of the subordinate court is correct, but it is a mistake to suppose that the proposition is without other support than what is derived from the reasons there assigned for the conclusion. Prior to that, the same question was decided by the highest court of the same country in the same way. Application to an insurance company was made by a certain party for a loan of money, which the company agreed to make if the party would insure his life, and assign to them the policy and give sureties for the payment of interest on the loan. It appears that the plaintiffs became sureties for the applicant, and that the defendant, a law agent employed by the principal who applied for the loan, drew up the papers in the transaction, among which was one intended for the security of the sureties, which proved to be incomplete. Loss was sustained by the sureties, and they brought suit against the law agent, charging that the loss was occasioned by his negligence and want of skill and other fault. Appearance was entered by the defendant, and he denied the alleged employment. Judgment was rendered for the plaintiffs in the lower court, and the defendant appealed to the House of Lords, where the appeal was argued by very able counsel. Opinions seriatim were delivered by the law lords. In substance and effect, Lord Campbell said that he never had any doubt of the unsoundness of the proposition that would maintain the action in such a case, and added, that there must be a privity of contract between the parties, which was not proved in that case.

No attempt was made by the appellee to controvert that proposition, but his counsel contended that the law of Scotland was different; that by the law of the latter country a law agent, in respect of damage occasioned by his neglects, is responsible to those who suffer by his default, although there may not have subsisted the relation of principal and agent between them. It was Lord Cranworth who responded to that proposition, and in the course of his judgment he commented upon

all the authorities cited in support of the same, and showed that they failed to establish it.

Emphatic concurrence in the conclusion announced by the Chancellor was expressed by Lord Wensleydale, to the effect following: that "he only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms."

By the law of England the right of action depends entirely upon the question between whom the relation of principal and agent, client and attorney, subsists. Nothing more decisive of the question need be sought; and we have the authority of that great magistrate to say that it is impossible to support, by a single case in that country, so extraordinary a proposition as that persons who were not, by themselves or their agents, employers of law agents to do an act, could have remedy against such agents for the negligent performance of it.

Speaking to the same point, Lord Chelmsford said it is clear that this general proposition, abstracted from the facts of the case, cannot be maintained to its full extent, as it would apply to cases where there is no privity of contract between the parties, when it is conceded that no liability would arise. *Robertson* v. *Fleming*, 4 Macq. H. of L. Cas. 167, 209.

Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect *Kahl* v. *Love*, 37 N. J. L. 5, 8.

Injury was received by the driver of a mail-coach which broke down from defects in its construction. He brought suit against the constructor of the coach who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. Held, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord Abinger, the most absurd consequences, to which no limit can be seen, will ensue; and Baron Alderson remarked, if we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. *Winterbottom* v. *Wright*, 10 Mee. & W 109, 115.

Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid* v. *Holliday*, 6 Exch. Rep. 761–767.

Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made; and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskilfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrong-doer. Reported cases of the kind are cited by the plaintiffs, but it is obvious that they have no proper application to the case before the court. *Peppin and Wife* v. *Sheppard*, 11 Price, 400; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *George* v. *Skivington*, Law Rep. 5 Exch. 1; *Philadelphia & Reading Railroad Co.* v. *Derby*, 14 How. 468, 484.

Many judicial decisions in this country besides those cited also adopt the same rule and fully recognize the same class of exceptions.

Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas* v. *Winchester*, 2 Seld. 397, 410.

Such an act of negligence being imminently dangerous to the lives of others, the wrong-doer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis* v. *Selden*, Law Rep. 3 C. P. 496.

Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *The Mayor, &c. of Albany* v. *Cunliff*, 2 N. Y. 165, 174.

Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life. *Loop* v. *Litchfield*, 42 id. 351–358.

So where the manufacturer of a steam-boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and

skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee* v. *Clute*, 51 id. 494–496.

Exactly the same rule prevails in the State of Pennsylvania, independent of any statutory regulation upon the subject, the Supreme Court of the State holding that the liability of the recorder in such a case is to the party who asks and pays for the certificate, and not to his assigns or alienee. *Houseman* v. *Girard Mutual Building & Loan Association*, 81 Pa. St. 256.

Satisfactory proof is exhibited that the defendant was duly employed by the pretended owner of the lot to examine his title to the same; and it is conceded that he did so, or that his son made the search for him, and that he made and signed the certificates in question, and that he was paid for his services by his employer; nor is it questioned that the title was defective as alleged. Concede that, and it follows as an implication of law that the defendant assumed to possess the requisite knowledge and experience to perform the stipulated service, and that he contracted with his employer that he would use reasonable care and skill in the performance of the duties. For a failure in either of these respects, if it resulted in damage to his employer, he, the employer, is entitled to recover compensation. *Chase* v. *Heaney*, 70 Ill. 268.

Decisions of the courts of the highest authority support that proposition; but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title, or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him any thing for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law as expounded by the decisions of the court.

Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but

where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty. *Langridge* v. *Levy*, 2 Mee. & W. 519, 530.

We agree, said Lord Denman, C. J., and affirm the judgment, on the ground stated by Parke, B., that as there is fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of the results, the party guilty of the fraud is responsible to the party injured. *Langridge* v. *Levy*, 4 Mee. & W. 337.

Abstracts of titles and certificates of the same are frequently if not usually made by recorders, prothonotaries, or clerks, and in some States their liability is prescribed and regulated by statute. Sess. Laws (Pa.), 1872, 1040.

By that act those officers are declared liable for all loss or damage which may happen by reason of any false or erroneous certificate of search, not only to the person or persons to, for, or upon whose order the said certificate of search is made or given, but also to any person or persons claiming title through, from, or under such person or persons, or who may suffer loss by reason of the making or giving of any such false or erroneous certificate. But it is unnecessary to enter into any discussion of such regulations, as it is clear that there are none such in this District which can have any application in this case.

Testimony was introduced at the trial tending to show that there is a local usage in the District that the attorney examining the title of such an applicant for a loan shall be considered as also acting for the lender of the money, and complaint is made that the court below did not submit that evidence to the jury, with proper instructions. Evidence of usage is not admissible to contradict or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. Omissions may be supplied in some cases by such proof, but it cannot prevail over or nullify the express provisions of the contract. So, where there is no contract, proof of usage will not make one, and it can only be admitted either to interpret

the meaning of the language employed by the parties, or where the meaning is equivocal or obscure. *Thompson* v. *Riggs*, 5 Wall. 663, 679.

Suffice it to say these parties never met, and there was no communication of any kind between the defendant and the brokers, or the lenders of the money. Nothing of the kind is pretended, the only suggestion in that direction being that it may be held that the applicant for the loan, when he employed the defendant, may be regarded as the agent of the plaintiffs. Such suggestion being entirely without evidence to support it, is entirely to no weight, especially as it appears that the principal certificate was procured several days before any interview upon the subject of the loan took place between the brokers and the plaintiffs.

Judgment affirmed.

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE BRADLEY, dissenting.

I am unable to agree to the judgment in this case. I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found. That, as it seems to me, is this case. Ward was employed by Chapman to examine and certify to the title to a certain lot in Washington. The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the facts certified to. In examining the records he overlooked a deed, in all respects properly recorded, which showed on its face that Chapman had conveyed the lot away in fee-simple, and certified as follows: "Lot 55, in Chapman's subdivision of lots, in square 364. The title of Leonard S. Chapman to the above lot is good and the property is unincumbered. Wm. H. Ward." The National Savings Bank, relying on this certifi-

cate as true, loaned Chapman $3,500, taking for security a deed of trust of the lot. It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate.

PHILLIPS v. MOORE.

1. A sale of lands in Texas, made before her separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen.
2. The court below properly allowed the plaintiff to file in the case a new petition, not differing in any substantial particular from the original, which was lost, without his fault.
3. The concluding clause of the third section of the act entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875 (18 Stat., part 3, 470), does not repeal the provision of the Revised Statutes authorizing the court to try, upon the stipulation of parties, issues of fact without the intervention of a jury.

ERROR to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by Moore against Phillips and Hancock to recover possession of a tract of land in Texas. There was a finding and judgment against the defendants, who thereupon sued out this writ of error.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. W. P. Ballinger* for the plaintiffs in error, and by *Mr. D. D. Atchison* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover the possession of one-fourth of a league of land, situated in the county of Wharton, in the State of Texas. The plaintiff claims the land under a grant of the State of Coahuila and Texas, made in April, 1833, to one John Dinsmore, a colonist, under the contract with the

Empresario Stephen Austin. The defendants assert title to it under a previous grant from that State, made in August, 1824, to one Bartlett Sims, a similar colonist. No question is raised as to the genuineness or validity of this grant to Sims, which was for one league; but, in May, 1828, he sold one-fourth of it, constituting the property in controversy, to one Kinchen Holliman, a resident and citizen of Mississippi, who never became a resident or citizen of Mexico or Texas. In 1833, Dinsmore presented a petition to the commissioner of the State appointed to distribute lands to the colonists, and to issue titles to them, in which he denounced the tract thus sold as vacant land, by reason of the non-residence and alienage of Holliman, and prayed a grant of it to himself. Upon reference of the petition to the agent of the empresario and to the alcalde of the place, the sale of the premises to Holliman and his alienage and non-residence were officially established, and their opinion obtained that he could not, under the laws, retain a right to the tract. The commissioner thereupon declared the land to be vacant, and conceded it to the petitioner, and directed that a survey be made of it, preparatory to the issue of the title. Such survey having been made, a formal document, as evidence of the transfer of the title, was issued to the petitioner, by which the commissioner, in the name of the State of Coahuila and Texas, granted to him the property in question. The validity of this grant is the principal question presented for our determination.

The contention of the defendants is that the sale of Sims to Holliman was invalid by reason of the latter's alienage and non-residence, and as a consequence that the title did not pass to him, but remained in Sims, and the tract sold was not subject to be regranted as vacant land.

There is some conflict of opinion in the decisions of the Supreme Court of Texas as to the effect upon the title of a sale of real property to a non-resident alien. Language properly applicable to grants to aliens under the colonization laws, and the instructions to the commissioner under the contract with the Empresario Austin, has sometimes been used with reference to sales to them by private parties. Such grants to non-resident aliens were inhibited by positive statu-

tory provisions, and for the obvious reason that the object of the colonization laws was to induce a settlement of the country by the introduction of persons who would cultivate the lands and become permanent residents; and this object would have been defeated, if such residence and cultivation had not been essential conditions upon which the bounty of the government was bestowed. For a similar reason, an abandonment of the country by the settler, after receiving his grant, without previous alienation of it, worked a forfeiture of the property, which immediately reverted to the mass of the public domain. The settler, after the performance of certain conditions, could, however, alienate his land, subject to some restrictions. In the early cases, particularly in *The Heirs of Holliman* v. *Peebles* (1 Tex. 673), an opinion was expressed, that under the laws of Spain, which remained in force in Mexico after her independence, and those subsequently enacted by her, an alien could not acquire real property in that republic. And in *Clay* v. *Clay*, in the 26th of Texas, the invalidity of a sale of land to a non-resident alien was expressly adjudged. But in the later case of *Barrett* v. *Kelly*, in the 31st of Texas, where land had been sold, in 1833, to citizens of the United States, then non-resident aliens, it was held that, unless there was an adjudication by some court or political authority upon their alienage, while it existed, their rights were not devested. The decision proceeded upon the ground that the title had passed to the grantees, notwithstanding their alienage, though subject to be devested upon an official determination of that fact.

According to this decision, considered with reference to the general prohibitory language of the laws of Mexico, respecting the acquisition of real property by aliens, in force in Texas previous to the latter's independence, the rule which there obtained may be stated to have been substantially this: that a non-resident alien could not acquire, under a sale by a citizen, such an interest in land as to be able to hold it against the government, or to prevent it being denounced and adjudged to be vacant land, subject to be regranted; but that the title would pass out of the vendor, so as to denude him of all estate in the land and consequent dominion over it; and the purchaser would take the title and hold it until, in some official way, the fact of non-

residence and alienage was authoritatively established, when the general law would come into operation, and restore the property to the public domain. Certain it is that, by the sale to the alien, the right of the vendor was deemed to be devested; and, so far as the present case is concerned, it is immaterial whether the title be considered as thereupon at once vesting in the government by reason of the attempted transfer of the property to a person incapable of taking it, or be deemed to pass to the alien, to be held until the government, upon its own motion, or the denouncement of a private citizen, should determine to claim the property. We are led to the latter view as the more reasonable one, and as being in harmony with the general doctrine obtaining in other cases, that a forfeiture incurred is inoperative to defeat a title until the party authorized to enforce it claims its benefit.

This conclusion is strengthened by the act of the Mexican Congress of March 12, 1828, in relation to passports and the mode of acquiring property by foreigners. Its sixth article provides that foreigners, introduced and established in the country in conformity to prescribed regulations, shall be protected by the laws, and enjoy the same rights conferred upon Mexicans, with the exception of acquiring landed property, which, by existing law, unnaturalized persons cannot hold. But yet the eleventh article of the same act declares that property acquired by unnaturalized foreigners, in fraud of the law, may be denounced by any Mexican, to whom it will be adjudged as soon as such fraud is proved. It would thus seem that, notwithstanding the prohibitory language of the sixth article, title may pass to a foreigner not naturalized, though it be one which is defeasible, upon the denouncement of a private citizen.

The Supreme Court of California, on the question as to the validity of a conveyance of land in Mexico, by a private citizen to an alien, held, after a full and elaborate consideration, that the conveyance was not absolutely void, but that the grantor by it was devested of the property which he had undertaken to convey, and the grantee invested with a defeasible estate therein, which he would hold until devested by the supreme authority, or by an inquisition had upon its denouncement. *Merle* v. *Matthews*, 26 Cal. 456.

By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as "office found." It removes the fact, upon the existence of which the law devests the estate and transfers it to the government, from the region of uncertainty, and makes it a matter of record. It was devised, according to the old law-writers, as an authentic means to give the king his right by solemn matter of record, without which he in general could neither take nor part with any thing; for it was deemed "a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury."

By the civil law, some proceeding, equivalent in its substantive features, was also essential to take the fact of alienage from being a matter of mere surmise and conjecture, and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government, or upon the denouncement of a private citizen. The course pursued in the present case seems to have been in conformity with common usage. The fact of alienage and non-residence was thus officially established; it became matter of record, and the subsequent declaration of the commissioner, that the land was vacant, was the judgment which the law prescribed in such cases. The land was then subject to be regranted by the commissioner, as fully as though no previous grant to Sims had ever been made.

It remains to consider the objections urged to the order of the court, allowing a new petition to be filed in place of the original, which was lost, and to the trial of the case by the court, without the intervention of a jury. We do not consider either of these objections to be well taken. It was not only proper to allow the filing of a new petition, when the original was lost, and no copy was to be had, but it would have been the subject of just complaint had this allowance been refused

The affidavit states that the loss was without the fault of the plaintiff, and there is no pretence that the fact was otherwise. The original petition was in the ordinary form in use in actions of trespass to try the title to land, and was for the recovery of one-fourth of a league; and there is no suggestion that the new petition differs from it in any substantial particular.

As to the trial by the court, it is sufficient to observe that a jury was waived by stipulation of the parties, filed with the clerk under the act of Congress. Rev. Stat., sect. 649. The concluding clause of the third section of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," does not repeal the previous law, authorizing a trial by the court, without the intervention of a jury, upon such stipulation. It was only intended to conserve to parties in the cases removed to the circuit courts the same right of jury trial which parties possess in cases brought originally in those courts, not to prevent the waiver of a jury by consent. The provision is similar to the one in the Judiciary Act of 1879. 18 Stat. 471; *Kearney* v. *Case*, 12 Wall. 281.

Judgment affirmed.

HOUGH *v.* RAILWAY COMPANY.

1. The general rule exempting the common master, whether a natural person or a corporation, from liability to a servant for injuries caused by the negligence of a fellow-servant recognized and considered.
2. To that rule there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servants, when conducting his business, to perils or hazards against which they may be guarded by proper diligence upon his part.
3. Therefore, although his liability to them is not that of a guarantor of the absolute safety or perfection of the machinery or other apparatus provided for their use, he is bound to exercise the care which the exigency reasonably requires in furnishing such as is adequate and suitable.

4. A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in that regard are, in discharging it, guilty of negligence, from which injury to an innocent party results.

5 If the servant of such a company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company to show contributory negligence.

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

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. James Turner* for the plaintiff in error, and by *Mr. John C. Brown* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Plaintiffs in error, the widow and child of W. C. Hough, deceased, seek in this action to recover against the Texas and Pacific Railway Company damages, compensatory and exemplary, on account of his death, which occurred in 1874, while he was in its employment as an engineer.

In substance, the case is this: —

The evidence in behalf of the plaintiffs tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track, over an embankment, whereby the whistle, fastened to the boiler, was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master-mechanic, and of the foreman of the round-house at Marshall; that to the former was committed the exclusive management of the motive-power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control, and discharge them at pleasure; that all engineers

were required to report for orders to those officers, and under their directions alone could engines go out upon the road; that deceased knew of the defective condition of the cow-catcher or pilot, and, having complained thereof to both the master-mechanic and foreman of the round-house, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but, by reason of the negligence of those officers, it was not put on the engine.

The evidence in behalf of the company conduced to show that the engine was not defective; that due care had been exercised, as well in its purchase as in the selection of the officers charged with the duty of keeping it in proper condition; that the defective cow-catcher or pilot was not the cause of the engine being thrown from the track; that the whistle was securely fastened, and did not blow out, but the cab being torn away, the safety-valve was opened, whereby the deceased was scalded; that if any of the alleged defects existed, it was because of the negligence of the master-mechanic and the foreman of the round-house, for which negligence the company claims that it was not responsible.

The principal question arising upon the assignments of error requires the consideration, in some of its aspects, of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant in the same employment.

"The general rule," said Chief Justice Shaw, in *Farwell* v. *Boston & Worcester Railway Corporation* (4 Metc. (Mass.) 49), "resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service,

and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

To prevent misapprehension as to the scope of the decision, he deemed it necessary, in a subsequent portion of his opinion, to add: "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company, — are questions on which we give no opinion."

As to the general rule, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application to the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages; what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation; who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow-servants in the same common adventure or undertaking, — are questions in reference to which much contrariety of opinion exists in the courts of the several States. Many of the cases are very wide apart in the solution of those questions.

It would far exceed the limits to be observed in this opinion to enter upon an elaborate or critical review of the authorities upon those several points. Nor shall we attempt to lay down any general rule applicable to all cases involving the liability of the common employer to one employé for the negligence of a co-employé in the same service. It is sufficient to say, that, while the general doctrine, as stated by Chief Justice Shaw, is sustained by elementary writers of high authority, and by numerous adjudications of the American and English courts, there are well-defined exceptions, which, resting as they clearly

do upon principles of justice, expediency, and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master.

In considering what dangers the servant is presumed to risk, the court, in *Railroad Company* v. *Fort* (17 Wall. 553, 557), said: "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make rep-

arations to an employé in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employés of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction."

A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employés, — an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality ; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its

agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés.

A leading case upon the question before us is *Ford* v. *Fitchburg Railroad Co.*, 110 Mass. 241. That was an action by an engineer to recover damages for injuries caused by the explosion of his engine, which was old and out of repair. His right to recover was disputed, upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs.

But the court said: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require." In a subsequent portion of the same opinion, the court said: "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition."

The same views, substantially, are expressed by Mr. Wharton in his Treatise on the Law of Negligence. The author (sect. 211) says: "The question is that of duty; and, without making the unnecessary and inadequate assumption of implied

warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting employés to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use." Again (sect. 212): "At the same time, we must remember that where a master personally, or through his representatives, exercises due care in the purchase or construction of buildings and machinery, and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care, either by himself or his representatives. The duty of repairing is his own; and, as we shall hereafter see, the better opinion is, that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master 'knows, or, in the exercise of due care, might have known,' that . . . his structures or engines were insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty." Still further, in reference to the obligation upon the master to supply suitable machinery for working use (sect. 232 *a*): "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases in which it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is, that, as the corporation can act only through superintending officers, the negligences of those officers, in respect to other servants, are the negligences of the corporation."

The current of decisions in this country is in the same direction, as will be seen from an examination of the authorities, some of which are cited in the note at the end of this opinion.

It is, however, insisted that the defence is sustained by the settled course of decisions in the English courts. It is undoubtedly true, that the general doctrine of the immunity of the master from responsibility for injuries received by his servant from a fellow-servant in the same employment has, in some cases, been carried much further by the English than by the American courts. But we cannot see that, upon the

precise question we have been considering, there is any substantial conflict between them. That question was not, as is supposed, involved, it certainly was not decided, in *Priestley* v. *Fowler*, 3 Mee. & W. 1. The decision there was placed by Lord Abinger partly upon the ground that, in the "sort of employment especially described in the declaration [transporting goods of the master by one servant, in a van, conducted by another of his servants], . . . the plaintiff must have known as well as the master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." But even in that case, although the court declared it was not called upon to decide how far knowledge upon the part of the master of vices or imperfections in the carriage used by the servant injured would make him liable, it was said: "He (the master) is, no doubt, bound to provide for the safety of the servant in the course of his employment, to the best of his judgment, information, and belief."

The question came before the House of Lords in *Paterson* v. *Wallace* (1 Macq. H. L. Cas. 748), and again, in 1858, in *Bartonshill Coal Co.* v. *Reid*, 3 id. 266. In the last-named case, Lord Cranworth said that it was a principle, established by many preceding cases, "that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." This he held to be the law in both Scotland and England. At the same sitting of the House of Lords, *Bartonshill Coal Co.* v. *McGuire* (3 id. 307) was determined. In that case, Lord Chancellor Chelmsford delivered the principal opinion, concurring in what was said in the Reid case. After referring to the general doctrine as announced in *Priestley* v. *Fowler*, and recognized subsequently in other cases in the English courts, he said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the fellow-

servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him."

Upon the same occasion, Lord Brougham, referring to the remark of a Scotch judge to the effect that an absolute and inflexible rule, releasing the master from responsibility in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said: "But, my lords, it is utterly unknown to the laws of England also. To bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that employment." 3 id. 313.

An instructive case is *Clarke* v. *Holmes*, decided in 1862, in the Exchequer Chamber, upon appeal from the Court of Exchequer, 7 H. & N. 937. There, the plaintiff was employed by the defendant to oil dangerous machinery, and he was injured in consequence of its remaining unfenced. He had complained of the condition of the machinery, and the manager of the defendant, in the latter's presence, promised that the fencing should be restored. In the course of the argument, counsel for the defendant relied upon *Priestley* v. *Fowler*, claiming it to have decided that whenever a servant accepts a dangerous occupation he must bear the risk. He was, however, interrupted by Cockburn, C. J., with the remark, "That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here, it is the negligence of the master." Crompton, J., also said: "It cannot be made part of the contract, that the master shall not be liable for his own negligence."

In the opinion delivered by Cockburn, C. J., it was said:

"I consider the doctrine laid down by the House of Lords in the case of *The Bartonshill Coal Co.* v. *Reid* as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely, that when a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur." Again, in the same opinion: "The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect that it would be kept."

Byles, J.: "But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. . . . The master is neither, on the one hand, at liberty to neglect all care, nor, on the other, is he to insure safety, but he is to use due and reasonable care. . . . Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable."

To the same effect is the recent case of *Murray* v. *Phillips*, decided in 1876 in the Exchequer Division of the High Court of Justice. 35 Law Times Rep. 477.

It is scarcely necessary to say that the jury were not correctly informed by the court below as to the legal principles governing this case. It is impossible to reconcile the general charge or the specific instructions with the rules which we have laid down. They were, taken together, equivalent to a peremptory instruction to find for the company. The jury may have believed, from the evidence, that the defects complained of constituted the efficient proximate cause of the death of the

engineer; that such defects would not have existed had the master-mechanic and foreman of the round-house exercised reasonable care and diligence in the discharge of their respective duties touching the machinery and physical appliances supplied to employés engaged in running trains; and that the deceased was not chargeable with contributory negligence: yet, consistently with any fair interpretation of the charge, and the specific instructions, they were precluded from finding a verdict against the company.

One other question, arising upon the instructions, and which has been discussed, with some fulness, by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiffs from recovering. The instruction upon that branch of the case was misleading and erroneous.

The defect in the engine, of which the engineer had knowledge, was that which existed in the cow-catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master-mechanic and the foreman of the round-house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed, as it was, by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been justified in relying upon those assurances.

If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the

death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But "there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." Shearman & Redf. Negligence, sect. 96; *Conroy* v. *Vulcan Iron Works*, 62 Mo. 35; *Patterson* v. *P. & C. R. W. Co.*, 76 Pa. St. 389; *Le Clair* v. *The First Division of the St. Paul & Pacific Railroad Co.*, 20 Minn. 9; *Brabbits* v. *R. W. Co.*, 38 Mo. 289. "If the servant," says Mr. Cooley, in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks."

And such seems to be the rule recognized in the English courts. *Holmes* v. *Worthington*, 2 Fos. & Fin. 533; *Holmes* v. *Clarke*, 6 H. & N. 937; *Clarke* v. *Holmes*, 7 id. 937. We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part. *Ford* v. *Fitchburg Railroad Co.*, 110 Mass. 261; *Laning* v. *N. Y. C. Railroad Co.*, 49 N. Y. 521. In such a case as that here presented, the burden of proof to show contributory negligence was

upon the defendant. *Railroad Company* v. *Gladmon*, 15 Wall. 401; Wharton, Negligence, sect. 423, and authorities there cited in note 1; *Indianapolis & St. Louis Railroad Co.* v. *Horst*, 93 U. S. 291.

Our attention has been called to two cases determined in the Supreme Court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the State in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the State courts.

Judgment reversed, and cause remanded, with directions to set aside the verdict and award a new trial, and for such other proceedings as may be consistent with this opinion.

NOTE. — 73 N. Y. 40; 49 id. 530; 53 id. 551; 59 id. 517; 13 Allen, 440; 48 Me. 116; 66 id. 425; 3 Dillon, 321; 55 Ill. 492; 45 id. 197; 60 id. 175; 8 Allen, 441; 1 Coldw. 613; 38 Wis. 293; 78 Pa. St. 32; 46 Mo. 169; 20 Minn. 9; 3 Sawyer, 444; Wharton, Negligence (2d ed.), sects. 199–242 and notes.

CRAIG *v.* SMITH.

1. Papers properly belonging to the files of a court should not be removed therefrom, except in cases of positive necessity. When, therefore, an appeal is taken, no order for transmitting such papers ought to be made, unless the actual inspection of them as originals is required to enable the appellate court to give them their just and full effect in the determination of the suit.
2. Where, on an appeal, papers have been improperly sent here, the order of the court below will be closely examined, to determine whether they are included in its terms.
3. Where, in a case involving the infringement and validity of letters-patent, the Circuit Court, on the allowance of an appeal from its final decree, directed its clerk to transmit with the transcript "the original exhibits, patent certificates, schedules, drawings, and models on file, along with and as part of the record and transcript," — *Held*, that certain affidavits sent here, but not copied into the transcript, although they had been filed as "exhibits" with the bill and the answer thereto, and by consent treated and read as deposi

tions on the hearing below, cannot be considered here as proofs in the cause, as they are not embraced by the order, the purpose of which was to send what had been *exhibited* below, as contradistinguished from what had been *read*.

4. Allowing, under a bill of review, the introduction of newly discovered evidence to prove facts in issue on the former hearing rests in the sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances which render it indispensable to the merits and justice of the cause.

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

The facts are stated in the opinion of the court.

The case was argued for the appellant by *Mr. Charles S. Whitman*, and for the appellee by *Mr. Matt. H. Carpenter*.

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

Samuel F. Craig, the appellant, on the 2d of February, 1872, filed in the Circuit Court a bill in equity against Jacob Smith and George D. Hale, to enjoin them from using an improved well-tube, for which he claimed to have letters-patent from the United States bearing date June 11, 1867. They answered, attacking the validity of the letters-patent: 1, Because the patented invention had been described in a certain printed publication publicly circulated and distributed prior to his supposed invention; 2, because it had been anticipated by certain other persons whose names and places of residence were given; and, 3, because it had been in public use more than two years before the date of the alleged letters-patent. A replication to this answer was filed, and proofs were taken. The cause was heard June 5, 1873, and a decree entered sustaining the letters-patent, awarding an injunction, and ordering a reference to a master to take an account of profits. The master made his report Dec. 12, 1873, and on the same day leave to file a petition for rehearing within forty days was granted the defendants. This petition was filed Jan. 21, 1874, and set forth that since the hearing the defendants had discovered evidence of new and substantive facts which they had not been able to discover before, and which they were advised and believed were material and pertinent to the issues. This new matter was: 1, Letters-patent issued by the United States to Charles Batcheller, of Keene,

New Hampshire, as early as Dec. 12, 1865, for an invention alleged to be substantially like that of Craig; and, 2, an extensive prior knowledge and use during the years 1865 and 1866, in various places throughout the United States, of well-tubes in all material respects like that in dispute. The names and places of residence of twenty-five persons who had this prior knowledge of the thing patented, and who knew of its prior use, were given, and in addition affidavits of each one of these persons, showing what they knew and had seen, were attached to the petition as exhibits.

The petition further stated that the defendants were general hardware dealers at Topeka, Kansas, and in the course of their business sold the well-tubes claimed to be an infringement of Craig's letters-patent; that when the suit was commenced they employed counsel, naming him to conduct their defence; that, as they believed, he used due diligence in procuring evidence, but that notwithstanding his and their efforts they never really obtained any available clew to the facts until after the former hearing; that the patent to Batcheller was not found until September, 1873, and it was after that date when they actually ascertained that they could prove by the persons named the facts set out in the affidavits made exhibits; "that since the commencement of the suit, through all such likely sources as they could discover or were informed of, the said defendants have made persistent inquiry and search after the facts material and pertinent to the issues in said cause, but owing to the often uncertain character of their information, the scattered situation of the sources of information, and, withal, the delay and obstacles, not easily surmounted, which were necessarily attendant upon such inquiry and search, they wholly failed to discover any of the evidence herewith exhibited until long after the submission, hearing, and decree in said cause as aforesaid." Attached to the petition as an exhibit was an affidavit of the counsel showing his diligence in the premises. The petition was sworn to by one of the defendants.

On the 24th of January, 1874, a supplemental petition was filed, setting forth a considerable number of rejected applications for letters-patent for improvements in well-tubes, which, it was claimed, described the complainant's patented invention

All the several applications were attached to the supplemental petition as exhibits. On the 13th of February, 1874, Craig asked and obtained leave until April 1, for the filing of counter-affidavits, and the defendants were allowed until May 1, for such further steps on their part as they should be advised were necessary.

To the petition and supplement Craig, on the 27th of April, filed his answer, insisting that the newly discovered matter was wholly inadmissible, in fact and in law, for the purpose of obtaining a rehearing, because it had all existed before the former hearing, and no sufficient reason was shown for the omission to procure it, and because it was cumulative only. He then denied that the patent to Batcheller anticipated his invention, and denied that the several persons named ever saw in use well-tubes like his before his letters-patent were granted. He then took up the several affidavits filed with the petition as exhibits, and gave his reasons in each case why they did not sustain the claims of the defendants. In addition to this, he produced a large number of counter-affidavits, which he attached and made exhibits to his answer.

On the 9th of June, the defendants filed a replication to the answer of Craig, and on the same day the following order was entered on the journal of the court: —

"This cause coming to be further heard on a petition of the defendants for a rehearing, and it appearing that the decree had been enrolled before the said petition for a rehearing was filed in this court, it is ordered by the court, the parties consenting, that the petition for rehearing stand as and for a bill of review, and that the answer to said petition stand as an answer to said bill of review, and that the replication stand as a replication to the said answer. It is further ordered by the court, upon the consent of the parties hereto, that the affidavits taken by the parties and filed herein stand and be treated as depositions, and as such be read on the hearing. And the said cause being submitted by the parties to the court on the original bill, answer, and replication, and the bill of review, answer, and replication thereto, and the proofs, exhibits, and drawings exhibited from the Patent Office, and models filed in the case, as well those used on the original bill, answer, and

replication as those taken and filed with the bill of review, answer, and reply, was taken under advisement."

At the next term, the bill of review was sustained, the original decree reversed, and the bill of the complainant dismissed with costs. At the same term, an appeal by Craig from this decree was allowed, and the following order made: —

"And it is ordered by the court that the clerk of this court transmit to the Supreme Court of the United States the original exhibits, patent certificates, schedules, drawings, and models on file, along with and as part of the record and transcript in this cause."

In making up the transcript of the record the clerk below omitted all the affidavits filed with the bill of review and answer thereto, and sent up the originals. In printing the record for the use of the court those affidavits were omitted, and the court declining to allow them to be used at the hearing on that account, the appellant moved that they be printed, and the hearing suspended until that could be done.

It is necessary to determine at the outset whether the affidavits which were attached as exhibits to the bill of review and the answer thereto, and brought here as original papers and not copied into the transcript, will be considered as part of the proofs in the case.

In the act of 1803 (2 Stat. 244), which first authorized appeals to this court in "cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize," it was provided "that, upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes." Under this statute it was held, in the case of *The Elsineur* (1 Wheat. 439), that, where an inspection of original documents was material to the decision of a prize cause, this court would order the original paper to be sent up from the court below. This decision was made in 1816, and the next year the following rule was promulgated (2 Wheat. vii.): "Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising

circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court on appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings." This rule, with some slight modifications, not at all important to the present inquiry, is still in force as par. 4, rule 8. In 1823, the following rule was adopted (8 Wheat. vi.): "No cause will hereafter be heard until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court." This rule is still in force as par. 3, rule 8. The statute law regulating this subject remained unchanged until 1864, when the "act to regulate prize proceedings and the distribution of prize-money, and for other purposes" (13 Stat. 306), was passed. Sect. 13 of that act provided for appeals in prize causes direct from the district courts, and for the transfer, on proper application, of causes then pending in the circuit courts to the Supreme Court. Then followed this language: —

"All appeals to the Supreme Court from the Circuit Court, in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the District Court to the Supreme Court. In any case of appeal or transfer the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

From this it is clear to our minds that it was the intention of Congress to confine its legislation on this subject to prize causes, leaving the rules of court alone in force as to other cases; but in the revision of this statute this special provision of the act of 1864 was reproduced in sect. 698, which is as follows: —

"Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hear-

ing of the appeal, shall be transmitted to the Supreme Court: *Provided*, that either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes."

Construing this statute in the light of those from which it was taken, and the practice that had prevailed in the courts, which it was undoubtedly intended to confirm, we think the power of the courts below, and of this court, over the transmission of original papers to this court on appeal, is, and should be, confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit. We will not undertake to control the discretion of the courts below in sending up papers which, in their judgment, require inspection; but where papers come up that ought not to be sent, we will look closely to the language of the order below to see whether they are included within its provisions.

Here the papers which have come up are what were used below as ordinary depositions, and there certainly appears to be no good reason why they should not be copied into the transcript. No complaint was made of their authenticity, and, so far as any representations have been made to us, there can be no possible necessity for their inspection. The order of the court was for the transmission of "the original exhibits, patent certificates, schedules, drawings, and models on file, along with and as part of the record and transcript." It is true that the affidavits were attached as exhibits to the bill of review and answer, but we think the term "exhibit" was not used in that sense in the order. The evident purpose of the court was not to send here the original of what was to be read simply, but of what was to be looked at for the impression it was to produce. They ordered up what had been *exhibited* below as contradistinguished from what had been *read*. In that sense, the order conforms to what has always been the practice, from which we are not inclined to depart. Prudence requires that papers which properly belong on the files of a court should never be removed, except in cases of positive necessity, and any thing

which has an opposite tendency should be promptly discouraged here and elsewhere.

For these reasons, we hold that the original affidavits which have been sent up by the clerk below are no part of the transcript in the cause, and that the clerk of this court was right in not having them printed. The motion to print them now is also overruled, because, if printed, they cannot be considered by us a part of the proof. This being so, we must, under the understanding by which the hearing was permitted to go on, consider the case as it was argued; that is to say, as upon a demurrer to the bill of review, or more properly, perhaps, as if the allegations made in the bill of review had been established by the evidence. In this condition of the case we may lay aside all the allegations in respect to the prior undiscovered patent issued to Batcheller, and all the newly discovered applications for patents on file in the Patent Office, rejected for want of patentability or otherwise. There is still left all that relates to the newly discovered evidence of the prior knowledge and use of machines like that patented. The averments as to this are full and complete, and notice of the names and places of residence of the persons alleged to have had such knowledge and to have seen the use is given with sufficient particularity. If the averments in this respect were true, and the newly discovered evidence was such as could be made available by bill of review, there can be no doubt that the original decree was wrong.

It is contended, however, that the evidence could not be used because it related to matters which existed at and prior to the former hearing, and by the use of proper diligence it might have been found and produced at that time, and also because the evidence was cumulative only. The bill avers that due dili gence was used to find the evidence, but without success. This is one of the facts which, for the purposes of this hearing, we are to consider as proved by the evidence submitted below, but not sent here.

There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on the former hearing. "But the allowance of it is not a mat

ter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause." Such was the language of Mr. Justice Story, in *Wood* v. *Mann* (2 Sumn. 334), and he states the rule none too strongly. In the absence of the evidence produced below, we are to presume that this case was brought within this requirement. In the original answer, a prior invention of one Young was set up, which, it was said, was like that of Craig, and the public use of this machine with the consent and allowance of Young in Mobile and Memphis. The new matter alleged in the bill of review relates to other machines used in other places. In legal effect, the bill of review gave new notice of prior knowledge and use by different persons and in different places from those set out in the answer. That a proper case was made for the admission of the evidence may fairly be inferred from the fact that, without submitting that question to the court, all parties went to a hearing, by consent, upon the merits of the case as presented under the original bill and the bill of review.

It is also contended that, even though the review was right, it was wrong to dismiss the original bill on the first hearing, and without an answer on file giving notice of the new matter; that is to say, of the names and places of residence of the persons alleged to have been discovered, who had knowledge of the prior invention and prior use, as required by sect. 4920 of the Revised Statutes. It is a sufficient answer to this to say that the cause was submitted by the parties "on the original bill, answer, and replication, and the bill of review, answer, and replication thereto, and the proofs, . . . as well those used on the original bill, answer, and replication, as those taken and filed with the bill of review, answer, and reply." This was clearly a submission of the whole case on the merits after a review granted. The bill of review contained all the notice to Craig that he could demand, and as it was filed more than thirty days before the final submission of the cause, all the requirements of sect. 4920, Rev. Stat., were substantially complied with.

Decree affirmed

UNITED STATES v. PERRYMAN.

1. An Indian, whose property within the Indian country is stolen by a negro, is not entitled to any payment therefor out of the treasury of the United States.
2. The legislation touching the liability of the United States for the property of friendly Indians which is taken, injured, or destroyed, examined.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the United States.

Mr. Robert S. Davis, contra.

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

This suit was brought to enforce an alleged liability of the United States, under sects. 2154 and 2155 of the Revised Statutes, to pay the value of twenty-three head of beef cattle, stolen from the claimant, a friendly Indian, within the Indian country.

These sections are as follows: —

"SECT. 2154. Whenever, in the commission, by a white person, of any crime, offence, or misdemeanor within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed.

"SECT. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury. But no Indian shall be entitled to any payment out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence."

This is a substantial reproduction of sect. 16 of the act entitled "An Act to regulate trade and intercourse with the

Indian tribes, and to preserve peace on the frontiers," approved June 30, 1834 (4 Stat. 731), and which continued in force until the Revised Statutes went into effect.

The facts are briefly these: On the 18th of December, 1874, Henry Carter, a negro, and not an Indian, and John Conner, a white man, stole from the claimant, a friendly Creek Indian, in the Indian country, the cattle sued for. At the May Term, 1875, of the District Court of the United States for the Western District of Arkansas, both Carter and Conner were indicted for the larceny. Afterwards, a *nolle prosequi* was entered as to Conner, and he was discharged; but Carter was tried, found guilty, and sentenced to pay to the claimant double the value of the cattle stolen, and be imprisoned in the penitentiary. He being unable to pay the judgment, this suit was brought. The Court of Claims was divided on the question whether the United States were liable in such a case for a theft committed by a negro, and, in order to allow an appeal, gave judgment *pro forma* for the claimant. From this judgment the United States appealed.

The single question we have to consider is, whether the United States are liable under the statute to the claimant, since the only offender who has been convicted and sentenced to pay for the property stolen was a negro, and not a white person. The term "white person," in the Revised Statutes, must be given the same meaning it had in the original act of 1834. Congress has nowhere manifested an intention of using it in a different sense. While the negro, under the operation of the constitutional amendments, has been endowed with certain civil and political rights which he did not have in 1834, he is no more, in fact, a white person now than he was then. He is a citizen of the United States, and free. No State can abridge his privileges and immunities as a citizen, or deny him the equal protection of the laws; but his race and color are the same, and he is no more included now within the descriptive term of a white person, than he always has been. If, then, this term was used in the act of 1834 to exclude the liability of the United States for the depredations of the negroes in the Indian country, it must be considered as having been so used in the Revised Statutes. There may be no good reason for

restricting any longer this liability to acts of whites; but until Congress sees fit to change the statute in this particular, the courts are not at liberty to disregard the law as it is left to stand. The question is not as to the effect of the constitutional amendments on an existing statute affecting the civil or political rights of the negro himself, but as to the meaning of the words "white person," when used as words of description in a statute making the United States liable for the acts of the persons described. No rights of the negro himself, as a citizen, or otherwise, are in any way involved.

It is contended, however, that the term "white person," as here used, means no more than "not an Indian;" in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute. The act of 1834 was not the first statute upon this subject. On the 19th of May, 1796, an act was passed "to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers." 1 Stat. 469. In this statute various provisions were made in respect to "any citizen of, or other person resident in, the United States or either of the territorial districts of the United States;" and the liability of the United States for depredations, &c., was extended to certain specified acts of all such persons. This statute expired by its own limitation in 1799, and on the 3d of March of that year another was passed with similar provisions, which continued in force for three years. Id. 743. On the 30th of March, 1802, a permanent statute on the same subject was passed (2 id. 139), making much the same general provisions. In this also various penalties were prescribed for certain acts by "any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States." The liability of the United States for injuries to the property of friendly Indians was extended to the enumerated acts of all "such citizens or other persons," the same as in the statute of 1796. This continued in force until that of 1834, *supra*, was passed. In the statute of 1834 the phrase "any citizen or other person resid-

ing within the United States or the territory thereof" is retained in all the provisions for penalties, &c., except in sect. 16, which was evidently intended to take the place of sect. 4 in the statute of 1802, providing for the liability of the United States for injuries by certain persons to the property of friendly Indians. In that section (16) the words "a white person" were substituted for "any such citizen or other person;" that is to say, "any citizen or other person resident of the United States," &c. It is impossible to believe that this was not done for a purpose. Had the phraseology throughout the entire statute been correspondingly changed, the question might have been different; but, confined as the change was to this particular section, we cannot but think that Congress meant just what the language used conveys to the popular mind. The Cherokee nation, which had given the State of Georgia so much trouble, was about to remove to its new home west of the Mississippi. It was, no doubt, thought if the United States made themselves liable only for such depredations as were committed by the whites, these and other Indians would be less likely to tolerate fugitive blacks in their country. Hence, as a means of preventing the escape of slaves, the change in the law was made. Although the reason of the change no longer exists, Congress has seen fit to keep the law as it was. As the right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute. That he has not done.

The judgment of the Court of Claims will be reversed, and the cause remanded with instructions to dismiss the petition; and it is *So ordered.*

OATES *v.* NATIONAL BANK.

1. The courts of the United States are not bound by the decisions of State courts upon questions of general commercial law.
2. A creditor who before its maturity accepts a negotiable note, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, in consideration of an extension of time granted to the debtor, is, according to the law merchant, a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice.
3. "Bills of exchange and promissory notes, payable in money at a certain place of payment therein designated," are, by an act of the legislature of Alabama, put upon the same basis as to immunity from set-off, discount, or equities as bills and notes payable at a bank or private banking-house. Such declared to be the intention and effect of the act of April 8, 1873, amending sect. 1833 of the Revised Code of that State.
4. The legislative intent, clearly expressed, should not be defeated by too rigid an adherence to the mere letter of the statute, nor an interpretation adopted which leads to absurd consequences.
5. At the request of its debtor, a national bank in Alabama gave him further time, in consideration of his transferring, before maturity, a negotiable note, as collateral security, and paying in advance usurious interest, for the period of extension. The note was so indorsed as to make the bank a party to the instrument, responsible for its due presentation, and for due notice of non-payment. The consideration being in part legal and in part vicious it was *held*, 1st, that the former was itself sufficient to sustain the contract of extension and transfer, and to constitute the bank a holder for value; 2d, that the National Banking Act subjects the bank to liability for taking usurious interest, but does not declare the contract of indorsement void, and that no such penalty being prescribed, the courts cannot superadd it.

ERROR to the Circuit Court of the United States for the Middle District of Alabama.

The facts are stated in the opinion of the court.

Mr. W. Hallett Phillips and *Mr. William C. Oates* for the plaintiff in error.

Mr. H. C. Semple for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error to a judgment in favor of the First National Bank of Montgomery, against Oates, the plaintiff in error, upon a promissory note for $5,200, executed by him at Eufala, Ala., on the twenty-fifth day of July, 1873, and made payable on the 1st of December thereafter, to the order of

B. H. Micow, president, at the office of the Tallassee Manufacturing Company, No. 1, in the city of Montgomery. The consideration of the note was fifty shares of the capital stock of that company purchased by Oates, for which, at the time, he received a certificate in the customary form. As part of the contract of purchase, he took from the company a separate written obligation, reserving to him the option, on the 1st of December, 1873, at the maturity of the note, of surrendering the certificate of stock and receiving his note duly cancelled. It appears that he was induced to buy the stock upon certain representations of the special agent of the company as to its financial condition. These representations were subsequently ascertained by him to have been false and fraudulent.

On or about Nov. 4, 1873, Micow applied to the bank for an extension of time upon certain indebtedness then held by it against the company, amounting to about $40,000, and all of which matured thereafter and in that month. That indebtedness had been previously extended, on several occasions, at usurious rates of interest, paid invariably in advance. The bank signified its willingness to give an extension for thirty, sixty, ninety, and one hundred and twenty days, upon collateral security being furnished, and upon the payment in advance for such extension of interest at the rate of one and one-quarter per cent per month, upon the different classes of the company's paper by it held. These conditions were complied with, and the extension was accordingly made for the periods stated. The required interest was not carried into the extension bills, but was paid in advance. Among the collaterals placed with the bank, under this arrangement, was the note for $5,200 already described, indorsed in blank, "B. H. Micow, Prest."

The evidence was somewhat conflicting as to whether the officers of the bank, at the time of receiving the note in question, had actual notice from Oates as to its consideration. It was, however, conceded that its president had reason to believe the note was given for stock of the company. Oates, although residing at Eufala, was a stockholder and director of the bank. No inquiry was made of him by the officers of the bank, before receiving the note as collateral security, as to any defence

which he might have against its payment. But it was proven by them that, when the extension was given to the company, they had no notice of any defect in or defence to the note, or of any equities, except such notice as might be implied from the foregoing facts and the relations of the parties. It is not claimed that the bank had, at that time, any notice of the separate written obligation of the manufacturing company to which we have already referred.

On the 24th of November, 1873, the bank gave written notice to Oates that it held his note as collateral security for the indebtedness of the company. A few days thereafter he transmitted to the bank the company's agreement or obligation, under which he had purchased the stock and given his note, informing its officers that he had, by the same mail, returned his stock-certificate to the company, and demanded the surrender and cancellation of his note. The bank, replying to this notification, stated that it had purchased the note as negotiable paper, in good faith, for a valuable consideration, and without notice of any private understanding between Oates and the company, its officers or agents.

These are the essential facts developed in the record. We are to inquire whether the court below committed any error of law to the prejudice of the plaintiff in error.

The first contention of the plaintiff in error is, that, by the terms of the contract under which he purchased the stock and gave his note, and in view of the false and fraudulent representations of the company's agent as to its financial condition, he was entitled, as of absolute right, to surrender the certificate of stock and have his note returned or cancelled; and, further, that his defence, upon that ground, was secured to him by the statutes of the State of Alabama, in force when the contract was made.

It is clear that, as between the Tallassee Manufacturing Company and Oates, the defence of the latter is perfect. And it would undoubtedly be sustained, even against the defendant in error, were it true, as claimed, that, by the statutes of Alabama, the transfer of the note was without prejudice to any defence which the maker might assert against the payee. This renders it necessary that we should ascertain to what

extent, if at all, the rights of parties are affected or controlled by the statutes of Alabama.

By sect. 1833 of the Revised Code of that State it is declared that "bills of exchange and promissory notes payable in money, at a bank or private banking-house, are governed by the commercial law, except so far as the same is changed by this code." Sect. 1839 declares that "all contracts or writings, except bills of exchange, promissory notes payable in money at a bank or private banking-house, and paper issued to circulate as money, are subject to all payments, set-offs, and discounts had or possessed against the same, previous to notice of the assignment or transfer."

Thus stood the law of Alabama until April 8, 1873, when, by statute of that date, entitled "An Act to amend sect. 1833 of the Revised Code of Alabama," it was enacted that sect. 1833 (copied in full in the act) "be so amended as to read as follows: 'Bills and notes payable at a banker's or *a designated place of payment*, are *negotiable instruments;* bills of exchange and promissory notes payable in money at a bank or *a certain place of payment therein designated*, are governed *by the commercial law*.'" Acts 1872–73, p. 111. By the same statute, sect. 1833, as it then stood in the Revised Code, was expressly repealed. It should be observed that the words "except so far as the same is changed by this code," in sect. 1833 as it originally stood, are omitted from that section as remodelled by the act of 1873.

The argument of the plaintiff in error is, that although, by the explicit declaration in the act of 1873, "bills and notes payable in money at a certain place of payment, therein designated," are negotiable instruments, to be governed by the commercial law, such bills and notes are, nevertheless, under sect. 1839, "subject to all payments, set-offs, and discounts had or possessed against the same, previous to notice of the assignment or transfer." We concur with the court below in holding that construction to be wholly inadmissible. It seems that upon this precise point there has been no direct adjudication by the Supreme Court of Alabama, to which primarily belongs the duty of giving authoritative construction of the statutes of that State. The only case in that court to which we are

referred, that has any bearing upon this question, is *Cook* v. *Mutual Insurance Co.*, 53 Ala. 37. Jones, it seems, gave to Cook, in 1871, a promissory note, payable to the order of the latter at the office of W. H. Roberts, Mobile, and indorsed by the payee to the insurance company. In an action instituted by the latter against Cook, the question arose as to whether the note was commercial paper, protected, in the hands of a *bona fide* holder for value, against defences resting upon payment, set-off, or discount. The inferior State court ruled that it was paper of that kind; but the Supreme Court of Alabama held that the note, when made, was not commercial paper, and that the rights and liabilities of the parties were to be determined by the statute in force at the date of its execution. That court, speaking by its Chief Justice, said: "Since the making of the promissory note, on the indorsement of which this suit is founded, the statute of April 8, 1873, has converted promissory notes, payable in money at a designated place, into negotiable instruments governed by the commercial law. It operates on the nature and obligation of the contract of the parties to such notes, and cannot be construed as affecting notes made and indorsed prior to its passage. The law in force when the note is made and indorsed regulates and defines the liability of the parties." No other reasons are assigned in support of the conclusion that the act of 1873 did not control the case. It is quite manifest from the language employed by the court, that, had the note there in suit been executed subsequently to the act of 1873, it would have sustained the ruling of the inferior State court, and excluded all defences inconsistent with the established doctrines of the commercial law. Such, in our opinion, must have been its determination upon any proper construction of the act of 1873. It is true that that statute does not in express words *amend* sect. 1839, whereby *only* "bills of exchange and promissory notes, payable in money at a bank or private banking-house, and paper issued to circulate as money," are, in terms, protected against payments, set-offs, and discounts, which the maker might assert in the case of all other contracts and writings. But it is perfectly evident that the object of the act of 1873 was to place bills of exchange and promissory notes, pay-

able at a certain designated place of payment, upon exactly the same basis, as to immunity from set-off, discount, or equities, as the statute prescribed in reference to bills and notes payable at a bank or private banking-house. In declaring that bills and notes of the former class were negotiable instruments, to be governed by the commercial law, the legislature necessarily intended to throw around such paper the same protection that had previously been given by statute to bills and notes payable at banks or private banking-houses. If such was not its object, then, confessedly, the act of 1873 was both meaningless and illusory. The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. *Wilkinson* v. *Leland*, 2 Pet. 627; Sedgwick, Const. and Stat. Constr. 196. And we should discard any construction that would lead to absurd consequences. *United States* v. *Kirby*, 7 Wall. 482. We ought, rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power when thus expressed. The defence of the plaintiff in error would be good under sect. 1839, if no regard was had to the act of 1873; but since that statute expressly included notes payable at a certain designated place in the class of negotiable instruments to be governed by the commercial law, — which could not be if sect. 1839 be enforced according to its literal import, — the judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers." *Suckley* v. *Furse*, 15 Johns. (N. Y.) 338; *The People* v. *Utica Insurance Co.*, id. 357, 380.

For these reasons we are of opinion that the statutes of Alabama do not permit, as against a *bona fide* holder, for value, of a "promissory note, payable in money at a certain place of payment therein designated," defences which are dis-

allowed in cases where the note is payable at a bank or private banking-house.

Giving to the Alabama statute the construction indicated, our next inquiry is, whether the bank, under the circumstances disclosed in this case, became, according to the recognized principles of commercial law, a *bona fide* holder for value of the note in suit. That it acquired the note in good faith, without fraud, we are not permitted by the evidence to doubt. Its officers were not bound to inquire of Oates, before they took the note, whether he had any defence or set-off. They rightfully supposed, as the face of the note imported, that he had undertaken absolutely to pay the amount specified at the time and place designated. That the president of the bank had reason to believe it was given for stock of the Tallassee Manufacturing Company is a fact of no significance whatever in determining the question of good faith. Having no knowledge or notice of the private agreement between Oates and the company, as set forth in the separate obligation of the latter, which was withheld from the public, the bank officers justly assumed that there was no circumstance attending the sale of the stock which could lessen the obligation of Oates to pay the note according to its tenor and effect.

But it is contended that by the rules of commercial law, as recognized by the Supreme Court of Alabama, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value, in the course of business, so as to cut off equities which the maker may have against the payee. Such was declared to be the settled doctrine of that court in *Fenouille* v. *Hamilton*, 35 Ala. 319. But the opinion in that case contains some passages which apply with peculiar force to a suit like this. The court said: "In this case there was no other consideration for the transfer of the note to the defendant than the security of the pre-existing indebtedness of the defendant's indorsee. The fact that the defendant may have been led to grant indulgence, or forbear to enforce his remedies for the collection of the debts, does not prove that such indulgence or forbearance was an element of the contract, or the consideration upon which it was made. If there was any forbearance by the defendant, it was a voluntary act to

which he may have been persuaded by the collateral security, and may have resulted from a consciousness of security; but such forbearance was not the result of contract, and is not shown to have been the consideration of it." Had there been, in that case, a present consideration for the transfer of the note beyond giving security for a pre-existing debt, or had the forbearance of the creditor to enforce his remedies been an element in a binding contract, under which the collateral security was furnished, we are persuaded that the Alabama court would have ruled that the creditor, in receiving the collateral, became a holder for value in the course of business. But, if we are mistaken in our interpretation of the decision of the Supreme Court of Alabama, the result will not follow for which plaintiff in error so earnestly contends. While the Federal courts must regard the laws of the several States, and their construction by the State courts (except when the Constitution, treaties, or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. *Swift* v. *Tyson*, 16 Pet. 1; *Carpenter* v. *Prov. Ins. Co.*, id. 495; *Watson* v. *Tarpley*, 18 How. 517. We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine upon their own judgment as to what these rules and doctrines are.

Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a *bona fide* holder for value of the note in suit. In *Swift* v. *Tyson* (*supra*), cited by counsel, this court, speaking by Mr. Justice Story, said that it entertained no doubt "that a *bona fide* holder for a pre-existing debt of a negotiable instrument is not affected by any equities between antecedent parties, when he has received the same before it became due, without notice of any

such equities." In some of the State courts the authority of that case has been disputed, so far as the language of the court referred to collateral security received for a pre-existing debt, upon the ground that the note there in suit was transferred in payment of, and not as security for, a pre-existing debt, and that, consequently, the opinion expressed in the language just quoted was unnecessary to the decision of the point in issue. In the more recent case of *Goodman* v. *Simonds* (20 How. 334), it was contended that a party who took negotiable paper *merely* as collateral security for a pre-existing debt did not acquire it in the usual course of business, but took it subject to prior equities. The court being of opinion that no such question was presented by the record, waived its consideration. But after an extended review of the authorities, American and English, the court, speaking through Mr. Justice Clifford, said: "It seems now to be agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument, before its maturity, as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is used as collateral."

That language would seem to be conclusive of the question under consideration. There was here a present consideration at the time of the transfer, independent of the indebtedness of the manufacturing company to the bank. That consideration as to the bank was the unconditional extension of time upon all the company's indebtedness, for different periods reaching beyond the maturity of the note transferred as collateral security. Such extension for fixed periods was a cardinal element of the contract. The creditor forbore pursuit of the remedies which the law supplied for the enforcement of his demands, then soon to mature, in consideration of collateral security being furnished, and in consideration also of the payment by the debtor of usurious interest in advance. Besides, having received the note, indorsed so that it became a party thereto,

the bank was bound to observe all the rules of the law merchant as to presentation, protest, and notice of non-payment. It did not receive the note as the agent of the debtor, and merely for collection. It took it under all the responsibility as to presentation, protest, and notice of dishonor, which attached to absolute ownership, and became liable to have the note treated as payment *pro tanto*, if there were a failure to make due presentation, and, in the event of non-payment, to give proper notice to the creditor. The debtor could not withdraw his indorsement after delivering the note, under the contract for extension, nor could the bank, after receiving the note under that contract, disregard its agreement for forbearance. Nor was the bank any the less bound by the contract for extension because of the payment in advance of usurious interest by its debtor. Although the taking of usurious interest subjected the bank to certain forfeitures prescribed by law, and to an action by the debtor, if he so elected, to recover twice the amount so paid by him, it could not, of its own volition or by its own act, avoid the contract for indulgence because of such payment of usury. The payment in advance was itself a sufficient consideration for the extension, in the sense that the bank would not be allowed to repudiate its agreement, upon the ground that it had taken usurious interest in violation of law. 2 Daniel, Neg. Inst., sect. 1317. But independent of that aspect of the case, and throwing out of view altogether the usurious feature of the contract, we are of opinion that a creditor, who takes a negotiable note before maturity, so indorsed that he becomes a party to the instrument as collateral security for a pre-existing debt, and in consideration of an extension of time to the debtor, actually granted, is, according to the law merchant, a holder for value, and that his rights as such holder cannot be affected by equities between antecedent parties, of which he had no notice. *Goodman* v. *Simonds*, *supra;* 1 Parsons, Notes and Bills, 221–228; Story, Promissory Notes, sect. 195, notes (7th ed., by Thorndike); 1 Daniel, Neg. Inst. (2d ed.), sects. 820, 832, and notes; Leading Cases upon Bills of Exchange and Promissory Notes, by Redfield and Bigelow, 186–217, and notes. Whether the taking of such note merely as collateral security for antecedent debts, without any binding

contract for indulgence, would constitute a valuable consideration within the established rules of commercial law, protecting the creditor against defences or equities between antecedent parties, of which he had no notice, it is not necessary now to decide. That precise question is not presented in this case, and we forbear to express any opinion upon it.

One other question remains to be considered. Counsel for plaintiff in error have pressed with much vigor the suggestion that the bank, consistently with public policy, should not be regarded as a *bona fide* holder for value of the note in suit, since the contract under which it received the note involved in its execution a direct violation of the statutes against usury. We are referred in support of that position to several decisions of the Supreme Court of Alabama which, it must be conceded, announce the broad doctrine that one "who has become the indorsee of a bill, by violating the provisions of a statute, cannot with any degree of propriety be said to be a *bona fide* holder in the usual course of trade." 13 Ala. 410; 14 id. 688; 16 id. 406. Without extending this opinion by a critical examination of those cases, we repeat that in the determination of such a question we are not bound by the decisions of the State court. The question is one of general law, and depends in nowise for its solution upon local laws and usages.

We are referred, in this connection, to two cases, *Levy* v. *Gadsby* (3 Cranch, 180), and *Gaither* v. *The Farmers' & Mechanics' Bank*, 1 Pet. 37. The first is so meagrely reported that it is difficult to see the precise ground upon which the conclusion of the court was placed, and the second is clearly distinguishable from this. There, a note was indorsed and delivered as collateral security for a pre-existing debt, evidenced by a note given on a usurious contract. The case was held to be governed by the statute of Maryland, which declared "all bonds, contracts, and assurances whatever, taken on a usurious contract," to be utterly *void*. Under that statute the contract of indorsement was held to be void. In the eye of the law, it was as though it had never existed, and consequently no cause of action, it was adjudged, passed to the indorsee.

The case in hand is altogether different. The statute under

which the bank was organized, known as the National Banking Act, does not declare the contract, under which the usurious interest is paid, to be *void*.

It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. "On what principle could this court add another to the penalties declared by the law itself?" *De Wolf* v. *Johnson*, 10 Wheat. 367; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *Barnett* v. *National Bank*, 98 id. 555.

Besides, in this case, the forbearance extended to the debtor was not upon the sole consideration of usurious interest paid in advance: it was upon the additional and substantial consideration that the debtor corporation gave collateral security for the payment of indebtedness about to mature, and which it confessed its inability to meet. We have already seen that the transfer of the note before maturity, as collateral security, and so indorsed that the bank became a party to the instrument under obligation to make due presentment and give due notice of non-payment, was itself a sufficient consideration to constitute the bank a *bona fide* holder for value, within the recognized principles of the law merchant. The presence, then, in the contract under which the note was indorsed and delivered to the bank of an additional consideration, — the payment in advance of usurious interest, — which the law declares to be vicious and illegal, ought not to destroy the entire contract of indorsement, when there is a sufficient consideration, aside from the usury paid, upon which it may rest.

We are of opinion that no error of law was committed by the court below.

Judgment affirmed.

TRENOUTH *v.* SAN FRANCISCO.

1. The history of the title of San Francisco to her municipal lands stated.
2. The act entitled "An Act to quiet the title to certain lands within the corporate limits of the city of San Francisco," approved March 8, 1866 (14 Stat. 4), confirmed her claim, in trust that certain lands should be disposed of and conveyed to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the act. *Held*, that trespassers then in possession of the lands, who were afterwards ejected therefrom at the suit of those upon whose prior possession they had intruded, are not beneficiaries under the act; but that the parties who so recovered the possession are entitled to a conveyance from the city.
3. A party cannot initiate a pre-emption right to public land by intrusion upon the actual possession of another; nor by settling upon land in California, a claim to which, under a foreign title, is at the time pending before the tribunals of the United States for confirmation.

ERROR to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

Mr. Walter Van Dyke for the plaintiff in error.

Mr. S. M. Wilson, *Mr. Edward Janin*, and *Mr. Edmond L. Goold*, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This was a suit to charge the defendants as trustees of certain land in the city of San Francisco, and to compel a conveyance of the legal title to the plaintiff. The case is free from difficulty, but to understand the positions of the plaintiff it will be necessary to state briefly the history of the titles to lands in that city.

At the time of the conquest of California by the forces of the United States, on the 7th of July, 1846, there was a Mexican pueblo at the site of the present city of San Francisco. This term "pueblo," in its original signification, means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality. *Grisar* v. *McDowell*, 6 Wall. 363. The pueblo at San Francisco was a small settlement, but it was of sufficient importance, as early as

1835, to have an ayuntamiento, composed of alcaldes and other officers; and it was under their government for some years. At the time of the conquest, and for some time afterwards, it was under the government of justices of the peace, or alcaldes.

By the laws of Mexico, in force in California on the acquisition of the country, pueblos or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of the lands embracing the site of such pueblos or towns and adjoining territory within the limits of four square leagues, to be measured and assigned to them by the officers of the government. Under those laws the pueblo of San Francisco asserted a claim to four square leagues, to be measured off from the northern portion of the peninsula upon which the present city is situated.

The alcaldes of a pueblo exercised the power of distributing the lands of the town in small parcels to its inhabitants for building, cultivation, or other uses, the remainder being gen erally retained for commons or other public purposes.

When the town of San Francisco was occupied by our forces, citizens of the United States were appointed by the military or the naval commanders to act as alcaldes in the place of the Mexican officers. Upon the sudden increase of population at that place, following the discovery of gold, the alcaldes were called upon for building-lots in great numbers, and those officers distributed them with a generous liberality usually attending the grant of other people's property. Numerous persons, however, arriving at the town were not disposed to recognize the authority in this respect of the American magistrates, and finding it less troublesome to appropriate what land they needed than to apply to the magistrates for it, they asserted that the land on which the pueblo was situated belonged to the United States, and, as evidence of the sincerity of their convictions, immediately proceeded to take as much of it for themselves as they could conveniently enclose and hold. Thus the town was soon filled with an active and restless population, making large and expensive improvements upon lands held in some instances under grants from the alcaldes, and in others by the right of prior possession. Sometimes the same parcel

was claimed by different parties; by one party as a settler, and by another as the holder of an alcalde grant. Disputes both in and out of the courts, the natural consequence of this difference in the origin of the titles of the claimants, were greatly increased in bitterness by the enormous value which in a short period the lands acquired.

In April, 1850, soon after the organization of the State government, San Francisco was incorporated as a city by the legislature. She at once made claim to the lands of the pueblo, as its successor; and, when the board of land commissioners was created under the act of Congress of March 3, 1851, she presented the claim for confirmation. In December, 1854, the board confirmed the claim for only a portion of the four square leagues. Dissatisfied with the limitation of the claim, the city appealed from the decree of the commissioners to the District Court of the United States. The government also appealed, though subsequently it withdrew its appeal. The case remained in the District Court undetermined until September, 1864, a period of nearly ten years, when, under the authority of an act of Congress, that court transferred the case to the Circuit Court, where it was decided in the following October. The decree, finally settled and entered May 18, 1865, confirmed the claim to a tract of land embracing so much of the upper portion of the peninsula upon which the city is situated, above the ordinary high-water mark of 1846, as would contain an area of four square leagues, — the tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area designated, subject to certain deductions, which it is unnecessary to mention here. The lands were confirmed to San Francisco in trust for the benefit of lot-holders under grants from the pueblo, town, or city, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city. As already stated, the city was incorporated in April, 1850. The charter she then received was repealed, and a new charter granted in April, 1851. The limits of the city, as defined by this latter charter, embraced an area of over two miles square. The lands lying outside of these charter limits

are designated in the subsequent legislation of the city and State, and frequently in the decisions of the courts, as outside lands.

Pending the appeal of the pueblo claim in the District Court, the city passed an ordinance, known in its history, from the name of its author, as the Van Ness Ordinance, the object of which was to settle and quiet the title of persons holding land in the city. It relinquished and granted all the right and claim of the city to land within the corporate limits as defined by the charter of 1851, with certain exceptions, to parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the com mon council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that, for all the purposes contemplated by the ordinance, persons should be deemed possessors who held titles to lands within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo, before the 7th of July, 1846, or by virtue of a grant subsequently made by those authorities, within certain limits of the city, previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. In March, 1858, the legislature ratified and confirmed this ordinance; and on the 1st of July, 1864, Congress relinquished and granted to the city all the interest of the United States to the lands within the corporate limits of 1851, in trust for the uses and purposes of the ordinance. Thus the contention of the different claimants to land within those limits was settled, their titles secured, and the usual result of quieting titles, progress and prosperity, followed.

But appeals were prosecuted to the Supreme Court, both by the United States and by the city, — by the United States from the whole decree, and by the city from so much of it as included the reservations in the estimate of the quantity of land confirmed. Whilst these appeals were pending, and on the 8th of March, 1866, Congress passed an act to quiet the title to

certain lands within the corporate limits of the city. At this time, the limits had been extended so as to be coincident with those of the county, and embraced the whole of the four square leagues confirmed. By this act, all the right and title of the United States to the land covered by the decree of the Circuit Court were relinquished and granted to the city, and the claim to the land was confirmed; subject, however, to certain reservations and exceptions, and upon trust that all the land not previously granted to the city should be disposed of and conveyed by the city to the parties in the *bona fide actual possession thereof, by themselves or tenants, on the passage of the act*, in such quantities and upon such terms and conditions as the legislature of the State of California might prescribe, except such parcels thereof as might be reserved and set apart by ordinance of the city for public uses. The appeals to the Supreme Court were accordingly dismissed. *Townsend* v. *Greeley*, 5 Wall. 326. The title of the city to the land within the four square leagues rests, therefore, upon the decree of the Circuit Court, as entered on the 18th of May, 1865, and this confirmatory act of Congress. By this act, the government expressed its will with respect to the claim of the city, and the conditions upon which it should be recognized and confirmed. As was said by this court, in *Grisar* v. *McDowell*, "in the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode; and, having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts; and it may arrest the action of board or courts at any stage. 6 Wall. 379.

The title of the city being thus settled, its authorities proceeded under the provisions of the confirmatory act, and reserved and set apart grounds for parks and other public

purposes. But, as these grounds were in many instances occupied, the city passed an ordinance known as No. 800, subsequently ratified by the legislature, by which a general assessment was levied upon all the lands conveyed to occupants as a condition of receiving deeds from the city, the money thus raised to be applied towards compensating those whose lands were thus taken for public purposes.

Some of the defendants, and parties through whom the others claim, had been in the actual possession of the land in controversy here before the passage of the act of 1866; but their possession had been intruded upon by violence, and they driven from the land by parties through whom the plaintiff claims. One of the intruding parties afterwards set up a claim that he entered as a pre-emptioner under the laws of the United States. Subsequently, the excluded parties recovered possession by suit; and the judgment in their favor was affirmed on appeal by the Supreme Court of the State. They then transferred the property, for the sake of convenience and expedition in securing the title, to one of their number, who applied to the city authorities and obtained a deed of the premises, first paying the assessment levied upon it and the taxes due. Under this deed the defendants hold the property. The plaintiff, representing the claims of the intruding and subsequently ejected parties, and insisting that they were beneficiaries under the act of Congress, because upon its passage they were in the actual possession of the property, brought the present suit to charge the defendants as trustees of the legal title for his benefit. The District Court and the Supreme Court of the State were of opinion that, upon his own showing, his grantors, the intruders mentioned, were never in the *bona fide* possession of the property, within the meaning of the act of Congress; and we agree with them in this respect. The claim of one of the intruders as a pre-emptioner was equally unfounded, — 1st, because the right of pre-emption, under the laws of the United States, cannot be acquired by intrusion and trespass upon lands in the actual possession of others; 2d, because the lands were claimed under a foreign title, — that of the pueblo from Mexico, — the claim to which was then pending before the tribunals of the United States.

The possession obtained by the intrusion and trespass of the plaintiff's grantors constitutes no ground for equitable relief against the holders of the city title; and the assertion of a possession thus obtained has as little merit as the lawless and unjustifiable conduct of the intruders in seizing the property.

Judgment affirmed.

TENNESSEE *v.* DAVIS.

1. Sect. 643 of the Revised Statutes of the United States, which declares that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, . . . the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court," &c., is not in conflict with the Constitution of the United States.

2. A. was, in a State court of Tennessee, indicted for murder. In his petition, duly verified, for removal of the prosecution to the Circuit Court of the United States, he stated that, although indicted for murder, no murder was committed; that the killing was done in necessary self-defence, to save his own life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue; that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal-revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries and the apparatus used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce said laws, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire, which is the killing mentioned in the indictment. *Held*, that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States for that district.

3 The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While limited in the number of its powers, it is, so far as its sovereignty

extends, supreme. No State can exclude it from exercising them, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which the Constitution has committed to it.

4. The general government must cease to exist whenever it cannot enforce the exercise of its constitutional powers within the States by the instrumentality of its officers and agents. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of the States. No such element of weakness is to be found in the Constitution.

5. The provision of the Constitution declaring that the judicial power of the United States extends "to *all* cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," embraces alike civil and criminal cases. Both are equally within that power.

6. A case arises under that Constitution not merely where a party comes into court to demand something conferred upon him by the Constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defence of a party, in whole or in part depends upon the construction of either. It is in the power of Congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law.

7. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the Federal court does not invade State jurisdiction. On the contrary, a denial of the right of the general government to remove, take charge of and try any case arising under the Constitution and laws of the United States, is a denial of its conceded sovereignty over a subject expressly committed to it. It is a denial of a doctrine necessary for the preservation of the acknowledged powers of the government. The exercise of the power to remove criminal prosecutions is seen in the act of Feb. 4, 1815 (3 Stat. 198), again in the third section of the act of March 2, 1833 (4 id. 633), and more recently in the act of July 13, 1866. 14 id. 171.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Middle District of Tennessee.

James M. Davis, was, in the Circuit Court for Grundy County, in the State of Tennessee, indicted for murder. On the twenty-ninth day of August, 1878, before the trial of the indictment, he presented to the Circuit Court of the United States for the proper district the following petition, praying for a removal of the case into that court, and for a *certiorari*: —

"Your petitioner, James M. Davis, would most respectfully show to the court that on the twenty-first day of May, 1878, at the May Term of the Circuit Court of Grundy County, Tennessee, the grand jurors for the State of Tennessee, at the instance of E. M. Haynes, as prosecutor, indicted your petitioner for wilfully, premeditatedly, deliberately, and of his malice aforethought killing one J. B. Haynes, which indictment and criminal prosecution so instituted is still pending against your petitioner in the Circuit Court of Grundy County, within the middle district of Tennessee.

"And he further shows that no murder was committed; but, on the other hand, the killing was committed in his own necessary self-defence, to save his own life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defence, while engaged in the discharge of the duties of his office as deputy collector of internal revenue; and he was acting by and under the authority of the internal-revenue laws of the United States, and was done under and by right of his office, to wit, as deputy collector of internal revenue. It is his duty to seize illicit distilleries and the apparatus that is being used for the illicit and unlawful distillation of spirits, and while so attempting to enforce the revenue laws of the United States, as deputy collector aforesaid, he was assaulted and fired upon by a number of armed men, and in defence of his life returned the fire.

In view of these facts, your petitioner prays that said cause may be removed from the Circuit Court of Grundy County to the Circuit Court of the United States for the Middle District of Tennessee for trial, and that a *certiorari* issue. And as in duty bound he will ever pray.

"JAMES A. WARDER, *Attorney.*

"DISTRICT OF MIDDLE TENNESSEE, }
"*County of Davidson:* }

"James M. Davis, being duly sworn, deposes and says that he is the petitioner named in said petition; that he has heard the same read, and knows the contents thereof, and that the same is true of his own knowledge.

"JAMES M. DAVIS.

"Subscribed and sworn to before me this Aug. 13, 1878.

"J. W. CAMPBELL,
"*U. S. Com'r for Middle Tenn.*"

The record having been returned, in compliance with the writ, a motion was made to remand the case to the State court; and, on the hearing of the motion, the judges were divided in opinion upon the following questions, which are certified here: —

First, Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under sect. 643 of the Revised Statutes.

Second, Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress.

Third, Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

Mr. Benjamin J. Lea, Attorney-General of Tennessee, and *Mr. James G. Field* for the plaintiff in error.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an act of Congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the act of Congress admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defence, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector; that he was

acting by and under the authority of the internal-revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire. The petition was verified by oath, and the certificate required by the act of Congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if sect. 643 of the Revised Statutes embraces criminal prosecutions in a State court, and makes them removable, and if that act of Congress was not unauthorized by the Constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law," the case may be removed into the Federal court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have

been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the act of Congress does provide for the removal of criminal prosecutions for offences against the State laws, when there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any act of Congress, and that it is an offence against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in State tribunals, and it is argued that the act of Congress cannot mean what it says, but that it must intend only such prosecutions in State courts as are for offences against the United States, — offences against the revenue laws. But there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether sect. 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin* v. *Hunter* (1 Wheat. 363), "the general government must cease to exist whenever it loses the

power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by

the second section of the third article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c. This provision embraces alike civil and criminal cases arising under the Constitution and laws. *Cohens* v. *Virginia*, 6 Wheat. 264. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379. It was said in *Osborn* v. *The Bank of the United States* (9 Wheat. 738), "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States, when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption

from State control." . . . "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, sect. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company* v. *Whitton* (13 Wall. 270), we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preserva-

tion of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in State courts, cases under the Constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the general government and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in State courts as they are in civil cases, in proportion to their number.

The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defence presents a case arising out of an act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty

of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

It is true, the act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from State courts into the circuit courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an act was passed (3 Stat. 198) providing that if any suit *or prosecution* should be commenced in any State court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for any thing done by virtue of the act or under color thereof, it might be removed before trial into the Circuit Court of the United States, provided the act should not apply to any offences involving corporal punishment. This act expressly applied to a criminal

action or prosecution. It was intended to be of short duration, but it was extended by the act of March 3, 1815 (3 Stat. p. 233, sect. 6), and re-enacted in 1817 for a period of four years.

So, in 1833, by the act of March 2 (4 id. c. 57, sect. 3), it was enacted that in any case where suit *or prosecution* should be commenced in a State court of any State against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the Federal Circuit Court of the proper district. The history of this act is well known. It was passed in consequence of an attempt by one of the States of the Union to make penal the collection by United States officers within the State of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the Senate by a vote of 32 to 1, and in the House by a majority of 92. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the Judiciary Committee which introduced the bill said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. *Whether in criminal or civil cases, it gives this right of removal.* Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. . . . It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed for ever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

The provisions of the act of July 13, 1866 (14 Stat. 171

sect. 67), relative to the removal of suits or prosecutions in State courts against internal-revenue officers, provisions re-enacted in sect. 643 of the Revised Statutes, are almost identical with those of the act of 1833, the only noticeable difference being, that in the latter act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word "prosecution" is, a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the Constitution has been that it authorizes the removal from State courts to the circuit courts of the United States, alike civil and criminal cases, arising under the laws, the Constitution, or treaties.

The subject has more than once been before this court, and it has been fully considered. In *Martin* v. *Hunter* (1 Wheat. 304), it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that Congress might authorize a removal either before or after judgment; that the time, the process, and the manner must be subject to its absolute legislative control. In that case, also, it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only upon the parties, and not upon the State courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would in many cases be rights without corresponding remedies." . . . "In respect to criminal prosecutions there would at once be an end of all control, and the State decisions would be paramount to the Constitution." The expression that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable has been laid hold of here, in argument, as a declaration of the court that criminal prosecutions cannot be removed. It is a very shortsighted and unwarranted inference. What the court said was, that the remedy in such cases seems to be insurmountable, *if it could not act upon State courts as well as parties;* and it was ruled that it does thus act. The expression must be read in its

connection. In *Martin* v. *Hunter* the removal was by writ of error after final judgment in the State court; which certainly seems more an invasion of State jurisdiction than a removal before trial. The case was followed by *Cohens* v. *Virginia* (6 id. 264), a criminal case, in which the defendant set up against a criminal prosecution an authority under an act of Congress. There it was decided that cases might be removed in which a State was a party. This also was a writ of error after a final judgment; but it, as well as the former case, recognized the right of Congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In *The Mayor* v. *Cooper* (6 Wall. 247), the validity of the removal acts of 1863, March 3, sect. 5 of c. 81 (12 Stat. 756), and its amendment of May 11, 1866 (14 id. 1866), which embraced not only civil cases but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: The constitutional power is given in general terms. "No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. How jurisdiction shall be acquired by the inferior court" (of the United States), "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature." "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." The court added, "We entertain no doubt of the constitutionality of the jurisdiction given by the act under which this case has arisen." See also *Com.* v. *Ashmun*

3 Grant, Cas. 436; id. 416–418; *State* v. *Hoskins* (77 N. C. 530), decided in 1877, where the constitutionality of sect. 643 of the Revised Statutes was affirmed after a full and instructive discussion.

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against State laws from State courts to the circuit courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of Federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is, "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the

trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

The first question will be answered in the affirmative, and the second is answered as in the opinion.

MR. JUSTICE CLIFFORD, with whom concurred MR. JUSTICE FIELD, dissenting.

Civil suits or criminal prosecutions, commenced in a State court against a revenue officer of the United States, on account of any act done under color of his office, or on account of any right, title, or authority claimed by such officer under such law, may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, in the manner prescribed in the section conferring the right. Rev. Stat., sect. 643.

Sufficient appears to show that the prisoner was formally indicted of murder in the first degree by the grand jury of the State, that the indictment was duly filed in the proper State court for trial, and that it was subsequently removed into the Circuit Court of the United States for the district, on motion of the accused. Neither the indictment nor the order of removal is exhibited in the transcript. Instead of that, the statement is that the Attorney-General of the State moved in the Circuit Court to remand the cause to the State court in which the indictment was found. Hearing was had, and it appears that the judges of the Circuit Court were divided in

opinion whether the motion of the Attorney-General ought or ought not to be granted.

Appended to the first question certified by the judges of the court is a paper which purports to be the petition of the prisoner under which the order of removal was granted. From that it appears that the homicide charged is admitted, but that the defence is that the killing by the prisoner was in self-defence, to save his own life; that he was and still is a deputy collector of internal revenue; and that the act for which he is indicted, as he alleges, was performed in self-defence while he was engaged in the performance of the duties of his office. Speaking more specifically, he states that it is his duty to seize illicit distilleries and the apparatus that is being used for the illicit and unlawful distillation of spirits, and that while attempting to enforce the revenue laws he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire.

Three questions are certified, as follows: 1. Is an indictment in a State court for murder, under the facts set forth in the petition for removal in this case, removable to the Circuit Court, under sect. 643 of the Revised Statutes? 2. If removable from the State court, is there any mode of procedure in the trial prescribed by an act of Congress? 3. And if not, can a trial of the guilt or innocence of the prisoner be had in the Circuit Court?

Questions of greater importance than those certified here by the Circuit Court could hardly be presented for discussion, as they involve the necessity of an inquiry into the nature, extent, and limitation of the judicial power both of the United States and of the circuit courts established by Congress. Judicial power, like other powers granted to the United States by the Constitution, is defined by the instrument making the grant. Governed by that rule, we find that the second section of the third article ordains that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, which provision describes the whole extent of the judicial power of the United States conferred by the Constitution that it is necessary to examine in

the present case. Other clauses in the same section enumerate numerous other subject-matters falling within the cognizance either of the Supreme Court or of the inferior courts created by Congress; but it will not be necessary to examine those clauses, as they have no bearing upon the questions to be answered.

Pursuant to the first section of the third article, the Congress passed the Judiciary Act, making provision for the organization of the Supreme Court, and establishing the circuit and district courts. 1 Stat. 73.

Jurisdiction of crimes and offences committed within their respective districts, and cognizable under the authority of the United States to a limited extent, was by that act conferred upon the district courts; but the eleventh section of the act provided that the circuit courts should have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where the act otherwise provides, and concurrent jurisdiction with the district courts of the crimes and offences cognizable in those courts. id. 78.

Neither the district nor circuit courts have jurisdiction of any crimes or offences by that act, unless the same are cognizable under the authority of the United States. Criminal jurisdiction is not by the Constitution conferred upon any court, and it is settled law that Congress must in all cases make an act criminal and define the offence before either the district or circuit courts can take cognizance of an indictment charging the act as an offence against the authority of the United States. Obvious and undoubted as the proposition is, it admits of but little illustration, and needs nothing more.

Powers expressly enumerated are granted to Congress, and such as shall be necessary and proper for carrying the enu merated powers into execution, or, in other words, the powers of Congress are made up of concessions from the people of the several States, with such implied powers as are necessary and proper to carry the express concessions into effect, subject to the limitation that whatever is not expressly granted or necessarily or properly implied to carry the granted powers into effect is reserved to the States respectively, or to the people. Like the other powers specified, the judicial power of the

United States is a constituent part of those concessions from the several States, and as was held by this court at a very early period, it is to be exercised by the Supreme Court or such inferior courts as the Congress may from time to time ordain and establish.

Of all the courts which the United States may, under their general powers, constitute, one only — the Supreme Court — possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts organized by the general government possess no jurisdiction but what is given by the power that created them, and they can be vested with none except what the power ceded to the United States will authorize the Congress to confer. Certain implied powers, it is admitted, must necessarily result to courts of justice, — such as to fine for contempt or imprison for contumacy, — but the jurisdiction of crimes against the authority of the United States is not among such implied powers, the universal rule in the Federal courts being that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment, before any Federal tribunal can determine the guilt or innocence of the supposed offender. *United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415; 1 Whart. Crim. Law (7th ed.), sect. 163.

In accordance with that rule, it was held by the whole court, Marshall, C. J., delivering the opinion, that the Circuit Court could not take cognizance of the crime of murder committed on board of one of our ships of war lying in a harbor within State jurisdiction, because the eighth section of the Crimes Act, by which alone any provision had been made for the punishment of such a crime on shipboard, only defines offences perpetrated upon the high seas or in any river, haven, basin, or bay out of the jurisdiction of any particular State. *United States* v. *Bevans*, 3 Wheat. 336, 387.

It was argued in behalf of the prosecution in that case that the jurisdiction existed because the homicide was committed on board a ship of war; but Mr. Webster denied the proposition, and contended that the jurisdiction of the Circuit Court

was only such as had been given to it by an act of Congress, and insisted that it was sufficient to maintain for the prisoner that no act of Congress authorized the Circuit Court to take cognizance of any offences merely because they were committed on ships of war. Instead of that, he insisted that it was the nature of the place in which the ship lies and not the character of the ship itself that decides the question of jurisdiction; and added, that if committed within the territorial jurisdiction of the State it excluded the jurisdiction of the Circuit Court by express exception, the language of the act only giving authority to try and punish offenders for offences committed upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State.

Commenting upon that provision, the Chief Justice said, It is not the offence, but the bay in which it is committed, which must be out of the jurisdiction of the State, adding that, unless the place itself be out of the jurisdiction of the State, Congress has not given cognizance of the offence to the circuit courts. *United States* v. *Wiltberger*, 5 Wheat. 76, 96.

Apply the conclusion reached in those two cases to the question under discussion, and it is clear that, in order to ascertain the jurisdiction of the Federal courts in criminal cases, resort must be had to the acts of Congress providing for the punishment of crimes; for although such courts are unquestionably to look to the common law, in the absence of statutory provision, for rules of guidance in the exercise of their functions in criminal as well as in civil cases, it is to the acts of Congress passed in pursuance of the Constitution alone that they must have recourse to determine what constitutes an offence against the authority of the United States, it being settled law that the United States have no unwritten code to which resort can be had as a source of jurisdiction. Conkling's Treatise (5th ed.), 181.

Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offence, or declare it punishable as such, until it has been defined as an offence by an act of Congress passed in pursuance of the Constitution. Argument to show that Congress has never

defined the act of murder, at a place within the exclusive jurisdiction of a State, as an offence against the authority of the United States, is certainly unnecessary, as no sane man will venture to advance such a proposition; nor will any one who ever looked into the record of this case deny that the place where the homicide which is the subject of inquiry was committed is in the exclusive jurisdiction of the State whose laws were violated by the perpetrator of the felonious act. None of these matters can be denied consistent with the truth of the facts as judicially known to every member of the court.

Offences against the authority of the United States, defined by an act of Congress passed in pursuance of the Constitution, are cognizable in the circuit courts by virtue of the eleventh section of the Judiciary Act, whether committed upon the high seas or in any river, haven, basin, or bay out of the jurisdiction of any particular State, or in any fort, dockyard, arsenal, armory, or magazine, or any other place the exclusive jurisdiction of which is ceded to the United States. Cognizance in criminal cases may also be given to those courts, of offences against the national authority, if properly defined by an act of Congress, when they are committed in violation of such an act passed pursuant to the second section of the third article of the Constitution, which extends the judicial power to all cases in law and equity arising under the Constitution, the laws of Congress, and the treaties therein specified. 1 Whart. Cr. Law (7th ed.), 174–180, inclusive.

Exceptional cases undoubtedly arise where it may properly be said that the citizen owes allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either, where the same act is a transgression and defined offence under the laws of both. Thus, an assault on the marshal or hindering him in the execution of legal process is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, if it results in a riot. assault, or murder, and may subject the same person to the punishment prescribed by the State laws. *Moore* v. *Illinois*, 14 How. 13.

Federal sovereignty as well as the sovereignty of the States is limited and restricted by the Constitution. Certain powers, legislative, executive, and judicial, are possessed by each, independent of the other; and in the exercise of such powers all agree that they act as separately and independently of each other as if the line of division was traced by landmarks visible to the eye. *Ableman* v. *Booth*, 21 How. 506, 516.

Both governments, though there be but one act, if the jurisdiction is dual, and the act charged is defined by the laws of each as an offence, may subject the offender to punishment; nor can he plead the conviction and sentence in one forum in bar to an indictment in the other, as the act committed was an offence against the authority of each. *Fox* v. *The State of Ohio*, 5 How. 410; *United States* v. *Marigold*, 9 id. 560.

Passing and uttering counterfeit coin was the charge in the first case, and it appears that the defendant, having been convicted in the State court, removed the cause into this court, and assigned for error that the court below had no jurisdiction of the offence; but this court held that the State law was valid, that offenders falling within the power of different sovereignties may be triable in each for the same act, and may properly be subjected to the penalties which each assigns to the perpetration of the act. When carefully examined, it will be found that the second case decides the same point in the same way, — that the same act may in certain cases constitute an offence against both the State and the United States, and that it may draw to its commission the penalties denounced by each for the commission of the act. *United States* v. *Amy*, 14 Md. 135, n., per Taney, C. J.; Cooley, Const. Lim. (4th ed.) 25.

Viewed in the light of these suggestions, it seems reasonable to conclude that Congress might define the malicious killing of a revenue collector with malice aforethought, while in the performance of his official duties, as murder, and might make provision for the trial and punishment of the offender, even though the homicide was committed at a place within the exclusive jurisdiction of the State. Congress may provide for the appointment of officers to collect the public revenue, and, if so, they may pass constitutional laws for their protection;

but Congress has not defined the act charged in the State indictment as an offence against the authority of the United States, nor does any act of Congress prescribe the punishment to be inflicted for its commission, or declare what court shall have jurisdiction of the offence.

Ample power, it was conceded, was vested in Congress to provide for the punishment of murder committed by a person serving on board a public ship of war, wherever the ship might be; but inasmuch as Congress had not defined the act of killing at that place as a crime, nor affixed a punishment to it, nor declared the court that should have jurisdiction of the offence, this court unanimously decided, Marshall, C. J., giving the opinion, that a murder committed on board a ship of war lying within the harbor of Boston was not cognizable in the Circuit Court of the District of Massachusetts, and the case was remanded with a certificate to that effect. *United States* v. *Bevans*, 3 Wheat. 336, 391.

Since that decision the law has been considered as settled that the circuit courts have no jurisdiction to try and sentence an offender, unless it appears that the offence charged is defined by an act of Congress, and that the act defining the offence, or some other act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offence. *United States* v. *Wiltberger*, 5 id. 76.

Homicide resulting from the acts of a party in opposing an officer, employed in the enrolment of men for the military service during the late rebellion, was defined by an act of Congress to be murder and punishable with death; and the same section enacted that the conviction of the party of that offence in the Circuit Court should not relieve him from liability for any crime committed by him against the laws of the State. 13 Stat., p. 8, sect. 12; *United States* v. *Gleason*, 1 Woolw. 75; *Same* v. *Same*, id. 128.

Decided cases everywhere hold that unless Congress first defines the offence, affixes the punishment, and declares, in some way, the court that shall have jurisdiction of the accusation, the Circuit Court can neither try the accused nor sentence him to punishment. Even the power of Congress to define offences and provide for the punishment of offenders is limited

to such subjects and circumstances as relate and are peculiar to the Federal government. Money may be coined by that government, and therefore Congress may provide for the punishment of counterfeiting the national coin. Congress may establish post-offices and post-roads, and therefore the Legislative Department may pass laws providing for the punishment of persons robbing the mails; but the Congress cannot enact laws for punishing persons for counterfeiting State bank issues, or for robbing express companies established by State authority. *United States* v. *Ward*, id. 17, 20.

Offices may be created by a law of Congress, and officers to execute the duties of the same may be appointed in the manner specified in the Constitution; and it is not doubted that Congress may pass laws for their protection, and for that purpose may define the offence of killing such an officer when in the discharge of his duties. Concede that, and it follows that if the punishment for the offence is affixed, and the jurisdiction is given to the circuit courts, those courts may try the offender, if legally indicted, and if duly convicted may sentence him to the punishment which the act of Congress prescribes. Beyond all question, the jurisdiction of the Circuit Court over such an indictment would be complete; but the difficulty in the way of the prosecutor in this case is that there is no act of Congress defining the offence charged in the indictment, nor is there any provision in such law providing for the punishment of such an offence, or which gives the Circuit Court or any other Federal court jurisdiction to try or sentence the offender.

Enough appears in these observations to show that, even if the indictment in this case had been found against a citizen of the State for murdering the revenue officer while engaged in the discharge of his official duties, the Circuit Court would not, under existing laws, have jurisdiction to try and sentence the offender, for the reason that the offence is not defined by any act of Congress, nor is there any act of Congress giving such jurisdiction to the circuit courts.

Judicial authorities to that effect are numerous and decisive; but the principal question in this case is of a very different character, as the indictment is against the officer of the revenue

for murdering a citizen of the State, having in no way any official connection with the collection of the public revenue. Neither the Constitution nor the acts of Congress give a revenue officer or any other officer of the United States an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender.

Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the circuit and district courts; but the acts of Congress give those courts no jurisdiction whatever of offences committed against the authority of a State. Criminal homicide, committed in a State, is an offence against the authority of the State, unless it was committed in a place within the exclusive jurisdiction of the United States. Congress has never defined such an offence when committed within the territorial limits of a State under the circumstances described in the transcript; nor is there any pretence for the suggestion either that the circuit or district courts have any jurisdiction of the case, or that there is any conflict of jurisdiction between the judicial authorities of the State and those of the United States.

Matters of fact are not in dispute; and it appears by the record that the prisoner, at the time mentioned in the petition, was duly indicted of the crime of wilful murder, with malice aforethought, by the grand jury of the county where the homicide was committed, and that the indictment is still pending in the proper court of the State where it was filed. Adjudged cases are not necessary to show that no Federal court created by Congress had jurisdiction of the offence, as the homicide was committed on land within the State, and not within any place over which the United States had exclusive jurisdiction. None of these matters can be successfully controverted; and, if not, then it follows that the exclusive jurisdiction of the offence was vested in the State court, unless it can be held that the prisoner, merely because he was a deputy collector of the revenue, is privileged to remove the State indictment found by the grand jury of the State into the Circuit Court for trial.

Nobody before ever pretended that such an offence ever was or could be defined by an act of Congress as an offence against

the Federal authority, or that the Circuit Court or any other Federal court has or ever had any jurisdiction of such a case to try or sentence such an offender for such an offence. Federal courts have no common-law jurisdiction in criminal cases, nor can such courts proceed to try or punish any offender, except when authorized by an act of Congress, passed in pursuance of the Constitution. *State of Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 563; *United States* v. *Worral*, 2 Dall. 384, 393; Cooley, Const. Lim. (4th ed.) 26; *Ex parte Bollman*, 4 Cranch, 75, 98.

Murder is defined by the law of the State as follows: If any person of sound memory and discretion unlawfully kill any reasonable creature, in being and under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of murder. 3 State Stat. 43. When perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious, and premeditated killing, or in the perpetration of or attempt to perpetrate certain other enumerated crimes, it is murder in the first degree; and the petition of the prisoner, in this case, shows that the charge against him is murder in the first degree, as defined by the State statute.

Such an offence has never been defined by an act of Congress, when committed against the authority of the State, nor even when committed against the national authority, unless when the killing was perpetrated on navigable waters, out of the jurisdiction of any particular State, or in some place within the exclusive jurisdiction of the Federal authority.

Crimes defined by an act of Congress, and within the jurisdiction of the Federal courts, may be divided into two general classes: 1. Such as are committed on the high seas or on navigable waters out of the jurisdiction of any particular State, or within some place under the exclusive jurisdiction of the United States. 2. Such as relate to subjects committed to the charge of the nation, which are comprised within the grant of judicial power over all cases arising under the Constitution, laws, and treaties of the United States, and cases affecting ambassadors or other public ministers and consuls.

Under existing laws the *circuit courts* have no jurisdiction

whatever to re-examine the judgments of the State courts in any case, civil or criminal, the power to exercise such a revision even in civil cases involving Federal questions, being vested exclusively in the Supreme Court. Neither the Supreme Court nor the circuit courts can re-examine the conviction, sentence, or judgment of the District Court in a criminal case in any form, either by writ of error or appeal. Final judgments or decrees of a State court falling within the condition specified in the twenty-fifth section of the Judiciary Act, or the second section of the act passed to amend the prior act upon the subject, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. 14 Stat. 386; Rev. Stat. sect. 709.

Appellate power in criminal cases decided in the district and circuit courts has not been vested in the Supreme Court by any act of Congress, and of course the power of the court in respect to such cases pending in those tribunals is confined to certificates of division of opinion. *United States* v. *More*, 3 Cranch, 159; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193. Grant that, but Federal judicial power extends to all cases in law or equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, and every such question may be re-examined by writ of error in the Supreme Court under the act of Congress passed as a substitute for the before-mentioned section of the Judiciary Act.

Cases which involve some one or more of those questions are often presented in the State courts; and where that occurs and the decision is adverse to the party setting up the title, right, or exemption, whether the suit be a civil or criminal one, he may, when the case is determined by the highest court of the State, sue out a writ of error and remove the cause into the Supreme Court for re-examination. *Murdock* v. *Memphis*, 20 Wall. 590, 636.

Writs of error of the kind are within every day's experience; but the rule is universal that, if the transcript when entered here does not present a Federal question for re-examination, the case will be dismissed, which shows to a demonstration that it is only the questions which arise under the Constitution,

the laws of the United States, and treaties made under their authority which this court is authorized to re-examine.

Convincing support to that proposition is found in the countless cases which this court dismisses at every session for the want of jurisdiction, the invariable rule being that, if the transcript does not exhibit some one of the questions specified in the section to which reference has been made, the case must be dismissed. 1 Stat. 85, sect. 25; 14 id. 386, sect. 2. Process to remove the judgment or decree from the State court to the Supreme Court is not allowed as matter of right. Instead of that, the practice is to submit the record of the State court to a justice of the Supreme Court, whose duty it is to ascertain whether, in his opinion, any question cognizable in the appellate tribunal is involved and was decided by the proper State court in a way to justify the allowance of the writ, and, if not, to refuse to direct that it shall be issued.

Two other differences between the writ of error to the State court and the common-law writ issued under the twenty-second section of the Judiciary Act deserve to be noticed. By the twenty-second section no case is re-examinable unless the matter in dispute exceeds the sum or value of a prescribed amount; but the section granting the writ of error to the State court makes no reference to the value involved in the controversy, the condition being that some one of the questions specified in the section must have been raised and decided adversely to the applicant for the writ. They also differ in this, that the twenty-second section confines the appellate power to final judgments and decrees in civil cases, but the other provision, when the proper case is presented, extends to criminal as well as civil cases. *Twitchell* v. *The Commonwealth*, 7 Wall. 321, Phillip's Prac. (rev. ed.) 144.

Where the matter in dispute is sufficient in value, the common-law writ of error to the Circuit Court will lie in every case, if the judgment is final in the court to which the writ of error is addressed; but the writ of error to the State court will not lie at all, unless the construction of some clause of the Constitution, or some act of Congress, or treaty, is drawn in question, and the decision was adverse to the party setting up such right or title. If those conditions concur, the writ will lie,

irrespective of the amount in dispute, provided it appears that the right or title set up depends on the construction of the Constitution, an act of Congress, or some constitutional treaty. *Williams* v. *Norris*, 12 Wheat. 117.

Power to re-examine such cases arises under that clause of the Constitution which provides that the judicial power of the United States shall extend to all cases in law or equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority. State courts have no jurisdiction whatever of cases affecting ambassadors, other public ministers, or consuls, nor of cases of admiralty and maritime cognizance. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court, as the Constitution provides, "shall have original jurisdiction." In all other cases mentioned in the article of the Constitution granting judicial power, the provision is that "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Early legislation of Congress gave the circuit courts original cognizance concurrent with the several States of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State. 1 Stat. 78.

By the same section it is also provided to the effect, as before explained, that the circuit courts shall also have exclusive cognizance of all crimes and offences *cognizable under the authority of the United States*, except as therein otherwise provided.

Jurisdiction both of civil and criminal cases is, beyond doubt, conferred upon the general government by several of the clauses of the third article of the Constitution describing the judicial power, entirely exclusive of that possessed by the tribunals of the States; but it is equally clear that none of them, except the introductory clause of sect. 2 of that article,

authorize any Federal court to re-examine the judgment of a State court in a criminal case, or to supersede the power of a State court to exercise its lawful jurisdiction in such a case.

When the judicial system was organized under the Constitution, Congress provided, in the twenty-fifth section of the Judiciary Act, that cases falling within that clause of the judicial article of the Constitution might be reversed or affirmed upon a writ of error, in the same manner and under the same regulations as if the judgment or decree had been rendered or passed in the Circuit Court. For eighty years that provision remained without any alteration; and the new provision, so far as respects the question before the court, is exactly the same as the original enactment. 1 Stat. 85; 14 id. 386.

Earnest opposition was made to that provision when it first went into operation, and it continued to increase until it culminated in two important cases reported in the volumes containing the decisions of the Supreme Court of that period. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 323; *Cohens* v. *Virginia*, 6 id. 264, 375.

Attempt is made in argument to support the proceeding in this case, by which the indictment was removed from the State court into the Circuit Court, and the refusal of the Circuit Court to remand the same by the judgment of the Supreme Court in those two cases; but it is clear that those judgments do not afford any justification either for the proceeding or the refusal to remand, as both were transferred into the Supreme Court by writ of error under the twenty-fifth section of the Judiciary Act. Both of those cases were rightfully removed into the Supreme Court under that section of the Judiciary Act, as appears by the respective transcripts annexed to the writs of error, and as appears by the countless cases since decided by this court, and a great number, probably more than one hundred, standing on the docket of the present term for re-examination.

Nor is it necessary to look beyond these cases to establish the proposition that they were re-examined under the twenty-fifth section of the Judiciary Act. Take the first case. It was an action of ejectment brought in a subordinate State court

for the recovery of a large parcel of land situated in that part of Virginia then called the Northern Neck. Service was made, and the defendant, Martin, appeared and pleaded the general issue upon the usual terms of confessing lease, entry, and ouster. Title was claimed by the defendant under a royal grant made prior to the Revolution, and he claimed that his title was protected by the treaty. Leave of court being obtained, the parties agreed as to the facts, and the subordinate court rendered judgment in favor of the plaintiff. Prompt appeal was taken by the defendant to the Court of Appeals, and the appellate court reversed the judgment of the court of original jurisdiction, and rendered judgment for the defendant.

Dissatisfied with the judgment of the Court of Appeals, the plaintiff sued out a writ of error under the twenty-fifth section of the Judiciary Act, and removed the cause into this court, where the judgment of the Court of Appeals was reversed. Pursuant to the usual course, this court sent down its mandate to the Court of Appeals, which that court refused to execute. No new proceedings took place, but a new writ of error was sued out, and the opinion of the court as reported is the one given in the case when brought here under the second writ of error.

Aid and comfort are attempted to be derived from certain remarks of the court in that case, as warranting the proceedings in the case before the court; but it is clear that they cannot have any such effect, as no such question was involved in the case, and of course the remarks of the court must be understood as applicable only to the matter then in decision. Important Federal questions were involved in the case; and we have the authority of the justice who delivered the opinion for saying that the judgment drew in question and denied the validity of a statute of the United States, as appeared on the face of the record, and the court also held that the principles and rules of decision to be applied under the second writ of error were the same as under the first, when the mandate was sent down.

Comment upon the opinion of the court in the second case is hardly necessary, as it does not appear to contain any thing relating to the present theory of the government, except that

it proves, what everybody admits, that a writ of error under the twenty-fifth section of the Judiciary Act will lie, in a proper case and when the question is properly presented, as well in a criminal as in a civil case, irrespective of the amount in controversy.

Cohens was prosecuted in a State court for vending and selling lottery-tickets contrary to the statute of the State. Regular process issued and he was arrested, and the parties entered into an agreed statement of facts. Authority was given to the city of Washington, under an act of Congress, to permit the drawing of lotteries for effecting certain improvements in the city, and the defendant, besides pleading the general issue, pleaded a justification under the act of Congress. Extended hearing was had, and the State court rendered judgment against the defendant, and he sued out a writ of error under the twenty-fifth section of the Judiciary Act, and removed the cause into this court.

Due appearance was entered for the State, and her counsel moved to dismiss the case for want of jurisdiction. Three causes were assigned in the motion for the dismissal of the writ of error: 1. That a State is the defendant. 2. That no writ of error lies from this court to a State court. 3. That the Supreme Court had no right to review the judgment of the State court, because neither the Constitution nor any law of the United States had been violated by the judgment of the State court.

Extreme views were advanced on behalf of the State, among which was the proposition that the Constitution did not provide any tribunal for its final construction, and that in the last resort the courts of the respective States may exercise that power. Responding to that extraordinary proposition, Marshall, C. J., speaking for the court, said that jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on *the character of the cause*, whoever may be the parties, and comprehends "all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority;" and, he added, that that clause extends the jurisdiction to all the cases described, without making in its

terms any exception whatever, and without any regard to the condition of the party.

His description of the second class is, that it comprehends controversies between two or more States, between a State and a citizen of another State, and between a State and foreign States, citizens, or subjects. Of course the second proposition of the Chief Justice must be subject to what is ordained in the Eleventh Amendment to the Constitution. 2 Story, Const., sect. 1724.

Original jurisdiction is vested in the Supreme Court in certain enumerated cases, and the Constitution also gives the same tribunal appellate jurisdiction in all other specified cases. Among those in which the jurisdiction must be exercised in the appellate form are cases arising under the first clause of the second section, including such as relate to the construction of the Constitution, the acts of Congress, and treaties. If a State is a party, the jurisdiction is original, except when the cases arise under the first clause of the second section, in which event the jurisdiction is appellate, as in such a case the jurisdiction can only be practically exercised in that form. Where a State is a party, and the case is such as to admit of its originating in the Supreme Court, in the opinion of the Chief Justice as there expressed, the case ought to originate in the Supreme Court; but where, from the nature of the case, it cannot originate here, he holds that the proper construction of the clause is that the jurisdiction is appellate.

When correctly understood, it is clear that the second case cannot have any tendency whatever to support the proposition that an indictment for wilful and felonious murder with malice aforethought, pending in a State court and found by a grand jury of the State under a statute of the State, not involving any Federal question, may be removed from the State court into the Circuit Court for trial merely because the prisoner at the time he committed the homicide was a deputy collector of the internal revenue.

Such a proposition, unsupported as it is by any respectable judicial authority, is only calculated to excite amazement, as the case cited is a direct and conclusive authority the other way, showing to a demonstration that the Federal courts cannot exer-

cise any jurisdiction whatever in a criminal case properly pending in a State court, unless it involves some question arising under the first clause of the second section of the article describing the judicial power conferred by the Constitution. 2 Story, Const., sects. 1721, 1740; 1 Kent, Com. (12th ed.) 299; Sergeant, Const., 59; Curtis, Com., sect. 9; Pomeroy, Const. (2d ed.), sect. 760.

Commentators on the Constitution seem to agree that Congress enacted the twenty-fifth section of the Judiciary Act in order to define the classes of cases originating in State tribunals to which the appellate power of the national courts might extend by means of the writ of error, to preserve the supremacy and to secure the uniform construction of the Constitution, acts of Congress, and international treaties. Curtis, Com., sect. 210.

All agree that the original jurisdiction of the Supreme Court is defined and limited by the Constitution, and that it can neither be extended nor restricted by an act of Congress; and it is equally undeniable that the appellate jurisdiction of that tribunal is granted subject to such exceptions and regulations as the Congress may make, from which it follows that appellate jurisdiction can only be exercised by the Supreme Court in such cases and to such extent as the acts of Congress authorize. *Wiscart* v. *Dauchy*, 3 Dall. 321, 327; 1 Kent, Com. (12th ed.) 324; *Clarke* v. *Bazadone*, 1 Cranch, 212.

Acts of Congress having been passed providing for the exercise of appellate judicial power, the established rule is that the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in all other cases. *Durousseau* v. *The United States*, 6 Cranch, 307, 314; *United States* v. *More*, 3 id. 159, 170.

Legislative power is undoubtedly vested in Congress to pass laws to define and punish offences against the authority of the United States; but it does not follow by any means that a prisoner charged with murder committed in violation of the laws of a State may claim to be tried in a Federal circuit court, or that a State indictment for such an offence constitutes a case arising under the Constitution or the laws of the United States, or that it can in any way become cognizable in such

a tribunal, certainly not unless it can be removed there in pursuance of some act of Congress defining the offence and providing for the trial and punishment of the offender. Persons charged with offences against the authority of the States find ample guaranties of a fair trial in the laws of the States and the usages of the State courts, and if the Federal officers need more, it belongs to Congress to provide the remedy in some mode authorized by the Constitution. 1 Kent, Com. (12th ed.) 340.

Adjudged cases admit that the power of removal instead of the writ of error, as prescribed in the twenty-fifth section of the Judiciary Act, may also be exerted when the subject-matter of the suit is such as to bring the case within the first clause of the second section of the article describing the Federal judicial power. Frequent cases of the kind of a civil nature arise, and if they could not be transferred to the circuit courts by removal under proper regulations, it might often happen that the object intended to be accomplished by the appellate tribunal would be defeated. Appellate power in the cases mentioned in the provision before referred to is given in the Constitution, and it is left to Congress to enact the manner of its exercise. Curtis, Com., sect. 148; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 349.

Whether the appellate power is employed by removal or writ of error, the right and extent of jurisdiction is the same; and in both the extent is limited by the constitutional grant, and cannot be extended beyond cases in law and equity arising under the Constitution, the acts of Congress, and such treaties as are therein described.

Legislative provision of a restricted character for the removal of civil causes from the State courts into the circuit courts was made by the Judiciary Act which was passed to organize our judicial system. 1 Stat. 79. Since that many other acts of Congress have been passed upon the subject, by which the power in civil cases has been very much enlarged. Proceedings were also prescribed by a later act, not now in force, which authorized the officers appointed for the collection of the customs to remove any suit or prosecution commenced or pending against them in a State court, for acts done by them

as such officers or under color of their respective offices, into the Circuit Court for trial; but the court is not furnished with any evidence that any such jurisdiction was ever exercised by the Circuit Court under that enactment in a criminal prosecution. 3 Stat. 198.

Special reference is also made to the second section in the still later act of Congress, usually denominated the Force Bill. 4 Stat. 632. Jurisdiction of the circuit courts was by that section extended to all cases in law and equity arising under the revenue laws, for which other provisions are not already made by law, and provision was made to the effect that any revenue officer injured in his person or property, on account of any act done by him for the protection of the revenue, might maintain a suit for such damages in the Circuit Court for the district where the wrong-doer resided.

Property taken or detained by a revenue officer was declared to be irrepleviable, and that it should be deemed in the custody of the law and subject only to the orders and decrees of the Federal court having jurisdiction of the same. Offenders who should dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained were to be deemed guilty of a misdemeanor, and punished as therein directed.

Sect. 3 of the same act empowered any such revenue officer to remove any suit or prosecution commenced against him in a State court, on account of any act done by him for the protection of the revenue, into the proper circuit court, for trial in the mode therein prescribed.

Properly construed, the act, as originally passed, was intended to furnish protection to the officers engaged in collecting import duties, and a subsequent act provided that it should not be so construed as to apply to cases arising under the internal-revenue acts. Unlike that, the fiftieth section of the act to increase duties on imports extended the provisions of the act to cases arising under the laws for the collection of internal duties. Had legislation stopped there, it would be correct to say that the Force Bill is still in force; but the still later act, passed July 13, 1866, repealed that section altogether, subject to a proviso inapplicable to the present case. *Philadelphia* v. *Collector*, 5 Wall. 728; 13 Stat. 241; 14 id. 172;

Hornthall v. *Collector*, 9 Wall. 560, 566; *Assessors* v. *Osborne*, 9 id. 567, 573.

Much stress in the argument was laid upon the word "prosecution," found in the third section of the act; but neither the written nor the oral argument furnished any evidence to show that any indictment found in the State where the difficulty arose which induced Congress to pass the act was ever removed from the State court into the Circuit Court for trial, and it is well known as a historical fact that no such removal of an indictment in that State was ever made. Civil cases pending in the tribunals of other States were in several instances removed under that act into the Circuit Court, and were there adjudicated to final judgment; but there is no authentic account that any State indictment for an offence against the authority of a State was ever removed under that act into the Circuit Court for trial or sentence.

Grave doubts are entertained whether the Congress, in the use of the word "prosecution," intended to extend the operation of the act to such an indictment, as ample provision existed at the time of its passage for the re-examination of every question of Federal cognizance arising on the trial of such an indictment, by a writ of error sued out pursuant to the authority given in the twenty-fifth section of the Judiciary Act. 1 Kent, Com. (12th ed.) 219.

Litigations of a civil nature, even when the jurisdiction of the Circuit Court depends entirely upon the character of the parties, may, under regulations enacted by Congress, be removed from the State court into the Circuit Court for trial, but there is no just pretence that a State indictment for an offence against the authority of the State can be removed from the State court where found into the Circuit Court for trial in any form of proceeding, unless the case, whether a suit at law or in equity, involves some question arising under the Constitution, the laws of Congress, or treaties made, or which shall be made, under their authority. *Com.* v. *Casey*, 12 Allen, 214, 217.

Nothing is contained in the section which has any tendency to support the opposite construction, except the words "suit or prosecution;" and it should not be overlooked that it employs

no words exclusively applicable to an indictment, and contains many expressions utterly repugnant to the theory that the proceedings to effect the removal of process were intended to extend to a criminal and indictable offence.

Every word of the section speaks a different intent, is as conclusively shown by the distinguished judge who gave the opinion of the court in the case last cited. Confirmation of that view is also derived from the fact that every reported case, where the removal was effected under that act, was a civil action, as appears from the following examples: *Wood* v. *Matthews*, 2 Blatch. 370; *Murray* v. *Patrie*, 3 id. 342; *Fisk* v. *The Union Pacific Railroad Co.*, 6 id. 362; s. c. 8 id. 243; *Tod, Relator*, v. *Fanfield Com. Pleas*, 15 Ohio St. 377, 387.

Formal application to the Supreme Court of Maine was made under that act of Congress to remove an indictment for an offence against the authority of the State into the Circuit Court of the district for trial, but the court unanimously denied the application, for the same reasons as those given by the Supreme Court of Massachusetts in the case before cited. *State* v. *Elder*, 54 Me. 381.

Taken together, these two cases ought to be regarded as decisive that a State indictment for an offence against the authority of the State could not be removed from the State court, under that act of Congress, into the Circuit Court for trial. Subordinate Federal courts find no other rules to guide them in the exercise of their functions than are to be found in the acts of Congress, and they can have no other recourse than to those enactments to determine what constitutes an offence against the authority of the United States. Conkling's Treatise (5th ed.) 181. Offences against the nation are defined and their punishment prescribed by acts of Congress. Cooley, Const. Lim. (4th ed.) 26.

Like power was given to the defendant, by the act relating to *habeas corpus*, for the removal into the circuit courts, after judgment of suits or prosecutions commenced in a State court against officers, civil or military, for acts done or committed by virtue of an order of the President, or pursuant to an act of Congress. 12 Stat. 756.

Pending an action in a State court against a marshal, in

which the verdict and judgment were in favor of the plaintiff, the defendant instituted proceedings in the State court for the removal of the cause into the Circuit Court, but the State court refused to send up the case. Thereupon the Circuit Court issued an alternative *mandamus* to the State court, which was followed by the peremptory process, when the plaintiff sued out a writ of error, and removed the cause into this court. Due hearing was had here, and this court *unanimously* held that so much of the act as provided for the removal of a judgment in a State court, in which the issue was tried by a jury, is not in pursuance of the Constitution, and is void. *The Justices* v. *Murray*, 9 Wall. 274; *McKee* v. *Rains*, 10 id. 22, 25.

Governed by that rule of decision, it must be considered that the power of removal, when the facts have been found by a jury, cannot be exercised in such a case after judgment.

Statutory power to remove an action from a State court into the circuit, says Judge Story, if it exists before judgment because it is included in the appellate power, must exist after judgment for the same reason, as he held that the same objection exists as to the removal before judgment as after, and that both must stand or fall together. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 349; 2 Story, Const., sect. 1745.

None of the advocates of the power of removal as applied to criminal cases pretend that it may be exercised after judgment in any other mode than by a writ of error; from which it would seem to follow, if the authorities cited are good law, that a State indictment for an offence against the authority of the State cannot be removed at all into the Circuit Court for trial, nor into the Supreme Court, except by writ of error.

Sect. 643 of the Revised Statutes, under which the removal in this case was made, is a revision of the sixty-seventh section of the act to reduce internal taxation. 14 Stat. 171. Officers appointed under that act may, before trial, in any case, civil or criminal, where suit or prosecution is commenced against them in a State court, remove the said suit or prosecution into the Circuit Court for trial. Rev. Stat. 643.

Further remarks in exposition of the enactment seem to be unnecessary, as it is clear that it is in all essential respects the

same as its predecessors, some of which were passed and went into operation even before the actual close of the second war of Independence.

Considering the long period the provision has been in operation, it would naturally be expected, if it was intended by its framers to include State indictments pending in State courts for offences against the authority of the State, that the advocates of such a construction would be able to produce some authoritative exposition of the enactment to support such an improbable and extraordinary theory. Nothing of the kind is produced, and for the best possible reason, that no removal of such an indictment from a State court into the Circuit Court for trial was ever before made in our judicial history.

Should it be suggested that a recent case, cited in the brief for the prisoner, is a precedent where a criminal case was removed from a State court into the Circuit Court for trial, the answer to the suggestion is, that the case does not support the proposition, for several reasons: 1. Because the order of removal was never carried into effect. 2. Because nothing was done in the Circuit Court except to pass the order for removal. 3. Because the opinion of the court as reported admits that the circuit courts have no power to try offences against the peace and dignity of the State, nor to control the State courts in any such case. 4. Because the court admit in that case that no man charged with an offence against the authority of the State can defend himself by the fact that he is a Federal officer. 5. Because it does not appear that the State indictment was ever transferred into the Circuit Court for trial. 6. Because it appears that the court giving the opinion in that case entirely overlooked the settled rule that the circuit courts have no jurisdiction of any act of an individual as an offence, unless the same is defined as such by an act of Congress, nor unless some act of Congress prescribes the punishment annexed to the commission of the offence, and designates the court to try and sentence the offender. 7. Because the indictment, for aught that appears to the contrary, is still pending in the State court, the report failing to show that it has ever been in fact transferred into the Circuit Court. *State* v. *Hoskins*, 77 N. C. 530, 546.

Viewed in any light, the proposition to remove a State indictment for felony, from a State court having jurisdiction of the case, into the Circuit Court, where it is substantially admitted that the prisoner cannot be tried until Congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous, that I fear I shall never be able to comprehend the practical wisdom which it doubtless contains. Were the object to give felons an immunity to commit crime, and to provide a way for their escape from punishment, it seems to me that it would be difficult to devise any mode more effectual to that end than the theory embodied in that proposition.

Difficulties almost without number would arise if any attempt should be made to try such an indictment in a circuit court.

It was suggested at the argument that the attorney-general of the State might appear in the Circuit Court as the public prosecutor, but he may not deem it any part of his duty to conduct criminal prosecutions in any other tribunals than those of the State from which he received his commission. Public prosecutions against the authority of the United States are in the circuit courts within the exclusive direction of the district attorneys, but they have nothing to do with prosecutions against the statutes, peace, and dignity of a State. *Confiscation Cases*, 7 Wall. 452.

Service of process is often required in a criminal case, and the question would arise whether it should be made by the sheriff or marshal. Subpœnas must be issued, and the inquiry would arise whether they should be issued in the name of the State or of the President. Expenses must be incurred for the service of process and for the travel and attendance of witnesses, and it would at once become a question whether the amount would be chargeable to the United States or to the State, and if to the latter, may the State be compelled to respond to the claim.

Persons indicted of murder and other high crimes are entitled to a copy of the indictment and process to compel the attendance of witnesses, and the inquiry arises whether it would be the duty of the Circuit Court clerk or the clerk of the State

court to comply with that constitutional requirement. Under the State law the prisoner, if the charge is of felony punishable with death, is entitled to thirty-five challenges, whereas under the act of Congress he is entitled only to twenty; and the inquiry would immediately arise, whether the right of the prisoner in that regard must be governed by the act of Congress or the State law. 2 State Stat., sect. 4014; Rev. Stat., sect. 819.

By the common law it was error, for which the judgment might be reversed, if the clerk did not in capital felonies inquire of the prisoner before sentence whether he had any thing to say why judgment of death should not be pronounced against him; and the question would arise whether this inquiry should be made by the clerk of the State court whose laws were offended by his crime, or by the clerk of the Circuit Court to which the indictment had been transferred. 1 Chitty, Cr. Law, 700, 717.

Juries in the Federal courts are not the judges of the law as well as the fact, consequently they are usually sworn in capital cases that they will well and truly try and true deliverance make of the prisoner they have in charge, according to the law and the evidence. Where such is the practice the question will arise whether the law referred to is Federal or State law, or both combined, including the common law, as is suggested for the other rules of decision in conducting the trial.

State rules of evidence or of procedure, adopted since the passage of the act of Congress organizing the Federal courts, do not apply in criminal cases where the indictment is found in the circuit courts; and the question may immediately arise, which system of evidence and of procedure will furnish the rule of decision where the indictment is found in the State court and the prisoner is tried in the Circuit Court. *United States* v. *Reid*, 12 How. 361, 365.

It was in view of these and many other equally embarrassing questions which might be suggested that induced Judge Story to remark, in one of his leading judgments upon the subject, that in respect to criminal prosecutions the difficulty seems admitted to be insurmountable, which is fully equivalent to a

declaration that the power of removal in such a case does not exist. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 349.

Ingenious effort was made in the argument at the bar to show that such was not the meaning of the learned justice when he gave utterance to that important qualification to his antecedent remarks in the same connection; but the effort is in vain, as the same learned magistrate made the same admission in his valuable Commentaries on the Constitution, published nearly twenty years later. 2 Story, Const. (3d ed.), sect. 1746.

Whether conclusive or not, it must be conceded that great weight is due to those admissions, and they are also much strengthened by a similar admission in the commentaries of another learned writer upon constitutional law. Curtis, Com., sect. 15.

Embarrassing questions, it is admitted, may arise in the exercise of such a peculiar and hitherto unknown jurisdiction; but the attempt is made to furnish a panacea for them all by referring to sect. 722 of the Revised Statutes, which seems to contemplate that where the laws of the United States are insufficient to define offences and punish offenders, resort may be had to the common law as modified and changed by the State wherein the Federal court exercising jurisdiction is held, both in the trial of the accused and in the infliction of punishment.

Examined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems.

Unless some better remedy than what is contained in that section can be found it seems to me that it would be better to close the discussion without suggesting any, as it is plain that there is nothing in that enactment which will enable the judge sitting in such a criminal trial to solve any considerable number of the embarrassing questions, which it may well be expected will arise in the trial of such a criminal case.

State police in its widest sense comprehends the whole system of internal regulation by which the State seeks not only to preserve the public order and to prevent offences against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality, and good conduct which are calculated to prevent a conflict of interests and to insure to every one the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others. Public police is in effect defined by the great commentator of the common law as the due regulation of domestic order, whereby the citizens of a State are bound to conform to the rules of propriety and good conduct, and to be moral, industrious, and inoffensive in their respective stations. 4 Bl. Com. 162.

Police, says Bentham, is a system of precaution, either for the prevention of crimes or calamities; and he divides the subject into many heads, of which three only will be mentioned: 1. Police for the prevention of offences. 2. Police for the prevention of calamities. 3. Police for the prevention of endemic diseases. Bentham's Works, title Offences against Police, vol. iii. p. 169, Edinburgh ed.

Unlike the conceded right to appropriate private property when the public exigency requires it, the power in question is one, says Shaw, C. J., vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the State and of the subjects of the same. *Commonwealth* v. *Alger*, 7 Cush. 53, 85.

It extends, says another eminent judge, to the protection of the lives, limbs, health, comfort, and quiet of all persons and of all property within the State, as exemplified in the maxim, *Sic utere tuo ut alienum non lædas. Thorpe* v. *R. & B. R. Co.*, 27 Vt. 140, 147.

Ordinary regulations of police, says Cooley, have been left with the States, nor can it be taken from them and exercised under legislation by Congress. Nor can the national government through any of its departments or officers assume any supervision of the police regulations of the States. All that

the Federal authority can do is to see that the States do not under cover of this power, invade the sphere of national sove reignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution. Cooley, Const. Lim. (4th ed.) 715.

No direct general power over these objects, says Marshall, C. J., is granted to Congress, and consequently they remain subject to State legislation. *Gibbons* v. *Ogden*, 9 Wheat. 203.

Within State limits, says Chase, C. J., an act of Congress upon the subject can have no constitutional operation. *United States* v. *Dewitt*, 9 Wall. 41–45.

Acts of Congress cannot properly supersede the police powers of the State, nor can the police powers of the State override the national authority, as the power of the State in that regard extends only to a just regulation of rights with a view to the due protection and enjoyment of all; and if the police law of the State does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State and its exercise for the regulation of the actions of the citizens can never constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.

Startling propositions are advanced in argument; but it is not probable that any one will contend that it would be competent for Congress to define as murder against the authority of the United States the homicide charged in the petition for removal, or that such act of homicide is now defined as murder by any act of Congress now in operation or which was ever passed by the Legislative Department since the Constitution was adopted.

Had the officer been killed, the proposition of removal would be less astonishing than the one set forth in the petition. Judging from the petition, the indictment is against the officer for wilfully, premeditatedly, and deliberately killing and murdering the deceased, against the peace and dignity of the State. No special ground is set forth for the removal nor any thing that can be tortured into a reason for withdrawing the case from the jurisdiction of the State court, unless it be that the

prisoner is a deputy collector of the revenue, and that he alleges in the petition that the killing was in his own necessary self-defence to save his own life, which is a defence that can as well be made in the State court as in the Circuit Court, unless it be assumed that a Federal officer is entitled as a matter of right to transfer every indictment against him for crime, when found in a State court, into a Federal court for trial.

Persons accused of capital or otherwise infamous crimes must be indicted by a grand jury, and when the offence is committed in a State, they must be tried in the State where it was committed; but attention is not called to any article or section of the Constitution that forbids that a Federal officer shall be tried in a State court for murder committed in the open State, against the peace and dignity of the State, and contrary to the form of the State statute defining the offence.

Large concessions were made by the States to the United States, but they never ceded to the national government their police powers or the power to define and punish offences against their authority, as admitted by all courts and all commentators upon the Constitution, which leads me to the following conclusions: 1. That the section of the Revised Statutes in question does not authorize the removal of a State indictment for an offence against the laws of the State from the State court where it is pending into the Circuit Court of the United States for trial. 2. That if it does purport to confer that authority, it is unconstitutional and void. 3. That the answer to each of the three questions certified here from the Circuit Court should be in the negative.

STRAUDER v. WEST VIRGINIA.

1. The Fourteenth Amendment of the Constitution of the United States considered, and *held* to be one of a series of constitutional provisions having a common purpose; namely, to secure to a recently emancipated race, which had been held in slavery through many generations, all the civil rights that the superior race enjoy, and to give to it the protection of the general government, in the enjoyment of such rights, whenever they should be denied by the States. Whether the amendment had other, and if so what, purposes, not decided.
2. The amendment not only gave citizenship and the privileges of citizenship to persons of color, but denied to any State the power to withhold from them the equal protection of the laws, and invested Congress with power, by appropriate legislation, to enforce its provisions.
3. The amendment, although prohibitory in terms, confers by necessary implication a positive immunity, or right, most valuable to persons of the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from discriminations, imposed by public authority, which imply legal inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the condition of a subject race.
4. The statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is, practically, a brand upon them, and a discrimination against them which is forbidden by the amendment. It denies to such citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is that it is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds.
5. Where, as here, the State statute secures to every white man the right of trial by jury selected from, and without discrimination against, his race, and at the same time permits or requires such discrimination against the colored man because of his race, the latter is not equally protected by law with the former.
6. Sect. 641 of the Revised Statutes, which declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending," considered and *held* not to be in conflict with the Constitution of the United States.

ERROR to the Supreme Court of Appeals of the State of West Virginia.

The facts are stated in the opinion of the court.

Mr. Charles Devens and *Mr. George O. Davenport* for the plaintiff in error.

Mr. Robert White, Attorney-General of West Virginia, and *Mr. James W. Green*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State court, and the cause was forced to trial.

Motions to quash the *venire*, "because the law under which

it was issued was unconstitutional, null, and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872–73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

The questions are important, for they demand a construction of the recent amendments of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments, and the legislation of Congress under them. The Fourteenth Amendment ordains that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its pro-

visions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, "No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested, — we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them." So again: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the Fourteenth Amendment] such laws were forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation." And it was added, "We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision."

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the

colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries — the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error — is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by

the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., *supra:* "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539. So in

United States v. *Reese* (92 U. S. 214), it was said by the Chief Justice of this court: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sect. 641 is such a provision. It enacts that "when any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next Circuit Court of the United States to be held in the district where it is pending."

This act plainly has reference to sects. 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution, the first of which declares that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and pro ceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment,

pains, penalties, taxes, licenses, and exactions of every kind, and to no other." This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Sect. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment.

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offences against the laws of the State, when the defence presents a Federal question, or when a right under the Federal Constitution or laws is involved. *Tennessee* v. *Davis*, *supra*, p. 257. It is unnecessary now to repeat what we there said.

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court, under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio county; and it is

So ordered.

MR. JUSTICE FIELD.

I dissent from the judgment of the court in this case, on the grounds stated in my opinion in *Ex parte Virginia* (*infra*, p. 349), and MR. JUSTICE CLIFFORD concurs with me.

VIRGINIA *v.* RIVES.

1. Sect. 641 of the Revised Statutes, which provides for the removal into the Federal court of any civil suit or prosecution "commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," &c., examined in connection with sects. 1977 and 1978. *Held*, that the object of these statutes, as of the Constitution which authorized them, was to place, in respect to civil rights, the colored race upon a level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.
2. The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and, consequently, the statutes founded upon the amendment, and partially enumerating what civil rights the colored man shall enjoy equally with the white are intended for protection against State infringement of those rights Sect. 641 was also intended to protect them against State action, and against that alone.
3. A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged.
4. But the Fourteenth Amendment is broader than sect. 641, as the latter does not apply to *all* cases in which the equal protection of the laws may be denied to a defendant. The removal thereby authorized is before trial or final hearing. But the violation of the constitutional prohibitions, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know until then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied. To such a case — that is, to judicial infractions of the constitutional amendment after the trial has commenced — sect. 641 has no applicability. It was not intended to reach such cases. They were left to the revisory power of this court.
5. Therefore, the denial or inability to enforce in the judicial tribunals of a State rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather

than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But, in the absence of constitutional or legislative impediment, he cannot swear before his case comes to trial that his enjoyment of his civil rights is denied to him.

6 The Constitution and laws of Virginia do not exclude colored citizens from service on juries. The petition for removal did not present a case under sect. 641.

7. The defendant moved in the State court that the *venire* be so modified that one-third or some portion of the jury should be composed of his own race. The denial of that motion was not a denial of a right secured to him by any law providing for the equal civil rights of citizens of the United States, or by any statute, or by the Fourteenth Amendment. A mixed jury in a particular case is not essential to the equal protection of the laws. It *is* a right to which any colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of his color. But that is a different thing from that which was claimed, as of right, and denied in the State court; viz., a right to have the jury composed in part of colored men.

8 A *mandamus* does not lie to control judicial discretion, except when that discretion has been abused. But it may be used as a remedy where the case is outside of that discretion and outside the jurisdiction of the court or officer to which or to whom the writ is directed. One of its peculiar and more common uses is to restrain inferior courts, and keep them within their lawful bounds.

PETITION for *mandamus*.

The facts are stated in the opinion of the court.

Mr. James G. Field, Attorney-General of Virginia, and *Mr William J. Robertson* for the petitioner.

Mr. Charles Devens and *Mr. W. Willoughby*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The questions presented in this case arise out of the following facts: —

Burwell Reynolds and Lee Reynolds, two colored men, were jointly indicted for murder in the county court of Patrick County, Virginia, at its January Term, 1878. The case having been removed into the Circuit Court of the State, and brought on for trial, the defendants moved the court that the *venire*, which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored

men. This motion was overruled on the ground that the court "had no authority to change the *venire*, it appearing (as the record stated) to the satisfaction of the court that the *venire* had been regularly drawn from the jury-box according to law." Thereupon the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the Circuit Court of the United States for the Western District of Virginia. This petition represented that the petitioners were negroes, aged respectively seventeen and nineteen years, and that the man whom they were charged with having murdered was a white man. It further alleged that the right secured to the petitioners by the law providing for the equal civil rights of all the citizens of the United States was denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens; that by the laws of Virginia all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race. The petitioners further represented that they had applied to the judge of the court, to the prosecuting attorney, and to his assistant counsel, that a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color, but that this right had been refused them. The petition further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the county of Patrick, in any case, civil or criminal, in which their race had been in any way interested. They therefore prayed that the prosecution might be removed

into the Circuit Court of the United States. The State court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for a removal of the case was renewed on the same petition, and again denied. The defendants were then tried again separately. One was convicted and sentenced, and a bill of exceptions was duly signed and made part of the record. In the other case the jury disagreed.

In this stage of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the Circuit Court of the United States, Nov. 18, 1878, which was at its next succeeding term after the first application for removal, and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken from the jail of Patrick County into the custody of the United States marshal, and they are now held in jail subject to the control of that court.

No motion has been made in the Circuit Court to remand the prosecutions to the State court, but the Commonwealth of Virginia has applied to this court for a rule to show cause why a *mandamus* should not issue commanding the judge of the District Court of the Western District of Virginia, the Hon. Alexander Rives, to cause to be redelivered by the marshal of said district to the jailer of Patrick County the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said Commonwealth. The rule has been granted, and Judge Rives has returned an answer setting forth substantially the facts hereinbefore stated, and averring that the indictments were removed into the Circuit Court of the United States by virtue of sect. 641 of the Revised Statutes.

If the petition filed in the State court before trial, and duly verified by the oath of the defendants, exhibited a sufficient ground for a removal of the prosecutions into the Circuit Court of the United States, they were in legal effect thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the State court subsequent to the removals were *coram non judice* and absolutely void. This, by virtue of the express declaration of sect. 641 of the Revised Statutes, which enacts that, "upon the filing of such petition, all fur-

ther proceedings in the State court shall cease, and shall not be resumed except as thereinafter provided." In *Gordon* v. *Longest* (16 Pet. 97), it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, "it is the duty of the State court to 'proceed no further in the cause,' and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the Court of Appeals, is *coram non judice*." To the same effect is *Insurance Company* v. *Dunn*, 19 Wall. 214.

It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State court and transferred it to the Federal court. Sect. 641 of the Revised Statutes provides for a removal "when any civil suit or prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," &c. It declares that such a case may be removed before trial or final hearing.

Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of Congress. It rests upon the Fourteenth Amendment of the Constitution and the legislation to enforce its provisions. That amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Sects. 1977, 1978, Rev. Stat. They enact that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property

as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Sect. 1978 enacts that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights. Sect. 641 was also intended for their protection against State action, and against that alone.

It is doubtless true that a State may act through different agencies, — either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court in which it is denied, into a Federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from State courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a

question whether the remedy of removal of cases from State courts into the courts of the United States, given by sect. 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case — that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced — sect. 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State, and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the Federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm any thing. It is sufficient to say now that sect. 641 does not.

It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference

to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the Federal court does not appear to have made any case for removal, if we are correct in our reading of the act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as

well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of *Strauder* v. *West Virginia* (*supra*, p. 303), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offence against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the act of Congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the State law, it cannot be said to have been such a "denial or disability to enforce *in the judicial tribunals of the State*" the rights of colored men, as is contemplated by the removal act. Sect. 641. It is to be observed that act gives the right of removal only to a person "who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights." And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the State" the rights which belong to him. In such a case it ought to be pre-

sumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, — it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of sect. 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court.

The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.

Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire*, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the Fourteenth Amendment of the Constitution. It *is* a right to which

every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or within the purview of sect. 641.

It follows that the petition for a removal stated no facts that brought the case within the provisions of this section, and, consequently, no jurisdiction of the case was acquired by the Circuit Court of the United States. In the absence of such jurisdiction the writ of *habeas corpus*, by which the petitioners were taken from the custody of the State authorities, should not have been issued. The Circuit Court has now no authority to hold them, and they should be remanded.

Upon the question whether a writ of *mandamus* is a proper proceeding to enforce the return of the men indicted to the custody of the State authorities, little need be said, in view of former decisions of this court. Sect. 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue . . . writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul, is a party. In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is

addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Bl. Com. 110. This subject was discussed at length in *Ex parte Bradley* (7 Wall. 364), and what was there said renders unnecessary any discussion of it now. To that discussion we refer. In our judgment it vindicates the use of a writ of *mandamus* in such a case as the present.

The writ will, therefore, be awarded; and it is

So ordered.

Separate opinion of MR. JUSTICE FIELD, in which MR. JUSTICE CLIFFORD concurred.

I concur in the judgment of the court that the prisoners, Lee and Burwell Reynolds, must be returned to the officers of Virginia, from whose custody they were taken; that the prosecution against them must be remanded to the State court from which it was removed; and that a *mandamus* to the district judge of the Western District of Virginia is the appropriate remedy to effect these ends. But as I do not agree with all the views expressed in the opinion of the court, and there are other reasons equally cogent with those given for the decision rendered, I deem it proper to state at length the grounds of my concurrence.

The prisoners were jointly indicted in a county court for the crime of murder. They are colored men, and the person alleged to have been murdered was a white man. On being arraigned they pleaded not guilty, and on their demand were remanded to the Circuit Court of the county for trial. When brought before that court, at the April Term of 1878, they moved that the *venire* of jurors, then composed entirely of persons of the white race, should be modified so as to allow one-third of the *venire* to be composed of persons of their own race. This motion was denied, on the ground that the court had no authority to change the *venire*, and that it satisfactorily appeared that the jurors had been regularly drawn from the jury-box according to law. The accused then presented a petition for the removal of the prosecution to the Circuit Court

of the United States for the Western District of Virginia, setting forth the pendency of the criminal prosecution against them, and alleging, in substance, that rights, secured by the law providing for the equal civil rights of all citizens of the United States, were denied to them by the judicial tribunals of the county, inasmuch as their application for a mixed jury had been refused. It further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of their case, on the ground that they were colored persons, and the one whom they were charged to have murdered was a white man; and that from this fact alone they were satisfied they could not obtain an impartial trial before a jury composed exclusively of persons of the white race.

The prayer of this petition was denied and the prisoners were tried separately and convicted of murder, one in the first and the other in the second degree. Both obtained new trials, one by the action of the court of original jurisdiction, and the other by that of the Court of Appeals on a writ of error.

At the October Term of 1878 they were a second time brought up for trial, and before the jury were impanelled again moved the court to remove the prosecution to the Circuit Court of the United States, upon the petition presented at the April Term; but the motion, as before, was denied. They were then tried separately. In one case, the jury disagreed, and the prisoner was remanded to jail to await another trial. In the other case, the prisoner was convicted of murder in the second degree, and his punishment was fixed by the jury at eighteen years' confinement in the penitentiary.

While the prisoners were held in jail, one of them to be again tried, and the other until he could be removed to the penitentiary under his sentence, they procured from the clerk of the court a copy of the record of the proceedings against them, which they presented to the Circuit Court of the United States for the Western District of Virginia, then held by Alexander Rives, the district judge, with the petition for removal presented to the State court, and prayed that the prosecutions should be there docketed and proceeded with. That court granted the petition, directed the cases to be placed

on its docket, and authorized the clerk to issue a writ of *habeas corpus cum causa* to the marshal of the district, requiring him to take the petitioners into his custody, and summon for their trial twenty-five jurors to attend at the next term of the court. A writ of *habeas corpus cum causa* was accordingly issued. Pursuant to its command, the prisoners were removed from the custody of the jailer and taken into the custody of the marshal. Thereupon the Commonwealth of Virginia presented a petition to this court praying for a writ of *mandamus* to be directed to the district judge, commanding him to order the marshal to redeliver the prisoners to her authorities, upon the ground that the judge in his proceedings had transcended the jurisdiction of his court, and undertaken the exercise of powers not vested by any law of the United States in him or the court held by him. Upon its presentation at the last term an order was issued to the judge to show cause why the writ should not issue as prayed. His return admits the facts as stated, and justifies his action on the ground that the refusal of the State court to set aside the *venire* summoned for the trial of the prisoners, and to give them a jury composed in part of their own race and color, was a denial to them of "the equal protection of the laws," and brought their cases within the provisions of the Revised Statutes for the removal of criminal prosecutions from the State to the Federal courts. The Attorney-General of the Commonwealth contending that the return is insufficient to justify his action, now moves that the writ be issued as prayed.

The application of Virginia is resisted by a denial of the jurisdiction of this court to issue a writ to the district judge in the case; a denial made not only by the counsel for the prisoners, who has been permitted to appear in their behalf, though the proceeding is one directly between the Commonwealth and the district judge, but by the Attorney-General, who has appeared, though not officially, for that officer. The ground of the denial is that the writ can be issued by this court only in the exercise or in aid of its appellate jurisdiction, and that the writ is here prayed in a proceeding which is not appellate but original, because it has its commencement in the presentation of the petition of the Commonwealth.

It is undoubtedly true that, except in cases where, under the Constitution, this court has original jurisdiction, the writ can be issued only in the exercise or in aid of its appellate authority. This was held as long ago as the case of *Marbury* v. *Madison*, decided in 1803, and the doctrine has been adhered to ever since; for the obvious reason that, the jurisdiction of the court being original in only a few enumerated cases, all exercise of power in other cases must be in virtue of its appellate jurisdiction. That jurisdiction may, however, be called into exercise in various ways. The term "appellate" in the Constitution is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals brought before it for examination in the modes provided by law. Congress has prescribed the mode or process by which such proceedings shall be brought before the court. In equity cases, it is by a simple notice that an appeal is taken from the decree or proceeding sought to be reviewed; in common-law cases, it is generally by writ of error; in some cases it is by a writ of prohibition, and in some by that of *certiorari*, or of *mandamus*. The mode is one resting entirely in the discretion of Congress. The Judiciary Act of 1789, passed at the first session of Congress after the adoption of the Constitution, declared that the Supreme Court should have appellate jurisdiction from the circuit courts and from courts of the several States in certain cases, and should "have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States."

In *Marbury* v. *Madison* it was held that the authority given by the act to issue the writ of *mandamus* to public officers was not warranted by the Constitution, the court observing that it was an essential criterion of appellate jurisdiction that it revises and corrects proceedings in a cause already instituted, and does not create the cause; and that although the writ might be directed to courts, yet to issue it to an officer for the delivery of a paper was in effect the same as to sustain

an original action for that paper; and, therefore, seemed to belong not to appellate, but to original jurisdiction. The case in which this language was used was an application to the court to compel Mr. Madison, then Secretary of State, to deliver to Mr. Marbury, as justice of the peace, a commission which had been signed by President Adams and transmitted to the predecessor in office of the Secretary, to be delivered to the appointee. There was, therefore, no action of an inferior tribunal brought up for review, the proceeding being merely to compel an executive officer to perform a ministerial act in which a citizen was interested. The language must, therefore, be limited by the facts of the case. It was not intended to deny the authority of this court to issue the writ to public officers, when the case is one in which it can exercise original jurisdiction; and probably to avoid such an inference the addition was made to the clause we have cited which now appears in the Revised Statutes, so as to allow the writ to issue to public officers only "where a State or an ambassador or other public minister or a consul or vice-consul is a party," — that is, in cases where the court has original jurisdiction. Indeed, it is only by such writ that the original jurisdiction of this court can in many cases be exercised. *Commonwealth of Kentucky* v. *Dennison*, 24 How. 66. Nor was the language intended to deny that this court can issue the writ to judicial officers where the object is to revise and correct their action in legal proceedings pending in the courts held by them. Though the writ to a subordinate or inferior court may be addressed to the court as such, it is usually directed to the judge thereof, or, if the court is composed of several judges, to such one or more of them as may be authorized to hold its sessions or participate in holding them. The reason assigned is that, in case of disobedience to the writ, the authority to enforce it is exercised over the judges personally who are vested with the power of exercising the functions of the court. High, Extraordinary Legal Remedies, sect. 275. In the present case, the writ is asked against the district judge who, whilst holding the Circuit Court of the Western District of Virginia, made the order which is the subject of complaint, and who, if the writ be granted, will be able to hold that court and carry out its command. There is no sound objection to its issue in this form.

The writ being one of the modes provided by Congress for the exercise of our appellate jurisdiction, the question whether it should be issued in this case is not difficult of solution if, as contended by the Commonwealth of Virginia, the Circuit Court, in taking the prisoners from the custody of her authorities, transcended its jurisdiction. To review that action and set aside what was done under it, the writ is sought. The jurisdiction invoked is, in its nature, appellate; and there is no other mode provided for its exercise in the case at bar than by the writ prayed. Though the petition is the first step taken by the Commonwealth against the judge, the proceeding is not on that account an original suit. The petition is merely the process by which our appellate jurisdiction is invoked.

It is well settled that the writ of *mandamus* will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy. "It issues," says Blackstone, "to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice." 3 Bl. Com. 110.

It is in accordance, therefore, with the principles and usages of law that this court should issue a *mandamus* in the cases here enumerated, and thus supervise the proceedings of inferior courts where there is a legal right and there is no other existing legal remedy. "It is upon this ground," says Mr. Justice Nelson, "that the remedy has been applied from an early day, — indeed, since the organization of courts and the admission of attorneys to practise therein down to the present time, — to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ

of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress." *Ex parte Bradley*, 7 Wall. 364. See also *Ex parte Robinson*, 19 id. 505.

And so in the case at bar, without the use of this writ the greatest possible injury would be inflicted upon the Commonwealth of Virginia, without any redress, if the Circuit Court, as contended, transcended its jurisdiction. In no case, therefore, could the writ be more properly issued in the interests of justice, order, and good government. Nor was there any necessity for a previous demand upon that court, in the way of a motion to remand the prisoners. While the authorities, says Mr. High, in his valuable treatise on the law of *mandamus*, are not altogether reconcilable as to the necessity of a previous demand and refusal to perform the act which it is sought to coerce, a distinction is made between the cases where the duties to be enforced are of a public nature, affecting the public at large, and those where the duties are of a private nature, affecting only the rights of individuals. "And while," continues the author, "in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by *mandamus;* in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." Extraordinary Legal Remedies, sect. 13.

In this case not only was the duty required of the Circuit Court one of a public nature, in which the Commonwealth of Virginia is interested, but it would have been a useless ceremony to move for an order remanding the prisoners to her authorities, in the face of its direction to the marshal to take them into custody, and its order to docket and proceed with the prosecution against them in the Circuit Court of the United

States, and the justification of this action contained in the return of the judge.

The preliminary objections to the exercise of our jurisdiction being disposed of, we are brought to the important inquiry, whether the action of the Circuit Court, in taking the prisoners from the custody of the authorities of Virginia, was authorized under the laws of the United States. The *mandamus* prayed is to compel the return of the prisoners, as already stated; but the validity of the order directing the marshal to take them into his custody depends upon the legality of the removal of the prosecution from the State to the Federal court. The order to the marshal was the necessary sequence of assuming jurisdiction of the prosecution. The legality of the removal is, therefore, the question for determination. Its legality is denied by Virginia on two grounds: 1st, that the act of Congress (Rev. Stat., sect. 641), upon the provisions of which the respondent relies, does not authorize the removal; and, 2d, that the act, in authorizing a criminal prosecution for an offence against a law of the State to be, before trial, removed from a State court to a Federal court, is unconstitutional and void. In my opinion, both of these grounds are well taken.

Sect. 641 of the Revised Statutes, re-enacting provisions of previous statutes, in terms provides in certain cases for the removal to the circuit courts of the United States of criminal prosecutions commenced in a State court. It declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in any part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespass, or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant filed in said State court, at any time before the trial

or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease." The section also provides for furnishing the Circuit Court with copies of the process, pleadings, and proceeding of the State court. A subsequent section provides for the issue in such cases of a writ of *habeas corpus cum causa* to remove the accused, when in actual custody upon process of the State court, to the custody of the marshal of the United States.

By this enactment it appears that, in order to obtain a removal of a prosecution from a State to a Federal court, — except where it is against a public officer or other person for certain trespasses or conduct not material to consider in this connection, — the petition of the accused must show a denial of, or an inability to enforce in the tribunals of the State, or of that part of the State where the prosecution is pending, some right secured to him by the law providing for the equal rights of citizens or persons within the jurisdiction of the United States. But how must the denial of a right under such a law, or the accused's inability to enforce it in the judicial tribunals of the State, be made to appear? So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions would be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal. *Texas* v. *Gaines*, 2 Woods, 344. There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded. There are many ways in which a person may be denied his rights, or be unable to enforce them in the tribunals of a State. The denial or inability may arise from direct legislation, depriving him of their enjoyment or the means of their enforcement, or discriminating against him or the class, sect, or race to which he belongs. And it may arise from popular prejudices, passions, or excitement, biassing the minds of jurors and judges. Relig

ious animosities, political controversies, antagonisms of race, and a multitude of other causes will always operate, in a greater or less degree, as impediments to the full enjoyment and enforcement of civil rights. We cannot think that the act of Congress contemplated a denial of, or an inability to enforce, one's rights from these latter and similar causes, and intended to authorize a removal of a prosecution by reason of them from a State to a Federal court. Some of these causes have always existed in some localities in every State, and the remedy for them has been found in a change of the place of trial to other localities where like impediments to impartial action of the tribunals did not exist. The Civil Rights Act, to which reference is made in the section in question, was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons: it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions.

The denial of rights or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State, as, for example, an act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community.

This conclusion is strengthened by the provisions of the Fourteenth Amendment to the Constitution. The original Civil Rights Act was passed, it is true, before the adoption of that amendment; but great doubt was expressed as to its validity, and to obtain authority for similar legislation, and thus obviate the objections which had been raised to its first section, was one of the objects of the amendment. After its adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests. That section is directed against the State. Its language is that "*no State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property without due

process of law, nor deny to any person within its jurisdiction the equal protection of the laws." As the State, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the State; the inhibition, therefore, is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court: it cannot be imputed to the State, so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights.

If these views are correct, no cause is shown in the petition of the prisoners that justified a removal of the prosecutions against them to the Federal court. No law of Virginia makes any discrimination against persons of the colored race, or excludes them from the jury. The law respecting jurors provides that "all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State," with certain exemptions not material to the question presented, may be jurors; and it authorizes an annual selection in each county, by the county judge, from the citizens at large, of from one to three hundred persons, whose names are to be placed in a box, and from them the jurors, grand and petit, of the county are to be drawn. There is no restriction placed upon the county judge in selecting them, except that they shall be such as he shall think "well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The mode thus provided, properly carried out, cannot fail to secure competent jurors.

Certain it is that no rights of the prisoners are denied by this legislation. The application to the State court, upon the refusal of which the petition was presented, was for a *venire* composed of one-third of their race, — a proceeding wholly inadmissible in any jury system which obtains in the several States.

From the return of the district judge it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the "equal protection of the laws;" but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If when a colored person is indicted for a criminal offence it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the Circuit Court announced as controlling its action.

The equality of protection assured by the Fourteenth Amendment to all persons in the State does not imply that they shall be allowed to participate in the administration of its laws, or to hold any of its offices, or to discharge any duties of a public trust. The universality of the protection intended excludes any such inference. Were this not so, aliens resident in the country, or temporarily here, of whom there are many thousands in each State, would be without that equal protection which the amendment declares that no State shall deny to any person within its jurisdiction.

It follows from these views as to the meaning and purpose of the act of Congress that the removal of the prosecution in this case from the State to the Federal court is unauthorized by it; and that the order of the Circuit Court to the marshal to take the prisoners from the custody of the State authorities is illegal and void.

The second objection of the Commonwealth to the legality of the removal is equally conclusive. The prosecution is for the crime of murder, committed within her limits, by persons and at a place subject to her jurisdiction. The offence charged is against her authority and laws, and she alone has the right to inquire into its commission, and to punish the offender. Murder is not an offence against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. The offence within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offence in such a case does not, therefore, arise under the Constitution and laws of the United States; and the act of Congress which attempts to give the Federal courts jurisdiction of it is, to my mind, a clear infraction of the Constitution. That instrument defines and limits the judicial power of the United States.

It declares, among other things, that the judicial power shall extend to cases in law and equity arising under the Constitution, laws, and treaties of the United States, and to various controversies to which a State is a party; but it does not include in its enumeration controversies between a State and its own citizens. There can be no ground, therefore, for the assumption by a Federal court of jurisdiction of offences against the laws of a State. The judicial power granted by the Constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the Constitution and laws, the power itself cannot be enlarged by

Congress. The Constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative, which cannot be lawfully passed.

This view would seem to be conclusive against the validity of the attempted removal of the prosecution in this case from the State court. The Federal court could not in the first instance have taken jurisdiction of the offence charged, and summoned a grand jury to present an indictment against the accused; and if it could not have taken jurisdiction at first, it cannot do so upon a removal of the prosecution to it. The jurisdiction exercised upon the removal is original and not appellate, as is sometimes erroneously asserted; for, as stated by Chief Justice Marshall in *Marbury* v. *Madison*, already cited, it is of the essence of appellate jurisdiction that it revises and corrects proceedings already had. The removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Railway Company* v. *Whitton*, 13 Wall. 270.

The Constitution, it is to be observed, in the distribution of the judicial power, declares that in the cases enumerated in which a State is a party the Supreme Court shall have original jurisdiction. Its framers seemed to have entertained great respect for the dignity of a State which was to remain sovereign, at least in its reserved powers, notwithstanding the new government, and therefore provided that when a State should have occasion to seek the aid of the judicial power of the new government, or should be brought under its subjection, that power should be invoked only in its highest tribunal. It is difficult to believe that the wise men who sat in the convention which framed the Constitution and advocated its adoption ever contemplated the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States, and so calculated to humiliate and degrade them, lurked in any of the provisions of the Constitution, that instrument would never have been adopted.

There are many other difficulties in maintaining the position

of the Circuit Court, which the counsel of the accused and the Attorney-General have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal court, what officer is to prosecute the case? Is the attorney of the Commonwealth to follow the case from his county, or will the United States district attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it, — the Governor of the State, or the President of the United States? Can the President pardon for an offence against the State? Can the Governor release from the judgment of a Federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding.

Undoubtedly, if in the progress of a criminal prosecution, as well as in the progress of a civil action, a question arise as to any matter under the Constitution and laws of the United States, upon which the defendant may claim protection, or any benefit in the case, the decision thereon may be reviewed by the Federal judiciary, which can examine the case so far, and so far only, as to determine the correctness of the ruling. If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the twenty-fifth section of the Judiciary Act of 1789, and is retained in the Revised Statutes. That great act was penned by Oliver Ellsworth, a member of the convention which framed the Constitution, and one of the early chief justices of this court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and State courts. It gives to the Federal courts the ultimate decision of Federal questions, without infringing upon the dignity and independence of the State courts. By it harmony between them is secured, the rights of both Federal and State governments maintained, and every privilege and immunity which the accused could assert under either can be enforced.

EX PARTE VIRGINIA.

1. A., a judge of a county court in Virginia, charged by the law of that State with the selection of jurors to serve for the year 1878 in the circuit and county courts of his county, was, in the District Court of the United States for the Western District of Virginia, indicted for excluding and failing to select as grand jurors and petit jurors certain citizens of his county, of African race and black color, who, possessing all other qualifications prescribed by law, were excluded from the jury lists made out by him as such officer, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace, &c., of the United States, and against the form of the statute in such case made and provided. Being in custody under that indictment, he presented to this court his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the inferior court, that he might be discharged, averring that the finding of the indictment, and his arrest and imprisonment thereunder, were unwarranted by the Constitution of the United States, in violation of his rights and the rights of the State of Virginia, whose judicial officer he is, and that the inferior court had no jurisdiction to proceed against him. A similar petition was presented by Virginia. *Held*, that while a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order which an inferior court of the United States had no jurisdiction to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.
2. The section of the act entitled "An Act to protect all citizens in their civil and legal rights," approved March 1, 1875 (18 Stat., part 3, 336), which enacts that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000," examined, and *held* to be authorized by the Thirteenth and Fourteenth Amendments of the Constitution.
3. The inhibition contained in the Fourteenth Amendment means that no agency of the State, or of the officers or agents by whom her powers are exerted, shall deny to any person within her jurisdiction the equal protection of the laws. Whoever by virtue of his public position under a State government deprives another of life, liberty, or property, without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition; and as he acts in the name of and for the State, and is clothed with her power, his act is her act. Otherwise, the inhibition has no meaning, and the State has clothed one of her agents with power to annul or evade it.
4. That amendment was ordained to secure equal rights to all persons. To render its purpose effectual, Congress is vested with power to enforce its

provisions by appropriate legislation. Such legislation must act, not upon the abstract thing denominated a State, but upon the persons who are its agents in the denial of the rights which were intended to be secured. Such is said act of March 1, 1875, and it is fully authorized by the Constitution.

5. The act of A. in selecting jurors was ministerial, not judicial, and, although he derived his authority from the State, he was bound, in the discharge of that duty, to obey the Federal Constitution and the laws passed in pursuance thereof.

PETITION for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Mr. James G. Field, Attorney-General of Virginia, and *Mr. William J. Robertson* for the petitioner.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the District Court of the United States for the Western District of Virginia. The indictment alleged that he, being a judge of the county court of Pittsylvania County of that State, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the District Court, in order that he may be discharged; and he avers that the District Court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offence punishable in said District Court; and that the finding of said indictment, and his consequent

arrest and imprisonment, are unwarranted by the Constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the State of Virginia, whose judicial officer he is.

A similar petition has been presented by the State of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench-warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners. The question is not free from difficulty, in view of the Constitution and the several acts of Congress relating to writs of *habeas corpus*, and in view of our decisions heretofore made. If granting the writ would be an exercise of original jurisdiction, it would seem that it could not be granted, unless the fact that one of the petitioners for the writ is the State of Virginia makes the cases to differ. This is established by the rulings in *Marbury* v. *Madison* (1 Cranch, 137), and in numerous subsequent decisions. And it is not readily perceived how the fact that a State applies for the writ to be directed to one of her own citizens can make a case for our original jurisdiction.

But the appellate power of this court is broader than its original, and generally — that is, in most cases — it may be said that the issue of a writ of *habeas corpus* by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the Constitution to any particular form or mode. It is not alone by appeal or by writ of error that it may be invoked. In the *Matter of Metzer* (5 How. 176), it was indeed ruled that an order of commitment made by a district judge, *at chambers*, cannot be revised here by *habeas corpus*. But such an order was reviewable in no form; and, besides, the authority of that case has been much shaken. *In re Kaine*, 14 How. 103; *Ex*

parte Yerger, 8 Wall. 85. In the latter of these cases, it was said by Chief Justice Chase, in delivering the opinion of the court: "We regard as established, upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress."

In the present case, the petitioner Coles is in custody under a bench-warrant directed by the District Court, and the averment is that the court had no jurisdiction of the indictment on which the warrant is founded.

The District Court is an inferior court, and, in such a case as that exhibited by the indictment, its judgments are reviewable here. The indictment has been found for a violation of sect. 4 of the act of Congress of March 1, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat., part 3, 336. The third section gives to the district courts as well as the circuit judicial cognizance of all offences against the provisions of the act; and the fifth section enacts that all cases arising under the provisions of the act shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other cases in said court. If this section applies to criminal cases as well as civil, our appellate power extends directly to the District Court, and the act of March 3, 1879 (20 Stat. 354), which allows writs of error to the Circuit Court in such cases, has not deprived us of appellate jurisdiction.

We have, then, an application to our appellate power over the action of a district court, in a case where it is alleged that court has acted outside of its jurisdiction. It is said there is nothing to appeal from, that no decision or judgment has been given in the inferior court, and that the appeal, if any, is taken from the finding of a grand jury. This is a mistake. The bench-warrant was an order of the court, and the validity of the bench-warrant is the matter in question. It is true there has been no final judgment or decision of the whole case; but an appeal may lie, and in many courts often does lie, from a merely interlocutory order. It is said no *habeas corpus* was sued out either in the district or circuit court, and that we are not called upon to review the

action of a lower court upon such a writ. This is true, and such a writ from the lower court would have been a more regular proceeding. We cannot say, however, it was indispensable, especially in view of the fact that a State is seeking release of one of her officers, and in view of former action in this court. In *Ex parte Hamilton* (3 Dall. 17), this court awarded a writ of *habeas corpus*, to review a commitment under a warrant of a district judge. *In Ex parte Burford* (3 Cranch, 448), such a writ was awarded to review a commitment by the Circuit Court of the District of Columbia, not to review a decision of an inferior court upon a *habeas corpus* issued by it. So, in *Ex parte Jackson* (96 U. S. 727), in which the question of our power to issue the writ was raised, and the petition only averred that the Circuit Court had exceeded its jurisdiction, this court considered the merits of the case, without regard to the fact that there had been no *habeas corpus* in the court below. And in *Ex parte Lange* (18 Wall. 163) it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment of a Federal court, given without authority of law, this court, by writs of *habeas corpus* and *certiorari*, will look into the record, so far as to ascertain whether that is the fact, and, if it is found to be so, will discharge him. Mr. Justice Miller said, in delivering the opinion: "The authority of the court in such a case, under the Constitution of the United States, and the fourteenth section of the Judiciary Act of 1789, to issue this writ and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question."

While, therefore, it is true that a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

Our conclusion, then, is that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case.

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification, — if any they have, — in the act of Congress of March 1, 1875, sect. 4. 18 Stat., part 3, 336. That section enacts that "no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000." The defendant has been indicted for the misdemeanor described in this act, and it is not denied that he is now properly held in custody to answer the indictment, if the act of Congress was warranted by the Constitution. The whole merits of the case are involved in the question, whether the act was thus warranted.

The provisions of the Constitution that relate to this subject are found in the Thirteenth and Fourteenth Amendments The Thirteenth ordains that "neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and it declares that Congress shall have power to enforce the article by appropriate legislation. This has been followed by the Fourteenth Amendment, which ordains that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws." This amendment also declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article."

One great purpose of these amendments was to raise the

colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. We had occasion in the *Slaughter-House Cases* (16 Wall. 27) to express our opinion of their spirit and purpose, and to some extent of their meaning. We have again been called to consider them in *Tennessee* v. *Davis* (*supra*, p. 257) and *Strauder* v. *West Virginia*, *supra*, p. 303. In this latter case we held that the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the amendment. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government and guaranteed by it. We held, further, that this protection and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appro-

priate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

We have said the prohibitions of the Fourteenth Amend ment are addressed to the States. They are, "No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever

modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the act of March 1, 1875, and we think it was fully authorized by the Constitution.

The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State, as was said in *Commonwealth of Kentucky* v. *Dennison*, 24 How. 66. The act under consideration in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. It was of such an act Mr. Chief Justice Taney said, that a power vested in the United States to inflict any punishment for neglect or refusal to perform the duty required by the act of Congress "would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights." But the Constitution now expressly

gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. The remarks made in *Kentucky* v. *Dennison* and in *Collector* v. *Day*, though entirely just as applied to the cases in which they were made, are inapplicable to the case we have now in hand.

We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts

penalties upon State judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the act of Congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of *habeas corpus,* the petitions are

Denied.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE CLIFFORD, dissenting.

I dissent from the judgment of the court in this case, and from the reasons by which it is supported; and I will state the grounds of my dissent.

In Virginia, all male citizens between the ages of twenty-one and sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are liable, with certain exceptions not material to be here mentioned, to serve as jurors. The judge of each county or corporation court is required to prepare annually a list of such inhabitants of the county or corporation, not less than one hundred, nor exceeding three hundred in number, "as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The name of each person on the list thus prepared is to be written on a separate ballot, and placed in a box to be kept by the clerk of the court. From this box the names of persons to be summoned as grand and petit jurors of the county are to be drawn.

The law, in thus providing for the preparation of the list of persons from whom the jurors are to be taken, makes no discrimination against persons of the colored race. The judge of the county or corporation court is restricted in his action only by the condition that the persons selected shall, in his opinion, be "well qualified to serve as jurors," be "of sound judgment," and "free from legal exception." Whether they possess these qualifications is left to his determination; and, as I shall attempt hereafter to show, for the manner in which he discharges this duty he is responsible only to the State whose officer he is and whose law he is bound to enforce.

The petitioner, J. D. Coles, is the judge of the county court of the county of Pittsylvania, in Virginia, and has held that office for some years. It is not pretended that, in the discharge of his judicial duties, he has ever selected as jurors persons who were not qualified to serve in that character, or who were not of sound judgment, or who were not free from legal exception. It is not even suggested in argument that he has not at all times faithfully obeyed the law of the State; yet he has been indicted in the District Court of the United States for the Western District of Virginia for having, on some undesignated day in the year 1878, excluded and failed to select as grand and petit jurors citizens of the county, on account of race, color, and previous condition of servitude. The indictment does not state who those citizens were, or set forth any particulars of the offence, but charges it in the general words of a definition. The District Court, nevertheless, issued a bench-warrant, upon which the judge was arrested, and, refusing to give bail, he is held in custody to answer the indictment. He therefore petitions for a *certiorari* to that court to send up the record of its proceedings for our examination, and for a writ of *habeas corpus*, alleging that its action was without jurisdiction, and that his imprisonment thereunder is unlawful; and he prays to be released therefrom.

The Commonwealth of Virginia has also presented a similar petition, declaring that she is injured by being deprived of the services of her judicial officer, by his unlawful arrest and imprisonment.

If the District Court had no jurisdiction, as alleged, of the matters charged against the county judge, if they constitute no public offence for which he could be held, his arrest and imprisonment upon process issued upon the indictment were unlawful, and his petition should be granted.

It has been settled by this court upon full examination, and after some conflict of opinion among its members, that the writ of *habeas corpus* is a mode provided for the exercise of its appellate jurisdiction, whenever by any unauthorized action of an inferior tribunal, whether it be by its order, decree, or process, a citizen is restrained of his personal liberty; and that a *certiorari* will issue in connection with the writ, to bring up

the record of the inferior tribunal for examination. In such cases this court will look into the record, to determine not whether the inferior tribunal has erred in its action, but whether it has exceeded its jurisdiction in the imprisonment of the petitioner. *Ex parte Yerger*, 8 Wall. 85; *Ex parte Lange*, 18 id. 166.

The indictment is founded upon the fourth section of the act of Congress of March 1, 1875, "to protect all citizens in their civil and legal rights," which declares, "That no citizen possessing all other qualifications, which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000."

In what I have to say, I shall endeavor to show that the District Court in issuing its process for the arrest of the defendant, and in imprisoning him, exceeded its jurisdiction: 1st, because, assuming that the act of 1875 is constitutional and valid legislation, the indictment describes no offence under it, but is void on its face; and, 2d, because that act in the section cited, so far as it relates to jurors in the State courts, is unconstitutional and void.

The indictment merely repeats the general language of the statute. It avers that the defendant, being judge of Pittsylvania County, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of the county, excluded and failed to select as jurors, on account of race, color, and previous condition of servitude, certain citizens of the county possessing all other qualifications prescribed by law; but it names no citizens who were thus excluded, and, of course, designates no specific traversable offence. It is essential to a valid indictment that it should set forth the offence, with such particulars of time, place, and person, that the accused may know the nature of the charge, and be able to prepare to meet it. It is not enough to repeat the definition of the offence in the general language of the statute, and then

aver that the defendant has been guilty of the offence thus defined, without other specification. It is not sufficient, for example, to charge in an indictment that the defendant has been guilty of murder, without stating the time and place of the offence, and the name of the person murdered, or, if his name be unknown, giving such a description as to identify him. An indictment without such specification would be merely a collection of pointless words. This doctrine is only common learning; it is found in the hornbooks of the law; it is on the pages thumbed by the student in his first lessons in criminal procedure.

The Constitution, in its sixth amendment, strikes with nullity all such vague accusations as are embraced in this indictment. It declares, repeating in this respect the doctrine of the common law, that, in all criminal prosecutions, the accused shall "be informed of the nature and cause of the accusation" against him; and this means that all the essential ingredients of the offence charged must be stated, embracing, with reasonable certainty, the particulars of time, place, and person or property. It is only by such information that the accused will be enabled to prepare his defence, and avail himself of his acquittal or conviction against any further prosecution for the same cause. "This principle," says Bishop in his treatise, "that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted, pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases. Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us." Sect. 81. To the same effect is the language of Archbold, in his treatise on Criminal Practice and Pleading. "The indictment," he says, "must state all the facts and circumstances comprised in the definition of the offence, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad." And he states that the principal rule as to the certainty required in an indictment may be laid down thus "That where the definition of an offence, whether by a rule

of the common law or by statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offence in the same generic terms as in the definition, but it must state the species, — it must descend to particulars. p. 88. This doctrine is fully stated and illustrated in the *Cruikshank Case*, both in the prevailing and dissenting opinion. 92 U. S. 558, 568. Tested by it, the indictment here is but a string of words, presenting no specific offence, and, therefore, not justifying the issue of any process for the arrest and imprisonment of the petitioner.

It is difficult to understand how an indictment so defective could have been drawn by the public prosecutor, unless we accept, as an explanation of it, the extraordinary statement of counsel, that the district judge instructed the grand jury to the effect, that whenever it appeared that a State judge, in discharging the duty imposed on him by the law of the State to prepare annually a list of such inhabitants of his county as he should "think well qualified to serve as jurors, being persons of sound judgment and free from legal exception," had never put colored persons on the jury lists, it was to be presumed that his failure to do so was because of their race, color, or previous condition of servitude, and that it was the duty of the grand jury to indict him for that offence. In the face of this ruling no defence could be made by the accused, although he may have exercised at all times his best judgment in the selection of qualified persons, unless he could prove, what in most cases would be impossible, that in a county of many thousand inhabitants there was not a colored person qualified to serve as a juror. With this ruling there could be no necessity of alleging in the indictment any thing beyond the general failure to put colored persons on the jury list, — a fact which could not be disputed; and it would sufficiently inform the accused that he must be prepared, in order to rebut the presumption of guilt, to prove that there were no persons of the colored race in the county qualified to act as jurors. It is difficult to speak of this ruling in the language of moderation.

My second position is that the fourth section of the act of 1875, so far as it applies to the selection of jurors in the State courts, is unconstitutional and void. Previous to the late

amendments, it would not have been contended, by any one familiar with the Constitution, that Congress was vested with any power to exercise supervision over the conduct of State officers in the discharge of their duties under the laws of the State, and prescribe a punishment for disregarding its directions. It would have been conceded that the selection of jurors was a subject exclusively for regulation by the States that it was for them to determine who should act as jurors in their courts, from what class they should be taken, and what qualifications they should possess; and that their officers in carrying out the laws in this respect were responsible only to them. The States could have abolished jury trials altogether, and required all controversies to be submitted to the courts without their intervention. The Sixth and Seventh Amendments, in which jury trials are mentioned, apply only to the Federal courts, as has been repeatedly adjudged.

The government created by the Constitution was not designed for the regulation of matters of purely local concern. The States required no aid from any external authority to manage their domestic affairs. They were fully competent to provide for the due administration of justice between their own citizens in their own courts; and they needed no directions in that matter from any other government, any more than they needed directions as to their highways and schools, their hospitals and charitable institutions, their public libraries, or the magistrates they should appoint for their towns and counties. It was only for matters which concerned all the States, and which could not be managed by them in their independent capacity, or managed only with great difficulty and embarrassment, that a general and common government was desired. Whilst they retained control of local matters, it was felt necessary that matters of general and common interest, which they could not wisely and efficiently manage, should be intrusted to a central authority. And so to the common government which grew out of this prevailing necessity was granted exclusive jurisdiction over external affairs, including the great powers of declaring war, making peace, and concluding treaties; but only such powers of internal regulation were conferred as were essential to the successful and efficient working of the govern

ment established, — to facilitate intercourse and commerce between the people of the different States, and secure to them equality of protection in the several States.

That the central government was created chiefly for matters of a general character, which concerned all the States and their people, and not for matters of interior regulation, is shown as much by the history of its formation as by the express language of the Constitution. The Union preceded the Constitution. As happily expressed by the late Chief Justice, "It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation." *Texas* v. *White*, 7 Wall. 725. Those articles were prepared by the Continental Congress, which was called to provide measures for the common defence of the colonies against the encroachments of the British crown, and which, failing to secure redress, declared their independence. Its members foresaw that, when the independence of the colonies was established and acknowledged, their condition as separate and independent States would be beset with dangers threatening their peace and safety; that disputes arising from conflicting interests and rivalries, always incident to neighboring nations, would lead to armed collisions, and expose them to reconquest by the mother country. To provide against the possibility of evils of this kind, the Articles of Confederation were prepared and submitted to the legislatures of the several States, and finally, in 1781, were adopted. They declared that the States entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare; and they bound themselves to assist each other against attacks on account of religion, sovereignty, trade, or any other pretence. They clothed the new government created by them with powers supposed to be ample to secure these ends, and declared that there should be freedom of intercourse and commerce between the inhabitants of the several States. They provided for a general congress, and, among other things, invested it with the exclusive power of determining on peace and

war, except in case of invasion of a State by enemies, or imminent danger of such invasion by Indians; of sending and receiving ambassadors, entering into treaties and alliances; of regulating the alloy and value of coin struck by the authority of the States or of the United States; of fixing the standard of weights and measures; of regulating the trade and managing all affairs with the Indians; and of establishing and regulating post-offices from one State to another; and they placed numerous restraints upon the States. But by none of the articles was any interference authorized with the purely internal affairs of the States, or with any of the instrumentalities by which the States administered their governments and dispensed justice among their people; and they declared in terms that each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by the articles expressly delegated to the United States in Congress assembled.

When the government of the confederation failed, chiefly through the want of all coercive authority, to carry into effect its measures, — its power being only that of recommendation to the States, — and the present Constitution was adopted, the same general ends were sought to be attained; namely, the creation of a central government, which would take exclusive charge of all our foreign relations, representing the people of all the States in that respect as one nation, and would at the same time secure at home freedom of intercourse between the States, equality of protection to citizens of each State in the several States, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the States and their people.

Accordingly, the new government was invested with powers adequate to the accomplishment of these purposes, with which it could act directly upon the people, and not by recommendation to the States, and enforce its measures through tribunals and officers of its own creation. There were also restraints placed upon the action of the States to prevent interference with the authority of the new government, and to secure to all persons protection against punishment by legislative decree,

and insure the fulfilment of contract obligations. But the control of matters of purely local concern, not coming within the scope of the powers granted or the restraints mentioned, was left, where it had always existed, with the States. The new government being one of granted powers, its authority was limited by them and such as were necessarily implied for their execution. But lest, from a misconception of their extent, these powers might be abused, the Tenth Amendment was at an early day adopted, declaring that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

Now, if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor, as I shall hereafter endeavor to show, in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The design of its framers was not to destroy the States, but to form a more perfect union between them, and, whilst creating a central government for certain great purposes, to leave to the States in all matters the jurisdiction of which was not surrendered the functions essential to separate and independent existence. And so the late Chief Justice, speaking for the court in 1869, said: "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government;" and then he adds, in that striking language which gives to an old truth new force and significance, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, *supra*.

And Mr. Justice Nelson, also speaking for the court, in 1871, used this language: "The general government and the

States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its spheres is independent of the States." And again: "We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States." *The Collector* v. *Day*, 11 Wall. 124–126.

The cases of *Texas* v. *White* and *The Collector* v. *Day* were decided after the Thirteenth and Fourteenth Amendments, upon which it is sought to maintain the legislation in question, were adopted; and with their provisions the Chief Justice and Mr. Justice Nelson, and the court for which they spoke, were familiar. Yet neither they, nor any other judge of the court, suggested that the doctrines announced in the opinions, from which I have quoted, were in any respect modified or affected by the amendments.

Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquillity which it was one of the objects of the Constitution to insure, — than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws. It will be only another step in the same direction

towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of the States.

The Constitution declares that a "person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." And yet in the case of *The Commonwealth of Kentucky* v. *Dennison*, where a fugitive from justice from Kentucky was demanded from the Governor of Ohio, and on his refusal application was made to this court for a *mandamus* to compel him to perform his duty in this respect, it was held that there was no clause or provision in the Constitution which armed the government of the United States with authority to compel the executive of a State to perform his duty, nor to inflict any punishment for his neglect or refusal. "Indeed, such a power," said Mr. Chief Justice Taney, speaking for the whole court, "would place every State under the control and dominion of the general government even in the administration of its internal concerns and reserved rights." 24 How. 107. And Mr. Justice Nelson, in the case of *Collector* v. *Day*, where it was held that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a State, said, that "any government whose means employed in conducting its operations are made subject to the control of another and distinct government, can exist only at the mercy of that government." I could add to these authorities, if any thing more were required, that all the recorded utterances of the statesmen who participated in framing the Constitution and urging its adoption, and of the publicists and jurists who have since studied its language and aided in the enforcement of its provisions, are inconsistent with the pretension advanced in this case by the counsel of the government.

The duties of the county judge in the selection of jurors were judicial in their nature. They involved the exercise of discretion and judgment. He was to determine who were qualified to serve in that character, and for that purpose whether they possessed sound judgment, and were free from legal exceptions. The law under which he acted had been in

force for many years, and had been always considered by the judicial authorities of Virginia to be in conformity with its Constitution, which inhibits the legislature from requiring of its judges any other than judicial duties. A test as to the character of an act is found in the power of a writ of *mandamus* to enforce its performance in a particular way. If the act be a judicial one, the writ can only require the judge to proceed in the discharge of his duty with reference to it; the manner of performance cannot be dictated. Here the writ could not command the county judge to select as jurors any particular persons, black or white, but only to proceed and select such as are qualified, — its command in that respect being subject to the limitation incident to all commands of such writs upon judicial officers touching judicial acts.

The Thirteenth and Fourteenth Amendments are relied upon, as already stated, to support the legislation in question. The Thirteenth Amendment declares "that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Fourteenth Amendment, in its first section, which is the only one having any bearing upon the questions involved in this case, declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment, which declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude," is not material to the question before us, except as showing that it was only with respect to the suffrage that an interdict was in terms placed against legislation on account of race, color, or previous condition of servitude. Equality in their civil rights was in other ways secured to persons of the colored

race; and the ballot being assured to them, an effectual means against unjust legislation was placed in their hands. To each of these amendments a clause is added, authorizing Congress to enforce its provisions by "appropriate legislation."

The history of the amendments is fresh in the recollection of all of us. They grew out of the late civil war and the events which followed it. They were primarily designed to give freedom to persons of the African race, prevent their future enslavement, make them citizens, prevent discriminating State legislation against their rights as freemen, and secure to them the ballot. The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but in construing the amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind. Nor should it be forgotten that they are additions to the previous amendments, and are to be construed in connection with them and the original Constitution as one instrument. They do not, in terms, contravene or repeal any thing which previously existed in the Constitution and those amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a bill of attainder or an *ex post facto* law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. If the States were destroyed, there could, of course, be no United States. In the language of this court, in *The Collector* v. *Day*, "without them the general

government itself would disappear from the family of nations." Legislation could not, therefore, be appropriate which, under pretence of prohibiting a State from doing certain things, should tend to destroy it, or any of its essential attributes. To every State, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial, and executive authority. Congress could not undertake to prescribe the duties of a State legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the State. Congress could not lay down rules for the guidance of the State judiciary, and prescribe to it the law and the motives by which it should be controlled, and if these were disregarded, direct criminal proceedings against its members; because a judiciary independent of external authority is essential to the independence of the State, and also, I may add, to a just and efficient administration of justice in her courts. Congress could not dictate to the executive of a State the bills he might approve, the pardons and reprieves he might grant, or the manner in which he might discharge the functions of his office, and assume to punish him if its dictates were disregarded, because his independence, within the reserved powers, is essential to that of the State. Indeed, the independence of a State consists in the independence of its legislative, executive, and judicial officers, through whom alone it acts. If this were not so, a State would cease to be a self-existing and an indestructible member of the Union, and would be brought to the level of a dependent municipal corporation, existing only with such powers as Congress might prescribe.

I cannot think I am mistaken in saying that a change so radical in the relation between the Federal and State authorities, as would justify legislation interfering with the independent action of the different departments of the State governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent amendments.

The people in adopting them did not suppose they were altering the fundamental theory of their dual system of governments. The discussions attending their consideration in Congress, and before the people, when presented to the legislatures of the States for adoption, can be successfully appealed to in support of this assertion. The Union was preserved at a fearful cost of life and property. The institution of slavery in a portion of the country was the cause of constant irritation and crimination between the people of the States where it existed and those of the free States, which finally led to a rupture between them and to the civil war. As the war progressed, its sacrifices and burdens filled the people of the loyal States with a determination, that not only should the Union be preserved, but that the institution which, in their judgment, had threatened its dissolution should be abolished. The emancipation proclamation of President Lincoln expressed this determination, though placed on the ground of military necessity. The Thirteenth Amendment carried it into the organic law. That amendment prohibits slavery and involuntary servitude, except for crime, within the United States, or any place subject to their jurisdiction. Its language is not restricted to the slavery of any particular class. It applies to all men; and embraces in its comprehensive language not merely that form of slavery which consists in the denial of personal rights to the slave, and subjects him to the condition of a chattel, but also serfage, vassalage, peonage, villeinage, and every other form of compulsory service for the benefit, pleasure, or caprice of others. It was intended to render every one within the domain of the republic a freeman, with the right to follow the ordinary pursuits of life without other restraints than such as are applied to all others, and to enjoy equally with them the earnings of his labor. But it confers no political rights; it leaves the States free, as before its adoption, to determine who shall hold their offices and participate in the administration of their laws. A similar prohibition of slavery and involuntary servitude was in the Constitution of several States previous to its adoption by the United States; and it was never held to confer any political rights.

On the 18th of December, 1865, this amendment was ratified,

that is, the official proclamation of its ratification was then made; and in April of the following year the Civil Rights Act was passed. Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, of which the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons." This legislation was intended to secure to all persons in the United States practical freedom. But its validity was questioned in many quarters entitled to consideration, and some of its provisions not long afterwards were declared by State courts to be beyond the constitutional authority of Congress. *Bowlin* v. *Commonwealth*, 2 Bush (Ky.), 15. There were also complaints made that notwithstanding the amendment abolishing slavery and involuntary servitude, except for crime, the freedmen were, by legislation in some of the Southern States, subjected to such burdensome disabilities in the acquisition and enjoyment of property, and the pursuit of happiness, as to render their freedom of little value. *Slaughter-House Cases*, 16 Wall. 36. There were, besides, complaints of the existence, in those sections, of a feeling of dislike towards citizens of the North seeking residence there, and towards such of their own citizens as had adhered to the national government during the war, which could not fail to find expression in hostile and discriminating legislation. It is immaterial whether these complaints were justified or not; they were believed by many persons to be well-founded. To remove the cause of them; to obviate objections to the validity of legislation similar to that contained in the first section of the Civil Rights Act; to prevent the possibility of hostile and discriminating legislation in future by a State against any citizen of the United States, and the enforcement of any such legislation already had; and to

secure to all persons within the jurisdiction of the States the equal protection of the laws, — the first section of the Fourteenth Amendment was adopted. Its first clause declared who are citizens of the United States and of the States. It thus removed from discussion the question, which had previously been debated, and though decided, not settled, by the judgment in the *Dred Scott Case*, whether descendants of persons brought to this country and sold as slaves were citizens, within the meaning of the Constitution. It also recognized, if it did not create, a national citizenship, as contradistinguished from that of the States. But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. Though some of these are in all respects qualified for such service, no one will pretend that their exclusion by law from the jury list impairs their rights as citizens.

The second clause of the first section of the amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In *Slaughter-House Cases*, it was held by a majority of the court that this clause had reference only to privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States, and, therefore, did not apply to those fundamental civil rights which belong to citizens of all free governments, such as the right to acquire and enjoy property and pursue happiness, subject only to such just restraints as might be prescribed for the general good. If this construction be correct, there can be no pretence that the privilege or duty of acting as a juror in a State court is within the inhibition of the clause. Nor could it be within that inhibition if a broader construction were given to the clause, and it should be held, as contended by the minority of the court in *Slaughter-House Cases*, that it prohibits the denial or abridgment by any State of those fundamental privi leges and immunities which of right belong to citizens of all free governments; and with which the Declaration of Indepen- dence proclaimed that all men were endowed by their Creator,

and to secure which governments were instituted among men. These fundamental rights were secured, previous to the amendment, to citizens of each State in the other States, by the second section of the fourth article of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Among those privileges and immunities it was never contended that jury duty or jury service was included.

The third clause in the first section of the amendment declares that no State "shall deprive any person of life, liberty, or property without due process of law." It will not be contended that this clause confers upon the citizen any right to serve as a juror in the State courts. It exists in the Constitution of nearly all the States, and is only an additional security against arbitrary deprivation of life and liberty, and arbitrary spoliation of property. It means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. The existence of this clause in the amendment is to me a persuasive argument that those who framed it, and the legislatures of the States which adopted it, never contemplated that the prohibition was to be enforced in any other way than through the judicial tribunals, as previous prohibitions upon the States had always been enforced. If Congress could, as an appropriate means to enforce the prohibition, prescribe criminal prosecutions for its infraction against legislators, judges, and other officers of the States, it would be authorized to frame a vast portion of their laws; for there are few subjects upon which legislation can be had besides life, liberty, and property. In determining what constitutes a deprivation of property, it might prescribe the conditions upon which property shall be acquired and held, and declare as to what subjects property rights shall exist. In determining what constitutes deprivation of liberty, it might prescribe in what way and by what means the liberty of the citizen shall be deemed protected. In prescribing punishment for deprivation of life, it might prescribe a code of criminal procedure. All this and much more might be done if it once be admitted, as the court asserts in this case, that Congress can authorize a criminal prosecution for the infraction

of the prohibitions. It cannot prescribe punishment without defining crime, and therefore must give expression to its own views as to what constitutes protection to life, liberty, and property.

The fourth clause in the first section of the amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Upon this clause the counsel of the district judge chiefly rely to sustain the validity of the legislation in question. But the universality of the protection secured necessarily renders their position untenable. All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.

The equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration. And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offences. It secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of gov-

ernment and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the States to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required.

The doctrine of the district judge, for which the counsel contend, would lead to some singular results. If, when a colored person is accused of a criminal offence, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential, if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict, might be carried.

The position that in cases where the rights of colored per-

sons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. To this result the doctrine asserted by the District Court logically leads. The jury *de medietate linguæ*, anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defence being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language.

If these views as to the purport and meaning of the Thirteenth and Fourteenth Amendments to the Constitution be correct, there is no warrant for the act of Congress under which the indictment in this case was found, and the arrest and imprisonment of the petitioner were unlawful, and his release should be ordered.

The case is one which should not be delayed for the slow process of a trial in the court below, and a subsequent appeal, in case of conviction, to this court to be heard years hence. The Commonwealth of Virginia has represented to us that the services of her judicial officer are needed in her courts for the administration of justice between her citizens, and she asks that the highest tribunal of the Union will release him from his unlawful arrest, in order that he may perform the duties of his office. Those who regard the independence of the States in all their reserved powers, — and this includes the independence

of their legislative, judicial, and executive departments, — as essential to the successful maintenance of our form of government, cannot fail to view with the gravest apprehension for the future, the indictment, in a court of the United States, of a judicial officer of a State for the manner in which he has discharged his duties under her laws, and of which she makes no complaint. The proceeding is a gross offence to the State: it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation; for if Congress can render an officer of a State criminally liable for the manner in which he discharges his duties under her laws, it can prescribe the nature and extent of the penalty to which he shall be subjected on conviction; it may imprison him for life, or punish him by removal from office. And if it can make the exclusion of persons from jury service on account of race or color a criminal offence, it can make their exclusion from office on that account also criminal; and, adopting the doctrine of the district judge in this case, the failure to appoint them to office will be presumptive evidence of their exclusion on that ground. To such a result are we logically led. The legislation of Congress is founded, and is sustained by this court, as it seems to me, upon a theory as to what constitutes the equal protection of the laws, which is purely speculative, not warranted by any experience of the country, and not in accordance with the understanding of the people as to the meaning of those terms since the organization of the government.

EX PARTE SIEBOLD.

1. The appellate jurisdiction of this court, exercisible by the writ of *habeas corpus*, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not.
2. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act.
3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error; and, of course, cannot be reviewed at all if no writ of error lies.
4. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ.
5. Certain judges of election in the city of Baltimore, appointed under State laws, were convicted in the Circuit Court of the United States, under sects. 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under sects. 2016, 2017, 2021, 2022, title xxvi., of the Revised Statutes. *Held*, that the question of the constitutionality of said laws is good ground for the issue by this court of a writ of *habeas corpus* to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged.
6. Congress had power by the Constitution to enact sect. 5515 of the Revised Statutes, which makes it a penal offence against the United States for any officer of election, at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, &c.; and sect. 5522, which makes it a penal offence for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, &c.; also, sects. 2011, 2012, 2016, 2017, 2021, 2022, title xxvi., which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals, — these being the laws provided in the

Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 28 1871, for supervising the elections of representatives, and for preventing frauds therein.

7. The circuit courts have jurisdiction of indictments under these laws, and a sentence in pursuance of a verdict of condemnation is lawful cause of imprisonment, from which this court has no power to relieve on *habeas corpus*.

8. In making regulations for the election of representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter, or modify the regulations made by the State.

9. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted.

10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter."

11. There is nothing in the relation of the State and the national sovereignties to preclude the co-operation of both in the matter of elections of representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the national government being paramount, collisions can only occur from unfounded jealousy of such authority.

12. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The national government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

13. The concurrent jurisdiction of the national government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, &c.

14. The provisions adopted for compelling the State officers of election to observe the State laws regulating elections of representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offence against the United States which Congress may rightfully inhibit and punish. This necessarily follows from the direct interest which the national government has in the due election of its representatives and from the power which the Constitution gives to Congress over this particular subject.

15. Congress had power by the Constitution to vest in the circuit courts the appointment of supervisors of election. It is expressly declared that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is nevertheless left to the discretion of Congress.

PETITION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Mr. Bradley T. Johnson for the petitioners.

The Attorney-General, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment.

Before making this application, each petitioner, in the month of September last, presented a separate petition to the Chief Justice of this court (within whose circuit Baltimore is situated), at Lynn, in the State of Connecticut, where he then was, praying for a like *habeas corpus* to be relieved from the same imprisonment. The Chief Justice thereupon made an order that the said marshal and warden should show cause, before him, on the second Tuesday of October, in the city of Washington, why such writs should not issue. That being the first day of the present term of this court, at the instance of the Chief Justice the present application was made to the court by a new petition addressed thereto, and the petitions and papers which had been

presented to the Chief Justice were by consent made a part of the case. The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

The jurisdiction of this court to hear the case is the first point to be examined. The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on *habeas corpus*, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the Circuit Court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman and Swartout*, 4 id. 100, 101; *Ex parte Yerger*, 8 Wall. 98.

That this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a State is a party; but has appellate jurisdiction in all other cases of Federal cognizance, "with such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and

may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. *Ex parte Bollman and Swartwout*, *supra*; *Ex parte Watkins*, 3 Pet. 202; 7 id. 568; *Ex parte Wells*, 18 How. 307, 328; *Ableman* v. *Booth*, 21 id. 506; *Ex parte Yerger*, 8 Wall. 85.

There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus*, and thus save the party the delay and expense of a writ of error. Bac. Abr., Hab. Corp., B. 13; *Bethel's Case*, Salk. 348; 5 Mod. 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*.

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange* (18 Wall. 163) and *Ex parte Parks*, 93 U. S. 18. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

Chief Justice Abbot, in *Rex* v. *Suddis* (1 East, 306), said: "It is a general rule that, where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court [the King's Bench] cannot review the sentence upon a return to a *habeas corpus*. In such cases, this court is not a court of appeal."

It is stated, however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Bac. Abr., Hab. Corp., B. 10. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void. The authority usually cited under this head is *Bushel's Case*, decided in 1670. There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the Court of Common Pleas for a *habeas corpus;* and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence. T. Jones, 13; s. c. Vaughan, 135; s. c. 6 Howell's State Trials, 999.

Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void,

and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits.

The indictments commence with an introductory statement that, on the 5th of November, 1878, at the Fourth [or other] Congressional District of the State of Maryland, a lawful election was held, whereat a representative for that congressional district in the Forty-sixth Congress of the United States was voted for; that a certain person [naming him] was then and there a supervisor of election of the United States, duly appointed by the Circuit Court aforesaid, pursuant to sect. 2012 of the Revised Statutes, for the third [or other] voting precinct of the fifteenth [or other] ward of the city of Baltimore, in the said congressional district, for and in respect of the election aforesaid, thereat; that a certain person [naming him] was then and there a special deputy marshal of the United States, duly appointed by the United States marshal for the Maryland district, pursuant to sect. 2021 of the Revised Statutes, and assigned for such duty as is provided by that and the following section, to the said precinct of said ward of said city, at the congressional election aforesaid, thereat. Then come the various counts.

The petitioner, Bowers, was convicted on the second count of the indictment against him, which was as follows: —

"That the said Henry Bowers, afterwards, to wit, on the day and year aforesaid, at the said voting precinct within the district aforesaid, unlawfully did obstruct, hinder, and, by the use

of his power and authority as such judge as aforesaid (which judge he then and there was), interfere with and prevent the *said supervisor of election* in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit, that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to sect. 5522 of said statutes, and against the peace, government, and dignity of the United States."

Tucker, who was indicted jointly with one Gude, was convicted upon the second and fifth counts of the indictment against them, which were as follows: —

"(2d.) That the said Justus J. Gude and the said Walter Tucker afterwards, to wit, on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such judges as aforesaid, did prevent and hinder the free attendance and presence of the said James N. Schofield (who was *then and there such deputy marshal* as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same deputy marshal to the same poll of election, contrary to the said last-mentioned section of said statutes (sect. 5522), and against the peace, government, and dignity of the United States.

"(5th.) That the said Justus J. Gude and the said Walter Tucker, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of sect. 5514 of said statutes), which had not been voted at said election in said precinct before the bal-

lots, then and there lawfully deposited in the same ballot-box, had been counted, with intent thereby to affect said election and the result thereof, contrary to sect. 5515 of said statutes, and against the peace, government, and dignity of the United States."

This charge, it will be observed, is for the offence commonly known as "stuffing the ballot-box."

The counts on which the petitioners, Burns and Coleman, were convicted were similar to those above specified. Burns was charged with refusing to allow the supervisor of elections to inspect the ballot-box, or even to enter the room where the polls were held, and with violently resisting the deputy marshal who attempted to arrest him, as required by sect. 2022 of the Revised Statutes. The charges against Coleman were similar to those against Burns, with the addition of a charge for stuffing the ballot-box. Siebold was only convicted on one count of the indictment against him, which was likewise a charge of stuffing the ballot-box.

The sections of the law on which these indictments are founded, and the validity of which is sought to be impeached for unconstitutionality, are summed up by the counsel of the petitioners in their brief as follows (omitting the comments thereon): —

The counsel say: —

"These cases involve the question of the constitutionality of certain sections of title xxvi. of the Revised Statutes, entitled 'The Elective Franchise.'

"SECT. 2011. The judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a representative or delegate in Congress is to be voted for, that it is their desire to have *such registration or election guarded and scrutinized*, shall open the Circuit Court at the most convenient point in the circuit.

"SECT. 2012. The judge shall appoint two supervisors of election for every election district in such city or town.

"SECT. 2016. The supervisors are authorized and required to attend all times and places fixed for registration of voters

to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters; and for purposes of identification to affix their signatures to each page of the original list.

"SECT. 2017. The supervisors are required to attend the times and places for holding elections of representatives or delegates in Congress, and of counting the votes cast; to challenge any vote the legality of which they may doubt; to be present continually where the ballot-boxes are kept, until every vote cast has been counted, and the proper returns made, required under any law of the United States, or any State, territorial, or municipal law; and to personally inspect and scrutinize at any and all times, on the day of election, the manner in which the poll-books, registry lists, and tallies are kept; whether the same are required by any law of the United States, or any State, territorial, or municipal laws.

"SECT. 2021. requires the marshal, whenever any election at which representatives or delegates in Congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint special deputy marshals, whose duty it shall be to aid and assist the supervisors in the discharge of their duties, and attend with them at all registrations of voters or election at which representatives to Congress may be voted for.

"SECT. 2022. requires the marshal, and his general and special deputies, to keep the peace and protect the supervisors in the discharge of their duties; preserve order at such place of registration and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offences prohibited herein, or any offence against the laws of the United States."

The counsel then refer to and summarize sects. 5514, 5515, and 5522 of the Revised Statutes. Sect. 5514 merely relates to a question of evidence, and need not be copied. Sects. 5515 and 5522, being those upon which the indictments are directly framed, are proper to be set out in full. They are as follows: —

"SECT. 5515. Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof, or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in sect. 5511."

"SECT. 5522. Every person, whether with or without any authority, power, or process, or pretended authority, power, or process, of any State, Territory, or municipality, who obstructs, hinders, assaults, or by bribes, solicitation, or otherwise, interferes with or prevents the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration, or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or who molests, interferes with, removes, or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal, or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any super-

visor of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than $3,000, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

These portions of the Revised Statutes are taken from the act commonly known as the Enforcement Act, approved May 31, 1870, and entitled "An Act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes;" and from the supplement of that act, approved Feb. 28, 1871. They relate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.

The counsel for the petitioners, however, do not deny that Congress may, if it chooses, assume the entire regulation of the elections of representatives; but they contend that it has no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States.

The general positions contended for by the counsel of the petitioners are thus stated in their brief: —

"We shall attempt to establish these propositions: —

"1. That the power to make regulations as to the times, places, and manner of holding elections for representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

"2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as

not to interfere with or come in collision with regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

"3. That when put in operation by Congress it must take the place of all State regulations of the subject regulated, which subject must be entirely and complety controlled and provided for by Congress."

We are unable to see why it necessarily follows that, if Congress makes *any* regulations on the subject, it must assume exclusive control of the *whole* subject. The Constitution does not say so.

The clause of the Constitution under which the power of Congress, as well as that of the State legislatures, to regulate the election of senators and representatives arises, is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the States to prescribe the regulations, it is added, "The Congress may *at any time*, by law, *make or alter* such regulations." "*Make or alter:*" What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and national governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repug-

nance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to "make or *alter*."

Suppose the Constitution of a State should say, "The first legislature elected under this Constitution may by law regulate the election of members of the two Houses; but any subsequent legislature may make or alter such regulations,"—could not a subsequent legislature modify the regulations made by the first legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not: it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would so far, and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.

Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

The peculiarity of the case consists in the concurrent authority of the two sovereignties, State and National, over the same

subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and inter-state commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that State regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding. This subject was largely discussed in the case of *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299. That was a case of pilotage. In 1789, Congress had passed a law declaring that all pilots should continue to be regulated in conformity with the laws of the States respectively wherein they should be. Hence, each State continued to administer its own laws, or passed new laws for the regulation of pilots in its harbors. Pennsylvania passed the law then in question in 1803. Yet the Supreme Court held that this was clearly a regulation of commerce; and that the State laws could not be upheld without supposing that, in cases like that of pilotage, not requiring a national and uniform regulation, the power of the States to make regulations of commerce, in the absence of congressional regulation, still remained. The court held that the power did so remain, subject to those qualifications; and the State law was sustained under that view.

Here, then, is a case of concurrent authority of the State and national governments, in which that of the latter is paramount. In 1837, Congress interfered with the State regulations on the subject of pilotage, so far as to authorize the pilots of adjoining States, separated only by navigable waters, to pilot ships and vessels into the ports of either State located on such waters. It has since made various regulations respecting pilots taking charge of steam vessels, imposing upon them peculiar duties and requiring of them peculiar qualifications. It seems to us that there can be no doubt of the power of Congress to impose any regulations it sees fit upon pilots, and to subject them to such penalties for breach of duty as it may deem

expedient. The States continue in the exercise of the power to regulate pilotage subject to the paramount right of the national government. If dissatisfied with congressional interference, should such interference at any time be imposed, any State might, if it chose, withdraw its regulations altogether, and leave the whole subject to be regulated by Congress. But so long as it continues its pilotage system, it must acquiesce in such additional regulations as Congress may see fit to make.

So in the case of laws for regulating the elections of representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no

danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfil

ment? Yet that is the case here. It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, — State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfil

ment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, — at the suit of the State, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a State law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offence, Mr. Justice Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be sub-

jected a second time to punishment by the other for acts essentially the same, — unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Fox* v. *The State of Ohio*, 5 How. 410. The same judge, delivering the opinion of the court in the case of *United States* v. *Marigold* (9 How. 569), where a conviction was had under an act of Congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case:* "With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of *Fox* v. *State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of *Moore* v. *State of Illinois* (14 id. 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence against the United States under the fugitive-slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." Substantially the same views are expressed in *United States* v. *Cruikshank* (92 U. S. 542), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturaliza

tion laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offence, even though he might also, under the State laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State?

If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State, — as we think they are, — then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of *Commonwealth of Kentucky* v. *Dennison* (24 How. 66) is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from justice was held not to belong to the United States. It is a purely executive duty, and Congress had no authority to require the governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most

an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of

the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which sub-

sist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is

founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is

the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case, it exists in the other.

The next point raised is, that the act of Congress proposes to operate on officers or persons authorized by State laws to perform certain duties nder them, and to require them to disobey

and disregard State laws when they come in conflict with the act of Congress; that it thereby of necessity produces collision, and is therefore void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.

Finally, it is objected that the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

The Constitution declares that "the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter

resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet. 258), that the appointing power in the clause referred to "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit courts to examine claims to revolutionary pensions, and the law of 1849, authorizing the district judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts.

The doctrine laid down at the close of counsel's brief, that the State and national governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not

been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of *habeas corpus* must be denied.

Application denied.

MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD dissented.

See MR. JUSTICE FIELD'S opinion *infra*, p. 404.

EX PARTE CLARKE.

1. An officer of election, at an election for a representative to Congress in the city of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under sect. 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open. *Held*, according to the decision in *Ex parte Siebold* (*supra*, p. 371), that Congress had power to pass the law under which the conviction was had, and that the Circuit Court had jurisdiction of the offence.
2. In such a case, a *habeas corpus* for discharge from imprisonment under the conviction was rightfully issued by a justice of this court, returnable before himself; and he had the right, if it could be done without injury to the prisoner, to refer the matter to this court for its determination, it being a case which involved the exercise of appellate jurisdiction.
3. Had the case involved original jurisdiction only, this court could not have taken jurisdiction of it.

PETITION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Mr. George Hoadly and *Mr. Richard T. Merrick* for the petitioner.

The Attorney-General and *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case comes before us on the return to a writ of *habeas corpus*, issued by order of one of the justices of this court. The petition for a *habeas corpus* was addressed to the judges of the Supreme Court of the United States by Augustus F. Clarke, who states therein that he is a member of the city council of Cincinnati, and, as such, one of the judges of election of precinct A in said city; in which capacity he acted at the State, congressional, county, and municipal elections held in said city in October, 1878. That on the 24th of October, 1878, he was indicted in the Circuit Court of the United States for the Southern District of Ohio for unlawfully neglecting to perform the duty required of him as such judge of election by the laws of the State of Ohio in regard to said election, in this, that having accepted one of the poll-books of said election, sealed and directed according to law, for the purpose of conveying the same to the clerk of the Court of Common Pleas of Hamilton County, in said State, at his office, he neglected to do so; and, in another count, that he permitted the said poll-books, sealed and directed for the purpose aforesaid, to be broken open before he conveyed the same to said clerk; that a motion to quash said indictment, and a demurrer thereto, having been successively overruled, he pleaded not guilty, and at the February Term, 1879, was tried and found guilty; and having unsuccessfully moved for a new trial, and in arrest of judgment, he was sentenced by said court to be imprisoned in the jail of Hamilton County for twelve months, and to pay a fine of $200 and the cost of prosecution; that in pursuance of said sentence he had been arrested and imprisoned, and is now imprisoned and restrained from his liberty by the marshal of the United States for said district. The petition then asserts that the said Circuit Court had no jurisdiction in the premises, and

that its acts were wholly void and his imprisonment unlawful. He, therefore, prays a *habeas corpus* to the said marshal, and a *certiorari* to the clerk of said court, if necessary, and that he may be discharged from custody. A certified copy of the indictment, proceedings, and judgment in the Circuit Court is annexed to the petition, from which it appears that the first count charged that the petitioner on the 9th of October, 1878, in the county of Hamilton, in the State of Ohio, being an officer of election at which a representative in Congress was voted for, to wit, a judge of said election at precinct A of the eighth ward of Cincinnati, and being duly appointed such judge of election under the laws of Ohio, did unlawfully neglect to perform a duty required of him by the laws of said State in regard to said election, specifying said neglect, to wit, that he neglected to convey the poll-book to the county clerk, which had been sealed up by the judges and delivered to him for that purpose; contrary to the form of the statute and against the peace and dignity of the United States. The second count charged that the petitioner, as such judge of election, violated a duty required of him by the laws of said State in regard to said election, specifying the violation, namely, that having received the poll-book in the manner and for the purpose aforesaid, he permitted it to be broken open before he conveyed it to the county clerk, contrary to the form of the statute, &c.

It is conceded that this indictment was found under sect. 5515 of the Revised Statutes of the United States, which is in the following words: [This section is set forth in *Ex parte Siebold*, *supra*, pp. 371, 381.]

The law of Ohio which the petitioner is charged with violating is as follows: —

"(32.) SECT. XIX. That, after canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise) to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the

election; and the other poll-book, where the same is not otherwise disposed of by this act, shall be deposited with the township clerk, or clerk of the election district (as the case may be), within three days from the day of election, there to remain for the use of the persons who may choose to inspect the same."

On the thirty-first day of July, 1879, the said petition was presented to Mr. Justice Strong, and a writ of *habeas corpus* was allowed by him, returnable forthwith before himself, at the Catskill Mountain House, in the State of New York. On the 11th of August, 1879, return being made of the body of the petitioner according to the command of the writ, with a copy of the judgment of the Circuit Court, and the warrant of commitment issued thereon, Justice Strong made an order postponing the hearing of the cause into this court, to be heard upon the second Tuesday of October, 1879 (being the first day of the present term), and admitted the petitioner to bail in the sum of $5,000 to abide the rule of the Supreme Court in the premises.

The case was argued at the same time with *Ex parte Siebold*, *supra*, p. 371; and most of the questions involved have been considered in that case.

One question, however, has been raised by the counsel for the government which it is necessary to consider. It is objected that this court cannot proceed upon a writ of *habeas corpus* which was originally presented to a justice of this court, and was postponed and referred by him to the court for its determination.

We have considered this point with some care, inasmuch as in *Kaine's Case*, reported in 14 How. 103, the court held that it could not act upon a writ thus referred to it by Mr. Justice Nelson. But the ground taken there was, that the writ had been issued by him in virtue of his original jurisdiction; though the court was of opinion that it could issue a new writ upon the papers before it in virtue of its own appellate jurisdiction, and would do so if the case required it; but being of opinion that there was no case on the merits the application was discharged. But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the justice who issued it, or by this court, would in fact require a

revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in its character. This appellate character of the proceeding attaches to a large portion of cases on *habeas corpus*, whether issued by a single judge or by a court. The presence of this feature in the case was no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court. The justice who issued it could undoubtedly have disposed of the case himself, though not, at the time, within his own circuit. A justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice. This has always been the practice of English judges in cases of great consequence and difficulty, and we do not see why it may not be done here. Under the Habeas Corpus Act, indeed, it was the regular course to take bail and recognize the party to appear in the King's Bench or assizes; though the judge would discharge absolutely if the case was clearly one of illegal imprisonment. Hab. Corp. Act, sect. 3; Com. Dig., Hab. Corp. F.; Bac. Abr., Hab. Corp. B. 13; 1 Chitty, Gen. Pr. 685–688. Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner was allowed to go at large on reasonable bail.

As to the merits of the case, there can be no serious question that the indictment charges an offence specified in the act of Congress. Rev. Stat., sect. 5515. Any defect of form in making the charge would be at most an error, of which this court could not take cognizance on *habeas corpus*. The prin-

cipal question is, whether Congress had constitutional power to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.

The petitioner, therefore, must be remanded to the custody of the marshal for the Southern District of Ohio; and it is

So ordered.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE CLIFFORD, dissenting.

I cannot assent to the decision of the majority of the court in this and the preceding case, and I will state the reasons of my dissent. One of the six petitioners is a citizen of Ohio, and the other five are citizens of Maryland. They all seek a discharge from imprisonment imposed by judgments of Federal courts for alleged official misconduct as judges of election in their respective States.

At an election held in the first congressional district of Ohio, in October, 1878, at which a representative in Congress was voted for, the petitioner from that State was appointed under its laws, and acted as a judge of election at a precinct in one of the wards of the city of Cincinnati. At an election held in the fourth and fifth congressional districts of Maryland, in November, 1878, at which a representative in Congress was voted for, the petitioners from that State were appointed under its laws, and acted as judges of election at different precincts in the wards of the city of Baltimore. For alleged misconduct as such officers of election the petitioners were indicted in the Circuit Courts of the United States for their respective districts, tried, convicted, and sentenced to imprisonment for twelve months, and, in some of the cases, also to pay a fine.

In what I have to say I shall confine myself principally to the case of the petitioner from Ohio; the other cases will be incidentally considered. In that case, the petitioner is charged with having violated a law of the State. In the cases from

Maryland, the petitioners are charged with having prevented Federal officers from interfering with them and supervising their action in the execution of the laws of the State. The principle which governs one will dispose of all of them; for if Congress cannot punish an officer of a State for the manner in which he discharges his duties under her laws, it cannot subject him to the supervision and control of others in the performance of such duties, and punish him for resisting their interference. In the cases from Maryland, it appears that the laws of the State under which the petitioners were appointed judges of election, and the registration of voters for the election of 1878 was made, were not in existence when the act of Congress was passed providing for the appointment of supervisors to examine the registration and scrutinize the lists, and of special deputy marshals to aid and protect them. The act of Congress was passed in 1871, and republished in the Revised Statutes, which are declaratory of the law in force, Dec. 1, 1873. The law of Maryland, under which the registration of voters was had, was enacted in 1874, and the law under which the judges of election were appointed was enacted in 1876, and these judges were required to possess different qualifications from those required of judges of election in 1871 and 1873.

In all the cases the petitioners are imprisoned under the judgments against them; and each one insisting that the Circuit Court, in his case, acted without jurisdiction, and that his imprisonment is, therefore, unlawful and subversive of his rights as a citizen, has petitioned this court for a writ of *habeas corpus*, annexing to his petition a transcript of the record of the proceedings against him; and prays that he may be released from restraint.

It has been settled by this court that the writ of *habeas corpus* is one of the modes by which its appellate jurisdiction will be exercised in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty; and, if necessary, that a *certiorari* will be issued with the writ to bring up for examination the record of the proceedings of the inferior tribunal. In such cases, we look into that record to see, not whether the court erred in its rulings, but whether it had

jurisdiction to impose the imprisonment complained of. If it had jurisdiction, our examination ends, and the case must await determination in the ordinary course of procedure on writ of error or appeal, should the case be one which can thus be brought under our review. But if the court below was without jurisdiction of the matter upon which the judgment of imprisonment was rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed, this court will interfere and discharge the petitioner. If, therefore, the act of Congress, in seeking to impose a punishment upon a State officer in one of these cases for disobeying a law of the State, and in the other cases for resisting the interference of Federal officials with the discharge of his duties under such law, is unconstitutional and void, the judgments of the circuit courts are unlawful and the petitioners should be released.

I do not regard the presentation by the petitioner from Ohio of his petition to one of the justices of the court in the first instance as a fact at all affecting his case. His petition is addressed to this court, and though the justice, who allowed the writ, directed that it should be returnable before himself, he afterwards ordered the hearing upon it to be had before this court. The petition may, therefore, with propriety be treated as if presented to us in the first instance. Irregularities in that regard should not be allowed to defeat its purpose, the writ being designed for the security of the personal liberty of the citizen.

The act of Congress upon which the indictment of the petitioner from Ohio was founded is contained in sect. 5515 of the Revised Statutes, which declares that "every officer of an election, at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized with intent to affect any such election or the result thereof, . . . shall be punished as prescribed" in a

previous section, that is, by a fine not exceeding $1,000, or imprisonment not more than one year, or by both.

The indictment contains three counts, the third of which was abandoned. The first count charges unlawful neglect on the part of the accused to perform a duty required of him by the laws of the State, in not carrying to the clerk of the Court of Common Pleas one of the poll-books of the election, covered and sealed by the judges of election, with which he was intrusted by them for that purpose. The second count charges the violation of a duty required of him by the laws of the State in permitting one of the poll-books, covered and sealed, intrusted to him by the judges of election to carry to the clerk of the Court of Common Pleas, to be broken open before he conveyed it to that officer.

The law of Ohio, to which reference is had in the indictment, provides that after the votes at an election are canvassed "the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise), to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election."

The provisions of the act of Congress relating to the appointment of supervisors of election, the powers with which they are intrusted, and the aid to be rendered them by marshals and special deputy marshals, for resisting and interfering with whom the petitioners from Maryland have been condemned and are imprisoned, are stated in the opinion of the court. It is sufficient to observe that they authorize the supervisors to supervise the action of the State officers from the registration of voters down to the close of the polls on the day of election; require the marshals to aid and protect them, and provide for the appointment of special deputy marshals in towns and cities of over twenty thousand inhabitants; and they invest those Federal officers with a power to arrest and take into custody persons without process more extended than has ever before in our country in time of peace been intrusted to any one.

In what I have to say I shall endeavor to show; 1st, that it is not competent for Congress to punish a State officer for the manner in which he discharges duties imposed upon him by the laws of the State, or to subject him in the performance of such duties to the supervision and control of others, and punish him for resisting their interference; and, 2d, that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States.

There is no doubt that Congress may adopt a law of a State, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretence of such adoption. In the case from Ohio it is for the violation of a State law, not a law of the United States, that the indictment was found. The judicial power of the United States does not extend to a case of that kind. The Constitution defines and limits that power. It declares that it shall extend to cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers and consuls; to cases of admiralty and maritime jurisdiction, and to various controversies to which the United States or a State is a party, or between citizens of different States, or citizens of the same State claiming lands under grants of different States, or between citizens of a State and any foreign State, citizens or subjects. The term "controversies" as here used refers to such only as are of a civil as distinguished from those of a criminal nature. The judicial power thus defined may be applied to new cases as they arise under the Constitution and laws of the United States, but it cannot be enlarged by Congress so as to embrace cases not enumerated in the Constitution. It has been so held by this court from the earliest period. It was so adjudged in 1803 in *Marbury* v. *Madison*, and the adjudication has been affirmed in numerous instances since. This limitation upon Congress would seem to be conclusive of the case from Ohio. To authorize a criminal prosecution in the Federal courts for an offence against a law of a State is to extend the judicial power of the United States to a case not arising under the Constitution or laws of the United States.

But there is another view of this subject which is equally conclusive against the jurisdiction of the Federal court. The act of Congress asserts a power inconsistent with, and destructive of, the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. If the Federal government can punish a violation of the laws of the State, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the States subversive of all their reserved rights. However large the powers conferred upon the government formed by the Constitution, and however numerous its restraints, the right to enforce their own laws by such sanctions as they may deem appropriate is left, where it was originally, with the States. It is a right which has never been surrendered. Indeed a State could not be considered as independent in any matter, with respect to which its officers, in the discharge of their duties, could be subjected to punishment by any external authority; nor in which its officers, in the execution of its laws, could be subject to the supervision and interference of others.

The invalidity of coercive measures by the United States, to compel an officer of a State to perform a duty imposed upon him by a law of Congress, is asserted in explicit terms in the case of *The Commonwealth of Kentucky* v. *Dennison*, 24 How. 66. The Constitution declares that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." And the act of Congress of 1793, to give effect to this clause, made it the duty of the executive authority of the State, upon the demand mentioned, and the production of a properly authenticated copy of the indictment or affidavit charging the person demanded with the commission of treason, felony, or other crime, to surrender the fugitive. The Governor of Ohio having refused upon a proper demand to sur-

render a fugitive from justice from Kentucky, the Governor of the latter State applied to this court for a *mandamus* to compel the performance of that duty. But the court, after observing that, though the words, "it shall be the duty," in ordinary legislation implied the assertion of the power to command and to cause obedience, said, that looking to the subject-matter of the law and "the relations which the United States and the several States bear to each other," it was of opinion that the words were not used as mandatory and compulsory, but as declaratory of the moral duty created, when Congress had provided the mode of carrying the provision into execution. "The act does not provide," the court added, "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State. It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that in using this word 'duty,' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution." And again: "If the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."

If it be incompetent for the Federal government to enforce by coercive measures the performance of a plain duty, imposed by a law of Congress upon the executive officer of a State, it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a State. If Congress cannot impose upon a State officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the State may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. It is a contradiction in terms to say that it can inflict punishment for disobedience to an act the performance of which it has no constitutional power to command.

I am not aware that the doctrine of this case, which is so essential to the harmonious working of the State and Federal governments, has ever been qualified or departed from by this court, until the recent decisions in the Virginia cases, of which I shall presently speak. It is true that, at an early period in the history of the government, laws were passed by Congress, authorizing State courts to entertain jurisdiction of proceedings by the United States, to enforce penalties and forfeitures under the revenue laws, and to hear allegations, and take proofs, if application were made for their remission. To these laws reference is made in the Kentucky case; and the court observes that the powers which they conferred were for some years exercised by the State tribunals, without objection, until, in some of the States, their exercise was declined, because it interfered with and retarded the performance of duties which properly belonged to them as State courts, and in other States because doubts arose as to the power of State courts to inflict penalties and forfeitures for offences against the general government, unless specially authorized to do so by the States; and that the co-operation of the States in thoses cases was a matter of comity which the several sovereignties extended to one another for their mutual benefit, and was not regarded by either party as an obligation imposed by the Constitution.

It is to be observed that, by the Constitution, the demand for the surrender of a fugitive is to be made by the executive authority of the State from which he has fled; but it is not

declared upon whom the demand shall be made. That was left to be determined by Congress; and it provided that the demand should be made upon the executive of the State where the fugitive was found. It might have employed its own agents, as in the enforcement of the fugitive-slave law, and compelled them to act. But, in both cases, if it employed the officers of the State, it could not restrain nor coerce them.

Whenever, therefore, the Federal government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the States, it must accept the agency with the conditions upon which the officers are permitted to act. For example, the Constitution invests Congress with the "power to establish a uniform rule of naturalization;" and this power, from its nature, is exclusive. A concurrent power in the States would prevent the uniformity of regulations required on the subject. *Chirac* v. *Chirac*, 2 Wheat. 259; The Federalist, No. 42. Yet Congress, in legislating under this power, has authorized courts of record of the States to receive declarations under oath by aliens of their intention to become citizens, and to admit them to citizenship, after a limited period of residence, upon satisfactory proof as to character and attachment to the Constitution. But, when Congress prescribed the conditions and proof upon which aliens might, by the action of the State courts, become citizens, its power ended. It could not coerce the State courts to hold sessions for such applications, nor fix the time when they should hear the applicants, nor the manner in which they should administer the required oaths, nor regulate in any way their procedure. It could not compel them to act by *mandamus* from its own tribunals, nor subject their judges to criminal prosecution for their non-action. It could accept the agency of those courts only upon such terms as the States should prescribe. The same thing is true in all cases where the agency of State officers is used; and this doctrine applies with special force to judges of elections, at which numerous State officers are chosen at the same time with representatives to Congress. So far as the election of State officers and the registration of voters for their election are concerned, the Federal government has confessedly no authority to interfere. And yet the super-

vision of and interference with the State regulations, sanctioned by the act of Congress, when representatives to Congress are voted for, amount practically to a supervision of and an interference with the election of State officers, and constitute a plain encroachment upon the rights of the States, which is well calculated to create irritation towards the Federal government, and disturb the harmony that all good and patriotic men should desire to exist between it and the State governments.

It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the government of the confederation, and they fully accomplished their purpose; for, as said by Chief Justice Marshall, in the *McCullough Case*, "No trace is to be found in the Constitution of an intention to create a dependence of the Federal government on the governments of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends." When, therefore, the Federal government desires to compel by coercive measures and punitive sanctions the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. If it sees fit to intrust the performance of such duties to officers of a State, it must take their agency, as already stated, upon the conditions which the State may impose. The co-operative scheme to which the majority of the court give their sanction, by which the general government may create one condition and the States another, and each make up for and supplement the omissions or defects in the legislation of the other, touching the same subject, with its separate penalties for the same offence, and thus produce a harmonious mosaic of statutory regulation, does not appear to have struck the great jurist as a feature in our system of government or one that had been sanctioned by its founders.

It is true that, since the recent amendments of the Constitution, there has been legislation by Congress asserting, as in the instance before us, a direct control over State officers, which

previously was never supposed to be compatible with the independent existence of the States in their reserved powers. Much of that legislation has yet to be brought to the test of judicial examination; and, until the recent decisions in the Virginia cases, I could not have believed that the former carefully considered and repeated judgments of this court upon provisions of the Constitution, and upon the general character and purposes of that instrument, would have been disregarded and overruled. These decisions do indeed, in my judgment, constitute a new departure. They give to the Federal government the power to strip the States of the right to vindicate their authority in their own courts against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied or cannot enforce some right under their laws. And they assert for the Federal government a power to subject a judicial officer of a State to punishment for the manner in which he discharges his duties under her laws. The power to punish at all existing, the nature and extent of the punishment must depend upon the will of Congress, and may be carried to a removal from office. In my judgment, — and I say it without intending any disrespect to my associates, — no such advance has ever before been made toward the conversion of our Federal system into a consolidated and centralized government. I cannot think that those who framed and advocated, and the States which adopted the amendments, contemplated any such fundamental change in our theory of government as those decisions indicate. Prohibitions against legislation on particular subjects previously existed, — as, for instance, against passing a bill of attainder and an *ex post facto* law, or a law impairing the obligation of contracts; and, in enforcing those prohibitions, it was never supposed that criminal prosecutions could be authorized against members of the State legislature for passing the prohibited laws, or against members of the State judiciary for sustaining them, or against executive officers for enforcing the judicial determinations. Enactments prescribing such prosecutions would have given a fatal blow to the independence and autonomy of the States. So, of all or nearly all the prohibi tions of the recent amendments, the same doctrine may be

asserted. In few instances could legislation by Congress be deemed appropriate for their enforcement, which should provide for the annulment of prohibited laws in any other way than through the instrumentality of an appeal to the judiciary, when they impinged upon the rights of parties. If in any instance there could be such legislation authorizing a criminal prosecution for disregarding a prohibition, that legislation should define the offence and declare the punishment, and not invade the independent action of the different departments of the State governments within their appropriate spheres. Legislation by Congress can neither be necessary nor appropriate which would subject to criminal prosecution State officers for the performance of duties prescribed by State laws, not having for their object the forcible subversion of the government.

The clause of the Constitution, upon which reliance was placed by counsel, on the argument, for the legislation in question, does not, as it seems to me, give the slightest support to it. That clause declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators." The power of Congress thus conferred is either to alter the regulations prescribed by the State or to make new ones; the alteration or new creation embracing every particular of time, place, and manner, except the place of choosing senators. But in neither mode nor in any respect has Congress interfered with the regulations prescribed by the legislature of Ohio, or with those prescribed by the legislature of Maryland. It has not altered them, nor made new ones. It has simply provided for the appointment of officers to supervise the execution of the State laws, and of marshals to aid and protect them in such super vision, and has added a new penalty for disobeying those laws. This is not enforcing an altered or a new regulation. Whatever Congress may properly do touching the regulations, one of two things must follow; either the altered or the new regulation remains a State law, or it becomes a law of Congress. If it remain a State law, it must, like other laws of the State,

be enforced, through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of Federal officials. If, on the other hand, it become a law of Congress, it must be carried into execution by such officers and with such sanctions as Congress may designate. But as Congress has not altered the regulations for the election of representatives prescribed by the legislature of Ohio or of Maryland, either as to time, place, or manner, nor adopted any regulations of its own, there is nothing for the Federal government to enforce on the subject. The general authority of Congress to pass all laws necessary to carry into execution its granted powers, supposes some attempt to exercise those powers. There must, therefore, be some regulations made by Congress, either by altering those prescribed by the State, or by adopting entirely new ones, as to the times, places, and manner of holding elections for representatives, before any incidental powers can be invoked to compel obedience to them. In other words, the implied power cannot be invoked until some exercise of the express power is attempted, and then only to aid its execution. There is no express power in Congress to enforce State laws by imposing penalties for disobedience to them; its punitive power is only implied as a necessary or proper means of enforcing its own laws; nor is there any power delegated to it to supervise the execution by State officers of State laws.

If this view be correct, there is no power in Congress, independently of all other considerations, to authorize the appointment of supervisors and other officers to superintend and interfere with the election of representatives under the laws of Ohio and Maryland, or to annex a penalty to the violation of those laws, and the action of the circuit courts was without jurisdiction and void. The act of Congress in question was passed, as it seems to me, in disregard of the object of the constitutional provision. That was designed simply to give to the general government the means of its own preservation against a possible dissolution from the hostility of the States to the election of representatives, or from their neglect to provide suitable means for holding such elections. This is evident from the language of its advocates, some of them members of the convention, when

the Constitution was presented to the country for adoption. In commenting upon it in his report of the debates, Mr. Madison said that it was meant "to give the national legislature a power not only to alter the provisions of the States, but to make regulations, *in case the States should fail or refuse altogether.*" Elliott's Debates, 402. And in the Virginia convention called to consider the Constitution, he observed that "it was found impossible to fix the time, place, and manner of the election of representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the State governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to *produce uniformity and prevent its own dissolution.*" 3 id. 367. And in the Federalist, Hamilton said, that the propriety of the clause in question rested "upon the evidence of the plain proposition that every government should contain in itself the means of its own preservation."

Similar language is found in the debates in conventions of the other States and in the writings of jurists and statesmen of the period. The conduct of Rhode Island was referred to as illustrative of the evils to be avoided. That State was not represented by delegates in Congress for years, owing to the character and views of the prevailing party; and Congress was often embarrassed by their absence. The same evil, it was urged, might result from a similar cause, and Congress should, therefore, possess the power to give the people an opportunity of electing representatives if the States should neglect or refuse to make the necessary regulations.

In the conventions of several States which ratified the Constitution an amendment was proposed to limit in express terms the action of Congress to cases of neglect or refusal of a State to make proper provisions for congressional elections, and was supported by a majority of the thirteen States; but it was finally abandoned upon the ground of the great improbability of congressional interference so long as the States performed their duty. When Congress does interfere and provide regulations, the duty of rendering them effectual, so far as they may require affirmative action, will devolve solely upon the Federal government. It will then be Federal power which is

to be exercised, and its enforcement, if promoted by punitive sanctions, must be through Federal officers and agents; for, as said by Mr. Justice Story in *Prigg* v. *Pennsylvania*, "The national government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution." If State officers and State agents are employed, they must be taken, as already said, with the conditions upon which the States may permit them to act, and without responsibility to the Federal authorities. The power vested in Congress is to alter the regulations prescribed by the legislatures of the States, or to make new ones, as to the times, places, and manner of *holding* the elections. Those which relate to the times and places will seldom require any affirmative action beyond their designation. And regulations as to the *manner of holding* them cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of voters. These are matters not pertaining to or involved in the *manner of holding* the election, and their regulation rests exclusively with the States. The only restriction upon them with respect to these matters is found in the provision that the electors of representatives in Congress shall have the qualifications required for electors of the most numerous branch of the State legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for representatives must be so framed as to leave the election of State officers free, otherwise they cannot be maintained. In one of the numbers of the Federalist, Mr. Hamilton, in defending the adoption of the clause in the Constitution, uses this language: "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle in this case would

have required no comment." By the act of Congress sustained by the court, an interference with State elections is authorized almost as destructive of their control by the States as the direct regulation which he thought no man would hesitate to condemn.

The views expressed derive further support from the fact that the constitutional provision applies equally to the election of senators, except as to the place of choosing them, as it does to the election of representatives. It will not be pretended that Congress could authorize the appointment of supervisors to examine the roll of members of State legislatures and pass upon the validity of their titles, or to scrutinize the balloting for senators; or could delegate to special deputy marshals the power to arrest any member resisting and repelling the interference of the supervisors. But if Congress can authorize such officers to interfere with the judges of election appointed under State laws in the discharge of their duties when representatives are voted for, it can authorize such officers to interfere with members of the State legislatures when senators are voted for. The language of the Constitution conferring power upon Congress to alter the regulations of the States, or to make new regulations on the subject, is as applicable in the one case as in the other. The objection to such legislation in both cases is that State officers are not responsible to the Federal government for the manner in which they perform their duties, nor subject to its control. Penal sanctions and coercive measures by Federal law cannot be enforced against them. Whenever, as in some instances is the case, a State officer is required by the Constitution to perform a duty, the manner of which may be prescribed by Congress, as in the election of senators by members of State legislatures, those officers are responsible only to their States for their official conduct. The Federal government cannot touch them. There are remedies for their disregard of its regulations, which can be applied without interfering with their official character as State officers. Thus if its regulations for the election of senators should not be followed, the election had in disregard of them might be invalidated; but no one, however extreme in his views, would contend that in such a case the members of the legislature

could be subjected to criminal prosecution for their action. With respect to the election of representatives, so long as Congress does not adopt regulations of its own and enforce them through Federal officers, but permits the regulations of the States to remain, it must depend for a compliance with them upon the fidelity of the State officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties, and providing for criminal prosecutions against them in the Federal courts, are, in my judgment, clearly in conflict with the Constitution. The law was adopted, no doubt, with the object of preventing frauds at elections for members of Congress, but it does not seem to have occurred to its authors that the States are as much interested as the general government in guarding against frauds at those elections and in maintaining their purity, and, if possible, more so, as their principal officers are elected at the same time. If fraud be successfully perpetrated in any case, they will be the first and the greatest sufferers. They are invested with the sole power to regulate domestic affairs of the highest moment to the prosperity and happiness of their people, affecting the acquisition, enjoyment, transfer, and descent of property; the marriage relation, and the education of children; and if such momentous and vital concerns may be wisely and safely intrusted to them, I do not think that any apprehension need be felt if the supervision of all elections in their respective States should also be left to them.

Much has been said in argument of the power of the general government to enforce its own laws, and in so doing to preserve the peace, though it is not very apparent what pertinency the observations have to the questions involved in the cases before us. No one will deny that in the powers granted to it the general government is supreme, and that, upon all subjects within their scope, it can make its authority respected and obeyed throughout the limits of the Republic; and that it can repress all disorders and disturbance which interfere with the enforcement of its laws. But I am unable to perceive in this fact, which all sensible men acknowledge, any cause for the exercise of ungranted power. The greater its lawful power, the greater

the reason for not usurping more. Unrest, disquiet, and disturbance will always arise among a people, jealous of their rights, from the exercise by the general government of powers which they have reserved to themselves or to the States.

My second proposition is that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States. The act upon which the indictment of the petitioner from Ohio is founded makes the neglect or violation of a duty prescribed by a law of the State in regard to an election at which a representative in Congress is voted for a criminal offence. It does not say that the neglect or disregard of a duty prescribed by any *existing* law shall constitute such an offence. It is the neglect or disregard of *any duty* prescribed by *any law* of the State *present or future*. The act of Congress is not changed in terms with the changing laws of the State; but its penalty is to be shifted with the shifting humors of the State legislatures. I cannot think that such punitive legislation is valid, which varies, not by direction of the Federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one State and criminal in another, not according to the views of Congress as to its propriety, but to those of another body. The Constitution vests all the legislative power of the Federal government in Congress; and from its nature this power cannot be delegated to others, except as its delegation may be involved by the creation of an inferior local government or department. Congress can endow territorial governments and municipal corporations with legislative powers, as the possession of such powers for certain purposes of local administration is indispensable to their existence. So, also, it can invest the heads of departments and of the army and navy with power to prescribe regulations to enforce discipline, order, and efficiency. Its possession is implied in their creation; but legislative power over subjects which come under the immediate control of Congress, such as defining offences against the United States, and prescribing punishment for them cannot be delegated to any other government or authority. Congress cannot, for example, leave to the States the enactment of laws and restrict the United States to their

enforcement. There are many citizens of the United States in foreign countries, in Japan, China, India, and Africa. Could Congress enact that a crime against one of those States should be punished as a crime against the United States? Can Congress abdicate its functions and depute foreign countries to act for it? If Congress cannot do this with respect to offences against those States, how can it enforce penalties for offences against any other States, though they be of our own Union? If Congress could depute its authority in this way; if it could say that it will punish as an offence what another power enacts as such, it might do the same thing with respect to the commands of any other authority, as, for example, of the President or the head of a department. It could enact that what the President proclaims shall be law; that what he declares to be offences shall be punished as such. Surely no one will go so far as this, and yet I am unable to see the distinction in principle between the existing law and the one I suppose, which seems so extravagant and absurd.

I will not pursue the subject further, but those who deem this question at all doubtful or difficult, may find something worthy of thought in the opinions of the Court of Appeals of New York and of the supreme courts of several other States, where this subject is treated with a fulness and learning, which leaves nothing to be improved and nothing to be added.

I am of opinion that the act of Congress was unauthorized and invalid; that the indictment of the petitioner from Ohio, and also the indictments of the petitioners from Maryland, and their imprisonment, are illegal, and that, therefore, they should all be set at liberty.

PACKET COMPANY *v.* ST. LOUIS.

1. A municipal corporation, owning improved wharves and other artificial means which it maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the Constitution of the United States from charging and collecting from parties using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of the property.
2. *Packet Company* v. *Keokuk* (95 U. S. 80) affirmed.

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

The facts are stated in the opinion of the court.

Mr. James H. Davidson, for the plaintiff in error.

Mr. Leverett Bell, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error is a corporation of the State of Iowa, and, during the years 1870, 1871, and up to March 28, 1872, was engaged with steamboats and barges of which it was the owner, in the business of commerce and navigation on the Mississippi River, between ports and places in different States. Its steamboats and barges, in the course of such business, landed at St. Louis, and, during the period named, it paid to that city, upon the demand of its constituted authorities, large sums of money, amounting in the aggregate to $6,571.35. These sums were exacted as wharfage dues, in virtue of certain ordinances of the city, one of which was entitled "An ordinance establishing and regulating the harbor department," and the other, "An ordinance to reduce the rate of wharfage in the city of St. Louis."

The authority of the city to collect these fees is referred to sect. 30 of the ordinance first named, which is as follows: —

"There shall be collected from each and every boat, of whatever kind or description, . . . for each and every time the same shall come within the harbor of said city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, or shall tow coal or any other article in the harbor, seven and one-

half cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues. If the boat have no custom-house measurement, or if the harbor-master be not satisfied as to the correctness of said boat's custom-house measurement, he is hereby empowered and directed to ascertain the tonnage of said boat by measurement, according to the rules and regulations of the United States in the measurement of boats and wharfage shall be collected according to such measurement: *Provided*, that any boat making regular daily, semi-weekly, tri-weekly, or weekly trips, or is engaged in the business of towing, and ferry-boats, may pay wharfage dues at a different or special rate, as may be provided by this ordinance."

The payments in question were made by the company whenever demanded, but always under protest, and without waiving any right it had to recover the same from the city by an action at law.

This action was instituted to compel the repayment of the sums thus collected, upon the ground that the ordinances in question, and particularly the section above quoted, was in conflict, 1st, with the clause prohibiting any State, without the consent of Congress, from laying any duty of tonnage; 2d, with the clause which declares that "no tax or duty shall be laid on articles exported from any State; no preference shall be given any regulation of commerce or revenue to the ports of any one State over those of another; nor shall any vessels bound to or from one State be obliged to enter, clear, or pay duties in another;" 3d, with the clause conferring upon Congress the right to regulate commerce with foreign nations, among the several States, and with the Indian tribes; 4th, with the "Treaty of Paris, 1783," which declares that "the navigation of the river Mississippi, from its source to the ocean, shall for ever remain free and open to the subjects of Great Britain and the citizens of the United States;" 5th, with the Treaty of Spain, concluded Oct. 27, 1795, which declares: ". . . And his Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth, from its source to the ocean, shall be free only to his subjects and the citizens of the United States;" 6th, with the ordinance of 1787, which, among other things, provides "that the

navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and for ever free, as well to the inhabitants of the said territory as to the citizens of the United States, that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The court below, the circuit and district judges concurring, was of opinion that the plaintiff in error was legally bound to pay the sums so exacted and paid as wharfage fees, under the ordinances to which we have referred. Judgment was, accordingly, given for the city. Whether the facts set forth in the special finding are sufficient to sustain the judgment is the controlling question arising upon this writ of error.

The elaborate argument of counsel for the company is directed to the support of the first, second, and third of the foregoing propositions. He withholds any suggestion or argument in support of the remaining propositions, for the obvious reason, as we suppose, that the case must fail altogether unless the plaintiff in error can successfully maintain the invalidity of the ordinances, under some one or more of the constitutional provisions by him cited. If the particular section of the ordinance, by virtue of which these collections were made, is not in conflict with the Federal Constitution, there would be no ground whatever for holding that it was inconsistent with either of the treaties referred to, or with the ordinance of 1787. We will, therefore, only consider whether the city of St. Louis was inhibited by any provision of the Federal Constitution from charging and collecting the fees, to enforce the repayment of which is the object of this action.

By the charter of the city, its mayor and council were invested with authority to regulate the stationing, anchoring, and mooring of vessels, within the city, and to charge and collect wharfage on fire-wood, lumber, logs, &c., brought to the port of St. Louis. The council was also required, from time to time, to provide, by ordinance, for the levy and collection of taxes, licenses, wharfage, and other dues, under penalty for neglect or refusal to pay the same; also, for maintaining the permanency of and improving the wharf and harbor, and for opening and extending the wharf, applying, in its discretion,

all the net receipts from wharfage to the credit of the wharf funds.

Under the authority thus conferred, the city passed the ordinance regulating and establishing its harbor department and prescribing the duties of the harbor-master.

By that ordinance it is declared that the harbor of the city comprises the bed of the Mississippi River, its channels, sloughs, bayous, bars, and islands, from the mouth of the Missouri River to the southern boundary of the city. The jurisdiction of the harbor-master is made to extend over all the lands, river bank, and beach dedicated, condemned, occupied, or used for wharf purposes, within the city, and over so much of the Mississippi River, and to the middle of the main channel thereof as lies immediately in front of the city, over which the city has control.

It is made his duty to direct the landing and stationing of all water-craft arriving at any point within the limits of the city, and to direct the discharge and removal of their cargoes, so as to prevent interference between different vessels and their cargoes; to superintend the arrangement of freight, merchandise, and materials for repairs in the river bank, so that the same shall occupy as little space as possible; to see that all combustible materials on the landing are sufficiently protected from fire; to keep the wharf and the river along the shore free from improper obstructions; to keep in repair the ring-bolts provided for fastening vessels; to regulate and control by proper rules to be established and published, all vehicles traversing the wharf or landing, and to remove thence such as unnecessarily obstruct free passage upon said wharf or landing, and generally to exercise complete supervision and control over the wharf, river bank, landing and Front Street.

It is also made his duty, under the direction of the mayor to provide, at the expense of the city, whenever the same shall be deemed necessary, suitable posts and ring-bolts for boats and rafts to make fast to and keep the same in repair; also to extend the steamboat landing, north and south, as soon as the wharf was made suitable for the landing of merchandise, and the depth of the water shall justify, so as to give room required by boats for the handling, receiving, and discharging of freight,

and for the free passage of drays and other vehicles, and to designate the boundary of each class of boats, according to the wants of different trades at the time of such extension.

The duties thus imposed upon the harbor-master, if faithfully discharged, must, it will be conceded, materially advance, and not obstruct or burden trade and business on the Mississippi River, especially at the port of St. Louis. Services rendered by him in the execution of those duties would be in aid, and not a hinderance, of commerce and navigation. Besides, as the special finding discloses, the city acquired, at its own expense, and owns the property within its limits along the west bank of the Mississippi River, and for the purposes of a wharf has improved, paved, and maintains in repair, at its own cost, one and a half miles of the same at an enormous expense. That wharf was used by the plaintiff in error in conducting its business, at all stages of water, for the purpose of receiving and discharging freight, and for the convenience of passengers in getting on and off its boats. Its boats landed at and used only the improved wharf. And it is found as a fact in the case that the fees demanded from and paid by the company, under the city ordinances, "were reasonable in amount, and a reasonable compensation for the use of defendant's wharf, if defendant (the city) was entitled to collect any sums whatever under said ordinance."

From this analysis of the special finding and the ordinance establishing and regulating the harbor department of St. Louis, it is not difficult to apprehend the nature and scope of the question before us. Briefly stated, it is whether a municipal corporation, owning improved wharves and other artificial means which it has provided and maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is prohibited by the national Constitution from charging and collecting from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of its property?

This precise question has heretofore received careful consideration by this court, and we recognize nothing in this case which has not been concluded by former adjudications, or which requires extended discussion.

In *Cannon* v. *New Orleans* (20 Wall. 577), upon writ of error to the Supreme Court of Louisiana, we had occasion to consider the constitutional validity of an ordinance of the city of New Orleans, whereby "levee and wharfage dues" were imposed upon steamboats mooring or landing "in any part of the port" of that city, the amount of such duties to be determined, at a fixed rate, by the tonnage of such vessels. That case is relied upon here as sustaining the ground upon which the plaintiff in error assails the validity of the ordinance passed by the municipal authorities of St. Louis. We do not, however, assent to any such construction of our opinion in that case. It was in evidence there, that not more than one-tenth of the twenty miles and more of the levee and banks of the Mississippi, within the corporate limits of New Orleans, had any wharf, and that vessels often landed at various places, within the city, where no wharfage facilities existed. It does not appear from the opinion of the court, or from the reporter's statement of that case, where the landings of Cannon's steamer were actually made, whether at the improved wharf of the city, or at points where no wharf accommodations were furnished for the use of vessels. We, therefore, held, that the ordinance, interpreted in the light of the admitted condition of the river and its banks within the city, imposed a duty of tonnage for the mere privilege of stopping, mooring, or landing at the port of New Orleans, and that the charges exacted could not, in view of the special circumstances disclosed by the evidence, be regarded or supported, as compensation simply for the use of the city's wharves. But we there expressly recognized, as essential to the interests of commerce and navigation, and as entirely consistent with the provisions of the national Constitution, the right of a municipal corporation, thereunto authorized by the State which created it, to demand from those engaged in commerce just compensation for the use of wharves, or other artificial facilities, provided and maintained at its expense.

That such was the import of our decision in *Cannon* v. *New Orleans* is shown in the recent case of *Packet Company* v. *Keokuk* (95 U. S. 80), where the question under consideration was again and very fully examined in connection with an ordinance of Keokuk, which, in its main features, is like that now under

examination. By the Keokuk ordinance wharfage fees were charged whenever a steamboat should make fast to any part of the wharf of that city, or to any vessel, or other thing at or upon said wharf, or should receive or discharge any passengers or freight thereon, or should use any part of the wharf for the purpose of discharging, receiving, or landing any freight or passenger — the fees, in such cases, to be measured by the tonnage of the boat using the wharf. The unanimous judgment of the court was that the Keokuk ordinance was not repugnant to the Constitution of the United States — that the wharfage fees collectible thereunder were by way of compensation to the city for the use of its property, and were not duties, taxes, or burdens for the mere privilege of entering the port of Keokuk, or remaining in it, or departing from it.

We need not repeat the reasons there given for the distinction between tonnage duties, which the States are prohibited from levying without the consent of Congress, and wharfage dues, properly so called, imposed in good faith, and to the extent only of fair remuneration for wharf accommodations furnished for the convenience of trade and commerce. We adhere to the doctrines announced in that case. They are decisive of the present one. The sums paid by the plaintiff in error were exacted and paid as compensation for the use of an improved wharf and not for the mere privilege of entering or stopping at the port of St. Louis, or for landing at the shore, in its natural condition, where there were no conveniences which could be called a wharf. The amount paid is conceded to have been just and reasonable compensation for vessels and barges such as those owned by the plaintiff in error. It was not out of proportion to the advantages and benefits enjoyed in the use of the improved wharf. The one was a fair equivalent for the other. Nor is there any ground whatever to suppose that these wharfage fees were exacted for the purpose of increasing the general revenue of the city beyond what was necessary to meet its outlay, from time to time, in maintaining its wharves in such condition as the immense business and trade of that locality required. We are not at liberty, from any thing disclosed by the record, to suppose that the city intended its ordinance as a mere cover for laying

duties of tonnage within the meaning of the Federal Constitution.

What has been said renders it unnecessary to consider any other question presented in argument.

To avoid misapprehension, it is, perhaps, well to say that we express no opinion as to the validity of any of the provisions of the city charter or ordinances except such as have direct reference to the case before us. We restrict our decision to the single point that the city was not prohibited by the Federal Constitution from collecting the wharfage fees in question as reasonable compensation for the use of its wharves by the plaintiff in error.

Judgment affirmed.

VICKSBURG *v.* TOBIN.

1. The ordinance of the city of Vicksburg passed July 12, 1865, entitled "AN ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft landing and lying at the City of Vicksburg," is not in conflict with the Constitution of the United States.
2. *Packet Company* v. *St. Louis* (*supra*, p. 423), affirmed.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. Philip Phillips, for the plaintiff in error.

Mr. W. B. Pittman, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error involves the constitutional validity of an ordinance of the city of Vicksburg, passed July 12, 1865, entitled "An ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft, landing and lying at the city of Vicksburg."

The ordinance declares that all steamboats "landing at this [that] city" shall pay wharfage at the following rates: All packets terminating their trips at the city, per week, $10; all steamboats under 1,000 tons burthen, passing and repassing,

for each landing, $10; and, for each one exceeding 1,000 tons, $1 for every 100 tons excess; circus or exhibition boats, $5 per day.

The ordinance further provides that, if the captain or officer in command of any steamboat or water-craft shall refuse to comply with its provisions, on conviction thereof he shall be charged $100 for each landing thereafter, until the settlement of the litigated claim.

Within the six years immediately preceding the commencement of this action, the city of Vicksburg collected from the defendants in error (without protest or objection on their part, although they knew the rates established by the city) the sum of $5,400, "for and on account," as the special verdict of the jury recites, "of wharfage for the landing of plaintiffs' [defendants in error] boats at the city landing of Vicksburg on the Mississippi, plaintiffs' boats being at the time engaged in the coasting trade on said river, between New Orleans and Vicksburg, and other ports above Vicksburg."

This action was instituted to recover from the city the sums thus exacted from the defendants in error. Judgment upon the special verdict of the jury was rendered against the city, to reverse which this writ of error is prosecuted.

It appeared, upon the trial in the Circuit Court, that the corporation of Vicksburg has been the riparian owner of the city landing, on account of which these charges were made, since 1851; that the former owner uniformly collected wharfage from steamboats stopping at said landing up to 1851, and that the city had done the same ever since that date, but at higher rates; that the landing is comprised in a river-front in the city, covering a length of about eighteen hundred feet between high and low-water mark; that the landing is worth $50,000, in the repair and improvement of which the city had expended, within the six years preceding the trial, $40,000; that the only improvement made by the city at the landing was the grading and piling of the bank to prevent caving; that, although the landing was not paved or covered with plank, it was a good landing in dry weather, but too muddy in wet weather to use as a place of deposit for freight; that the annual net receipts by the city from the use of the landing did not exceed $11,500; that the

wharf and harbor-master demanded and received from each boat stopping at the city landing $10, and no more, without reference to the tonnage of the boat or the time it lay at the landing.

It was also in evidence that, during the whole period for which collections were made from defendants in error, the Merchants' Wharf-boat Association had a wharf-boat lying at the city landing, and, for the privilege of occupying the space necessary therefor, had paid the city $2,000 per annum; that, during that period, the boats of the defendants in error had touched the city landing only about twenty times, upon all other occasions landing against or fastening to the boat of the Merchants' Association.

The record discloses other facts; but they do not seem to be material in the determination of the case.

The judgment rests mainly upon the ground that the ordinance by virtue of which the money sued for was demanded and collected was in conflict, as well with the clause of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States, as with the clause inhibiting the States from laying duties of tonnage.

This question is disposed of by the opinion just rendered in *Packet Company* v. *St. Louis*, *supra*, p. 423. It is, in substance, the same question as that decided in *Packet Company* v. *Keokuk*, 95 U. S. 80. The latter case had not been determined in this court, when the judgment now complained of was rendered. Here, as in the cases concerning the ordinances of Keokuk and St. Louis, the sums sued for were exacted and received as wharfage-fees by way of compensation for the use of an improved wharf, purchased and maintained by a municipal corporation at its own cost, for the benefit of commerce and navigation. They were not exacted for the mere privilege of entering or remaining in or departing from the port of Vicksburg. The ordinance in question does not, therefore, entrench upon the power of Congress to regulate commerce among the States, nor does it lay a duty of tonnage in the sense of the Constitution.

It is contended that this ordinance, in explicit language, imposes a tax for merely landing *at the city*, and points on the

shore where there may have been in fact no wharf. If the ordinance was susceptible of that construction, a question would be presented for our determination altogether different from the one before us. Clearly, the city could not collect wharfage for the use of the unimproved shore of the river, or for that which was not, in any fair business sense, a wharf. Here there was an improved wharf, and as such it was used by the boats of the defendants in error. The sums demanded were paid as and for wharfage dues, collectible under an ordinance which, rightly construed, only authorized the imposition of dues, by way of reasonable compensation, for the use, not of the river shore in its natural condition, but of the wharves of the city, erected and maintained at public expense.

One other point deserves notice. The circumstance that the defendants in error paid the Merchants' Wharf-boat Association its regular charges for landing at or against its boat does not affect the right of the city to demand from vessels the wharfage dues prescribed by the ordinance in question. It does not appear that the city, by granting the privilege which it did to that association, waived or intended to surrender its claim for wharfage from vessels landing against the association wharf-boat. All freight received by or discharged from such vessels necessarily passed over the city's wharf to its destination. It is not to be presumed that the city intended, by the special privileges granted to the Merchants' Wharf-boat Association, to waive its claim for wharfage dues from vessels landing against that boat, and using the city's wharf.

In view of what has been said touching the validity of the city ordinance, it is unnecessary to inquire whether, had such ordinance been held to be unconstitutional, the defendants in error, under the evidence in this action, could recover back what they had paid without protest or objection, and with a full knowledge of all the facts.

The judgment of the Circuit Court will be reversed, with directions to render judgment for the city upon the special verdict of the jury; and it is

So ordered.

GUY *v.* BALTIMORE.

1. A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden or tax than upon like products of her own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them.
2. An ordinance of Baltimore, whereunder vessels laden with the products of other States, are required to pay for the use of the public wharves of that city, fees which are not exacted from vessels landing thereat with the products of Maryland, is in conflict with the Constitution of the United States.
3. Such fees, so exacted, must be regarded not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States.
4. So far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin, the power of the national government over commerce with foreign nations and among the several States reaches the interior of every State of the Union.

ERROR to the Baltimore City Court, State of Maryland.

Section 4 of an act of the General Assembly of Maryland of 1827, chapter 162, entitled "An Act to appoint State wharfingers in the city of Baltimore, and to authorize the collection of wharfage in certain cases in said city" (Maryland Code of Public Local Laws, art. 4, sect. 945), provides as follows: —

"The mayor and city council of Baltimore shall be, and they are hereby, empowered and authorized to regulate, establish, charge and collect, to the use of the said mayor and city council, such rate of wharfage as they may think reasonable, of and from all vessels resorting to or lying at, landing, depositing, or transporting goods or articles other than the productions of this State, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State."

Pursuant to the authority conferred by said act, the mayor and city council, on July 27, 1858, passed an ordinance "to regulate the public wharves in the city of Baltimore," the provisions of which, as found in the thirty-third and thirty-fifth sections of art. 22 in the Baltimore City Code, are as follows: —

"SECT. 33. All goods, wares, or merchandise, landed on the public wharves from on board of any vessel or vessels lying at said wharves . . . shall pay the following rates of wharfage for each and every day the same may remain thereon . . . to be paid by the owner or consignee, or in the event of there being none, the master of the vessel, and all goods shipped from one vessel to another, one-half to be paid by the shipper, bags of coffee, ginger, pepper, or any other articles in similar bags, each one cent; bales of merchandise, . . . &c., each four cents; barrels of every description containing merchandise or otherwise, each two cents; boxes of sugar, . . . &c., each three cents; . . . grain per bushel, and all other articles sold by the bushel, other than the product of the State of Maryland, one-half cent; grindstones, each one cent;" &c., "all other goods not enumerated in the above list to pay in proportion."

"SECT. 35. All vessels resorting to or lying at, landing, depositing or transporting goods or articles other than the production of this State, on or from any wharf or wharves belonging to the mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State, shall be chargeable with the wharfage as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said mayor and city council; and the master or owner of the vessel so depositing, landing, or transporting said goods or articles, shall be responsible for the same."

The act of the General Assembly of 1860, chapter 226 (Code of Public General Laws, art. 96, sect. 18), requires potatoes to be sold in the State of Maryland "by weight, at the rate of fifty-six pounds to the bushel," under penalty of a fine of ten dollars.

Sect. 6 Revised Ordinances of 1858 (Baltimore City Code, art. 22, sect. 10) is as follows: —

"It shall not be lawful for any vessel landing or receiving cargo at any of the wharves within the limits of the city, which is required to pay wharfage on cargo or vessel to the harbor masters of the city of Baltimore, to leave the wharf where said vessel receives or discharges her cargo, without furnishing said harbor master, upon application, with his manifest or bills of lading of cargo, and paying the wharfage on the same, under a penalty of $20, to be collected, as other debts are collected, from the captain, commander, owner or consignees of said vessels so offending."

In June, 1876, Edward T. Guy, a resident in and citizen of the county of Accomac, in the State of Virginia, arrived at the city of Baltimore with the schooner "George S. Powell," of which he was captain and part owner, laden with a cargo of potatoes raised and produced in the State of Virginia, and landed said cargo, amounting to two hundred and twenty bushels, on Pratt Street wharf, belonging to said city, not "that part of Pratt Street wharf reserved." Thereupon the harbor-master demanded of him the sum of $4.40 wharfage upon said potatoes so landed; and payment thereof being refused, the city of Baltimore brought this action of debt, to recover the penalty of $20, imposed by art. 22, sect. 10, of the city code, *supra*. The defendant appeared, and judgment for $20 penalty and costs having been rendered against him, he appealed to the Baltimore City Court, at the trial wherein he prayed the court to grant, as the law of the case, the following propositions: —

1st, That the act of the General Assembly of Maryland of 1827, c. 162, sect. 4, and the portions of the ordinances of the mayor and city council passed thereunder, which impose a special wharfage charge on extra-state grown products, are repugnant to the third clause of the eighth section of art. 1 of the Constitution of the United States, and unlawful.

2d, That the act of the General Assembly of Maryland of 1827, c. 162, sect. 4, and the portions of the ordinances of the mayor and city council passed thereunder, which impose a special wharfage charge on extra-state grown products, are repugnant to the second clause of the tenth section of art. 1 of the Constitution of the United States, and unlawful.

3d, That the act of the General Assembly of Maryland of 1827, c. 162, sect. 4, and the portions of the ordinances of the mayor and city council passed thereunder, which impose a special wharfage charge on extra-state grown products, are an infringement upon the rights, privileges, and immunities of the appellant, claimed under the first clause of the second section of art. 4 of the Constitution of the United States, and are unlawful.

The court having refused to grant said propositions and affirmed the judgment below, Guy sued out this writ of error

Mr. Frederick J. Brown, for the plaintiff in error.

The act of the General Assembly of Maryland and the ordinances of the city of Baltimore, under which this action was brought, are repugnant to the Constitution of the United States, and therefore void. *Brown* v. *Maryland*, 12 Wheat. 419; *Steamship Company* v. *Port Wardens*, 6 Wall. 31; *Woodruff* v. *Parham*, 8 id. 123; *Hinson* v. *Lott*, id. 148; *Ward* v. *Maryland*, 12 id. 418; *State Tonnage Tax Cases*, id. 204; *Case of the State Freight Tax*, 15 id. 232; *Peete* v. *Morgan*, 19 id. 581; *Cannon* v. *New Orleans*, 20 id. 577; *Railroad Company* v. *Maryland*, 21 id. 456; *Welton* v. *State of Missouri*, 91 U. S. 275; *Henderson* v. *Mayor, &c.*, 92 id. 259; *McCready* v. *Virginia*, 94 id. 391; *Cooke* v. *Pennsylvania*, 97 id. 566; *Packet Company* v. *Keokuk*, 95 id. 80; *The Wharf Case*, 3 Bland (Md.), 361.

Mr. James L. McLane, *contra*, cited *Dugan* v. *Mayor, &c.*, 5 Gill & John. (Md.) 357; *Passenger Cases*, 7 How. 402; *Conner* v. *Elliott*, 18 id. 591; *Steamship Company* v. *Port Wardens*, 6 Wall. 31; *Woodruff* v. *Parham*, 8 id. 136; *Downham* v. *Alexandria Council*, 10 id. 173; *Marshall* v. *Vicksburg*, 15 id. 146; *Case of the State Freight Tax*, id. 277; *McCready* v. *Virginia*, 94 U. S. 391; *Packet Company* v. *Keokuk*, 95 id. 80; Cooley on Taxation, 62.

MR. JUSTICE HARLAN delivered the opinion of the court.

In *Woodruff* v. *Parham* (8 Wall. 123), we had occasion to consider the constitutional validity of an ordinance of the city of Mobile under the provisions of which had been assessed, for municipal purposes, a tax upon sales in that city of certain goods and merchandise, the product of States other than Alabama. The ordinance, in its application to articles carried into Alabama from other States, was assailed as being inconsistent with the constitutional inhibition upon the States levying imposts or duties on imports or exports — with the power of Congress to regulate commerce with foreign nations and among the several States — and with that clause which declares that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States.

Touching the first of these propositions it was ruled that the

term import, as used in sect. 10, art. 1, of the Constitution, had reference to articles imported from foreign countries, and not to such as were brought from one of the States of the Union into another. In the argument, *Brown* v. *Maryland* (12 Wheat. 419) was cited in support of the proposition that the whole ordinance, in its application to articles brought from other States to Mobile for sale, was an unauthorized regulation of inter-state commerce. Upon that branch of the case, we said: "If the court there [in *Brown* v. *Maryland*] meant to say that a tax levied on goods from a sister State, which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right to regulate commerce among the States, as much as the tax on foreign goods, then under consideration, was in conflict with the authority to regulate commerce with foreign nations, we agree to the proposition."

In a subsequent portion of our opinion in *Woodruff* v. *Parham*, it was said: "But we may be asked, is there no limit to the power of the States to tax the produce of other States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory? The case before us is a simple tax on sales of merchandise imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama, or of another State, and whether the goods sold are the products of that State or of some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. 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."

In *Hinson* v. *Lott* (8 Wall. 148), we upheld a statute of Alabama, imposing taxes upon the sale of spirituous liquors within its limits, upon the ground that it did not discriminate against the products of other States, and only subjected them to the same taxation imposed upon similar articles manufactured

in that State. Had the statute been susceptible of a different construction, it would have been held to be repugnant to the Constitution.

In *Ward* v. *Maryland* (12 id. 418), we examined the provisions of a statute of Maryland which, among other things, required of persons, not permanent residents of that State, before selling or offering for sale within the limits of the city of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in that State, to obtain a license therefor. The amount exacted for such license was larger than the statute required of resident traders engaged in like business. In declaring the statute to be repugnant to the Federal Constitution, we said that, "inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell or offer or expose to sale, within the district described in the indictment, any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

Upon the same ground, in the more recent case of *Welton* v. *State of Missouri* (91 U. S. 275), we held void a statute of Missouri imposing a peddler's license-tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, except books, charts, maps, and stationery, not the growth, product, or manufacture of that State, and which did not impose a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri.

In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality

of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired. "Over whatever other interests of the country," said Mr. Webster, "this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." But State legislation such as that indicated in the cases which have been cited, if maintained by this court, would ultimately bring our commerce to that "oppressed and degraded state," existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the States composing the Union.

How far the principles enunciated in the foregoing cases control the determination of the one before us, we now proceed to inquire.

By an act of the General Assembly of Maryland, passed in 1827, authority was given to the mayor and city council of Baltimore to regulate, establish, charge, and collect to their use such rate of wharfage as they might think reasonable, of and from all vessels resorting to or lying at, landing, depositing, or transporting goods or articles, *other than the products of that State*, on any wharf or wharves belonging to that municipal corporation, or any public wharf in the city other than the wharves belonging to or rented by the State, and that part of Pratt Street wharf, theretofore reserved for the use of the citizens of that State. Maryland Code of Public Local Laws, art. 4, sect. 945.

In pursuance of that act the city, by its constituted authorities, in the year 1858, passed an act regulating the public wharves. By its thirty-third section it is declared that all goods, wares, or merchandise landed on the public wharves from on board any vessels lying at said wharves, or placed thereon for the purpose of shipment or exposure for sale, *other than the product of the State of Maryland*, shall pay wharfage according to certain rates therein prescribed. The thirty-fifth

section declares that "all vessels belonging to or lying at, landing, depositing, or transporting goods or articles *other than the production of this State*, on or from any wharf or wharves belonging to the mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State, shall be chargeable with the wharfage as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said mayor and city council; and the master or owner of the vessel so depositing, landing, or transporting said goods or articles, shall be responsible for the same." The ordinance contained other sections providing for its enforcement.

The appellant Guy, a resident citizen of Accomac County, Virginia, was engaged in the year 1876 in sailing a schooner, of which he was master and part-owner, from that county to Baltimore, laden with potatoes raised in Virginia. In June of that year, he landed his vessel at one of the public wharves belonging to the city (not that part of the Pratt Street wharf reserved), and discharged therefrom two hundred and twenty barrels of potatoes. Under the authority of the foregoing statute and ordinance, the city harbor-master demanded of him the payment of $4.40 as wharfage. He refused to comply with that demand, and, being sued by the city, judgment was rendered against him in the court of a justice of the peace, which was affirmed by the City Court of Baltimore, the highest court of Maryland in which a decision of the case could have been had.

It is admitted that such wharfage dues are not and never have been assessed against parties or vessels bringing to that port potatoes or other articles grown in the State of Maryland.

The argument in support of the statute and ordinance upon which the judgment below rests is that the city, by virtue of its ownership of the wharves in question, has the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland; and that those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property.

This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the State of Maryland to promote the public interests and the public convenience. The wharf at which appellant landed his vessel was long ago dedicated to public use. The public for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce upon the public navigable waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hinderance from local or State authority; and the national Constitution secures to all, so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever, not excluded therefrom by, or under the authority of, some statute in Maryland enacted in the exertion of its police powers. The State, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other States. The concession of such a power to the States would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States. But it is claimed that a State may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden inter-state commerce by exacting from those transporting to its wharves the products of other States wharfage fees, which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways. The city of Baltimore, if it chooses, can permit the public wharves, which it owns, to be used without charge. Under the authority of the State, it may also exact wharfage fees, equally, from all who use its improved wharves, provided such charges do not exceed

what is fair remuneration for the use of its property. *Packet Company* v. *St. Louis*, supra, p. 423; *Vicksburg* v. *Tobin*, supra, p. 430; *Packet Company* v. *Keokuk*, 95 U. S. 80. But it cannot employ the property it thus holds for public use so as to hinder, obstruct, or burden inter-state commerce in the interest of commerce wholly internal to that State. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.

Such exactions, in the name of wharfage, must be regarded as taxation upon inter-state commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations.

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.

The power of the national government over commerce with foreign nations and among the several States is broad and comprehensive. It reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin. *Brown* v. *Maryland*, 12 Wheat. 419.

Nothing can be clearer than that the statute of Maryland and the ordinance of the city of Baltimore, in the respects

adverted to, are in conflict with the power of Congress over the subject of commerce.

The judgment is reversed, with directions to dismiss the action against the appellant, with his costs against the city.

So ordered.

MR. CHIEF JUSTICE WAITE dissenting.

I cannot concur in this judgment. We have decided that a municipal corporation may collect reasonable compensation for the use of its improved public wharves and landing-places. Such a charge is in no just sense a tax or burden. The State of Maryland has seen fit to prohibit the city of Baltimore from making any such charge for landing and depositing the products of the State. That was all the State undertook to do. I am unable to bring my mind to the conclusion that the Constitution of the United States makes this the equivalent of a provision that all wharfage at the public wharves belonging to the city shall be free so long as the law as it now stands is in force.

PIERCE v. WADE.

Where in replevin judgment was rendered in favor of the plaintiff for a portion of the property delivered under the writ, and in favor of the defendant for a return of the residue, or its value, the same not being $5,000, and the plaintiff sued out a writ of error to this court, *held*, that the writ must be dismissed for want of jurisdiction.

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

The facts are stated in the opinion of the court.

Mr. Nelson Cobb for the plaintiffs in error.

No counsel appeared for the defendant in error.

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

This was a suit in replevin brought by Pierce and Reed, the plaintiffs in error, against Wade to recover a large number

of cattle branded in a particular way. In executing the writ, the marshal, by mistake, took from the defendant sixty-two head of Texas steers, not having the proper brand, and delivered them with the other cattle to the plaintiffs, on receiving the requisite bond. On the trial, it was found that the plaintiffs were the owners, and entitled to the immediate possession of all thus delivered over to them, except the Texas steers, taken by mistake. It was thereupon adjudged that they "have and recover from the said defendant the possession of all the cattle, . . . except sixty-two head of Texas steers;" and, as to these, it was adjudged that they be returned by the plaintiffs to the defendant, or if that could not be done, "that the defendant have and recover from the plaintiffs the said sum of $1,400, the value thereof." From that judgment the plaintiffs below have taken this writ of error.

Upon this state of facts it is clear we have no jurisdiction. The matter in dispute is the sixty-two head of Texas steers, the value of which is only $1,400. The plaintiffs recovered every thing else which they claimed, and the judgment against them is less than $5,000. We have always held that when a case is brought here by the defendant below, the amount of the recovery against him is the measure of our jurisdiction, except when he has asked affirmative relief, and that has been denied. The same rule is applicable to plaintiffs in replevin suits, where the defendant gets judgment for a return of property taken and delivered under the writ, or its value.

Writ of error dismissed.

NOTE. — In *Pierce* v. *Tough*, error to the Circuit Court of the United States for the District of Kansas, submitted by the same counsel as was the preceding case, MR. CHIEF JUSTICE WAITE remarked that, as the judgment was for $2,000 only, the case was in all material respects like that of *Pierce* v. *Wade* (*supra*, p. 444), and that, for the reasons there stated, the writ would be dismissed.

So ordered

CASE *v.* BANK.

A., in order to secure the payment of his note to B., pledged to the latter certain shares of the capital stock of a national bank in Louisiana, with authority to sell them in default of such payment. Default having been made, B. sold them, and in March, 1873, applied to the cashier of the bank to have them transferred on its books. That officer refused to allow the transfer, on the ground that A. was indebted to the bank. Before the transfer could be enforced, the bank failed, and C. was appointed a receiver, against whom B., Feb. 24, 1876, brought this action to recover damages for the loss sustained by him. It does not appear that the bank ever adopted any by-law providing for a lien on the shares of a stockholder indebted to it, or that A.'s debt to it had been contracted before his stock was pledged to B. *Held*, 1. That the action is not prescribed by the limitation of one year. 2. That the cashier having been intrusted by the directors of the bank with the transfers of stock, his refusal to permit the transfer was the refusal of the bank. 3. That judgment having been rendered, the court below had power to order C. to pay the claim, or certify it to the comptroller.

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

This is an action by the Citizens' Bank of Louisiana against Frank F. Case, receiver of the Crescent City National Bank, to recover damages for an alleged refusal on the part of the latter bank to permit a transfer of two hundred and twenty shares of its capital stock.

The petition, which was filed Feb. 24, 1876, alleges, in substance, that the shares were pledged to the Citizens' Bank by Lizardi & Co., to secure the payment of their note to it for $20,000; that the act of pledge contained an authority to the Citizens' Bank to sell and transfer the stock, for the purpose of paying said note; that said stock was sold under the act of pledge for $40 per share, but that the Crescent City National Bank refused to permit the transfer thereof on its books, alleging the indebtedness of Lizardi & Co. to it as an excuse for such refusal; that, by such refusal, the sale of said stock was prevented; and that, before legal steps could be taken to enforce the right of transfer, the Crescent City National Bank failed, causing a loss to the Citizens' Bank of $8,800.

The prayer is, that the receiver be ordered to recognize the Citizens' Bank as a creditor for said sum; and that he place it

on the next tableaux of distribution for its share of the amount already divided among creditors, and in all future dividends to be distributed.

On the 15th of March, 1876, the receiver filed an exception, setting up two grounds of defence: 1. That the cause of action did not accrue within one year next before the commencement of the action, as appears from the petition filed. 2. That the petition did not disclose a cause of action.

These exceptions having been overruled, he filed an answer reserving them, and denying all the allegations of the petitioner, except his appointment.

A verdict of the jury in favor of the plaintiff below for $4,000, with five per cent interest from March 6, 1873, having been returned, the court rendered judgment "that the Citizens' Bank of Louisiana do have and recover of the Crescent City National Bank, Frank F. Case, receiver, $4,000 and interest, &c.; . . . and that Frank F. Case, receiver, do recognize the said Citizens' Bank of Louisiana as creditor; . . . and that he do pay the same, or certify the same to the comptroller, to be paid in due course of administration; . . . and that the Citizens' Bank of Louisiana do receive, before further payment to creditors, its due proportion of dividends *pro rata* with those already paid to the creditors of the Crescent City National Bank."

The receiver, thereupon, brought the case here.

The remaining facts are set forth in the opinion of the court.

Mr. J. D. Rouse and *Mr. William Grant* for the plaintiff in error.

Mr. A. Pitot and *Mr. Edward Janin*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Associations formed under the act to provide a national currency are required to enter into articles of agreement, specifying the object of the association; and the articles may contain other regulations, not inconsistent with the act which the association may see fit to adopt for the conduct of their business and affairs. Such an association may make contracts, sue and be sued, and complain and defend in any court of law or equity

as fully as natural persons. They may also elect directors; and the board of directors may appoint a president, vice-president, cashier, and other officers, and define their duties. 13 Stat. 101; Rev. Stat., sect. 5136; *Knight* v. *Bank*, 3 Cliff. 429, 431.

Sufficient appears to show that the plaintiff bank discounted for the firm named in the transcript their promissory note, in the sum of $20,000, payable to the order of the bank in thirty days; and that the promisors, to insure the payment of the note, pledged to the holders two hundred and twenty shares of the capital stock of the bank of which the defendant is the receiver, — part standing in the name of the debtor firm, and part in the name of their senior partner. Authority was given to the pledgees, at the time the stock was pledged, in case the note was not paid at maturity, to sell the shares pledged at public or private sale, the pledgors agreeing to sign all required transfers of the same necessary in the premises.

Payment of the note, when it fell due, was refused; and the pledgees of the stock, having found purchasers for the same at the rate specified in the declaration, requested the bank of which the defendant is the receiver for permission to transfer the stock to the purchasers of the same; and the charge is that the bank peremptorily refused the request, on the ground that the promisors of the note were indebted to the bank, and that their stock could not be transferred before payment of their indebtedness.

Nothing appears to show when the indebtedness of the pledgors of the stock was contracted to the defendant bank; but it is not alleged that it preceded the pledge of the stock, nor is it claimed that the defendant bank had any lien on the stock for the payment of the alleged indebtedness.

Process was served, and the defendant bank appeared and filed a peremptory exception to the declaration: 1. Because the supposed cause of action did not accrue within one year next before the commencement of the suit. 2. Because the petition or declaration does not disclose any cause of action against the defendant.

Hearing was had, and the court overruled the exception. Proceedings now unimportant followed, when defendant again

appeared and filed an answer, denying all the material allegations of the petition. Issue being joined, the parties went to trial, and the verdict and judgment were in favor of the plaintiff; and the defendant excepted, and sued out the present writ of error.

Since the cause was entered here, errors have been assigned to the effect following: 1. That the Circuit Court erred in holding and instructing the jury that the action rose *ex contractu*, and that it was not prescribed by one year. 2. That the Circuit Court erred in instructing the jury that the defendant was liable for the refusal of the cashier to permit the stock to be transferred. 3. That the Circuit Court erred in refusing the two prayers for instruction presented by the defendant. 4. That the Circuit Court erred in ordering the receiver to pay the amount of the judgment or to certify the same to the comptroller.

By-laws were adopted by the defendant bank, which provide that the stock of the bank shall be assignable only on the books of the bank, subject to the provisions and restrictions of the act of Congress, and that a transfer-book shall be kept, in which all the assignments of stock shall be made. Certificates of stock signed by the president and cashier may, as the by-laws provide, be issued to stockholders; but the requirement is, that the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank, — the further requirement being that, when stock is transferred, the existing certificates shall be cancelled and returned, and that new ones shall be issued.

Provision is made by the code of the State that persons are responsible for the damage they occasion, not merely by their acts but by their negligence, their imprudence, and their want of skill, which is not different in its application to this case from the rule which prevails at common law. Rev. Code La., arts. 2315, 2316.

Whenever an agent violates his duties or obligation to his principal, and loss ensues to the principal, he is responsible therefor, says Judge Story, and is bound to make a full indemnity. Story, Agency (6th ed.), sect. 217 *a*.

Actions for injurious words, whether verbal or written, and

those for damages caused by animals, or resulting from offences, or *quasi* offences, are prescribed by one year in the jurisprudence of the State. Rev. Code La., sect. 3536. And the first proposition of the defendant is that the Circuit Court erred in holding that the action in this case was not barred by that article of the code.

Causes of action resulting from offences or *quasi* offences are barred by the lapse of one year, and the defendant bank contends that the cause of action set forth in the petition in this case falls within the one or the other of those designations. Argument to show that it was not an offence is certainly unnecessary, as the proposition if made would be wholly without merit, from which it follows that the theory must be wholly rejected, unless the act for which the damages are claimed in this case can properly be regarded as a *quasi* offence within the meaning of that provision.

Even suppose the terms of the provision apply to such a cause of action, it is by no means certain that the admission, if made, would benefit the defendant, as the Supreme Court of the State has decided that prescription in respect to a promissory note is interrupted so long as the holder is in possession of collaterals pledged by the maker to secure its payment. *Blanc* v. *Hertzog*, 23 La. An. 199.

Stocks pledged as security for a loan, the same court holds, constitute a standing acknowledgment of the debt which interrupts prescription during the time the securities pledged remain in the possession of the creditor. *Police Jury* v. *Duralde*, 22 id. 107; *Citizens' Bank* v. *Knapp*, id. 117.

Suppose, however, the claim for damages resulting from the refusal of the bank to transfer the stock must be considered as a cause of action wholly distinct from the note and the collaterals, then it becomes necessary to examine the objections taken by the plaintiff bank to the validity of the defence of prescription. Coming to that defence the plaintiff bank contends that the cause of action does not fall within the rule of prescription by the lapse of a year, because the act which gives rise to the claim was neither an offence nor a *quasi* offence within the meaning of that article of the Revised Code. Precisely the same question was presented to the Supreme Court

of the State and was decided by that court adversely to the views of the defendant. *Campbell* v. *Miltenberger*, 26 id. 72.

Compensation was claimed by the plaintiff in that case for damages occasioned by the defective and improper construction of a fence around his dwelling and premises by the defendant. The prescription of one year was pleaded, setting up the same article of the code, but the court decided that the rule of prescription of one year only applied to cases arising from damages caused by the commission of an offence or *quasi* offence, and overruled the defence as inapplicable to the case.

Actions arising under the article referred to survive, in case of the death of the injured party, for the space of one year, in favor of the minor children and widow of the deceased. Rev. Code, art. 2315.

Personal actions are not in general prescribed in that State short of ten years, even when the creditor is present, nor short of twenty years if he be absent. Id., art. 3544.

Many decisions have been made in the State upon the subject, but a few of each of the classes in question will be sufficient to show that the act which gave rise to the cause of action in this case cannot be regarded either as an offence or *quasi* offence within the rules of decision adopted in that State.

Wilful trespass in cutting wood upon another man's land and refusing to account for the same when accused of the act was held to be prescribed by that provision. *Whitehead* v. *Dugan*, 25 La. An. 409.

Where damages were claimed for the illegal and wrongful seizure of the defendant's property by virtue of an execution against another party, whereby much of the property was lost or destroyed, it was held that the claim for damages fell within the category of that rule. *De Lizarde* v. *The New Orleans Canal and Banking Co.*, 25 id. 414.

Claim for injuries occasioned by a railroad to individuals, or for the destruction of domestic animals, are held to fall within the same category as charges of *quasi* offences. But the right to recover of a banker for failure to protest a note, whereby the indorser is charged, is only prescribed by ten years. *Eichelberger* v. *Pike*, 22 id. 142; Rev. Code, 3544.

So an action against a telegraph company for loss on goods by a mistake in the message may be maintained unless prescribed by ten years. *La Grange* v. *Southwestern Telegraph Co.*, 25 La. An. 383.

Cases in great number of a like character might be cited, but it must suffice to refer to one other, which seems to be decisive of the point. *Percy* v. *White*, 7 Rob. (La.) 513. It was an action by the stockholders against the directors to recover damages for losses sustained through their negligence, fraud, and mismanagement, and the court held that it was not prescribed short of ten years from the acts which were the subject of complaint. Such a case every one must admit is much stronger than the case at bar, as the directors were directly charged as wrong-doers, and as guilty of negligence, fraud, and mismanagement in the performance of their official duties.

Opposed to that the defendant refers to the case of *Taylor* v. *Graham*, as being inconsistent with the prior case, but the court is not inclined to adopt that view, as the notary is a public officer and the charge against him was that of gross negligence in the performance of his official duty. *Taylor & Raddin* v. *Graham*, 15 La. An. 418.

Promptitude and fidelity are expected of notaries in giving notice of protest in all jurisdictions where that duty is required of those officers, and it cannot be doubted that the court regarded the charge as imputing a *quasi* offence. In the case at bar the demand of transfer was made by the plaintiff bank in behalf of the purchaser of the stock, and the cashier answered that by order of the directors he could not allow the transfer, as the holder of the certificates was indebted to the bank. Instructions from the directors were obligatory upon the cashier, who in point of fact assumed no responsibility. He acted by order of the directors, who for that purpose constituted the bank, it appearing that he merely obeyed their instructions not to transfer any stock whose owner had discounted notes in the bank unpaid.

Evidence was introduced by the plaintiffs tending to show that the cashier of the defendant bank was the officer intrusted by the directors with the transfer of stock, and they also gave

in evidence the note secured by the pledge of the stock, but they gave no other evidence to show that the note was due and unpaid, or that any effort had been made to collect the same of the maker, or that the maker was insolvent, nor was any evidence introduced to show that any thing had occurred to interrupt or suspend prescription.

Both parties having closed, the defendant bank requested the court to instruct the jury that the defendant is not liable for the refusal of its cashier or other officer to transfer the stock, unless he acted in the premises under the authority of the charter or by-laws of the bank, or pursuant to some general or special authority derived from the corporation through its board of directors, but the court refused to give the requested instruction, and instructed the jury that if they found that a person representing the plaintiff, having in his possession the certificates of the stock, sent to the defendant bank during the ordinary hours of business and found there the cashier, and that he was the officer customarily intrusted by the directors to make such transfer of stock, and that he, the person having the certificates, demanded the transfer of the cashier, at the same time offering to deliver up the old certificates, and that the cashier refused to allow the transfer, upon the ground that the owner was indebted to the defendant bank, that such a refusal was a refusal of the bank.

Compare the instruction given with that requested, and it will be seen that the introductory part of the request is fully given in the instruction given to the jury. They were told that if they found that a person representing the plaintiff, having the certificates of the shares in his possession, went to defendant bank and there found the cashier, and that he was the officer customarily intrusted by the directors to make the transfers, which was fully equivalent to the request, though stated in the affirmative and not in the negative form. Unless the jury found all those facts to be true, they were not authorized to find a verdict for the plaintiff; and, inasmuch as the verdict returned was in favor of the plaintiff, it must be assumed by the Appellate Court that the entire theory of fact involved in the instruction is proved.

Suppose that is so, then it is plain that the whole instruction

is correct, as it is not controverted that the demand was regularly made, nor that the cashier refused to allow the transfer.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions; and their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons "possessing no other knowledge." *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46.

Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice, and course of business; and it would be the height of injustice to hold that the bank as the principal to the cashier may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story, Agency (6th ed.), sect. 127.

Such an officer is *virtute officii* intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice, and course of business.

Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier, and the evidence introduced by the plaintiff tended to show that the practice of the defendant bank was in accordance with the general usage. Evidence to that effect having been introduced, it was certainly competent for the court to submit it to the jury, and the judge might have instructed them that, in view of that evidence, they would be warranted, if they believed the testimony, in finding that the cashier had the authority to make the transfer. *Wild* v. *Bank*, 3 Mas. 505.

Official acts may be performed by a cashier which constitute the ordinary and customary functions of such an officer, and persons dealing with the bank are warranted in believing that the cashier is duly authorized to perform any customary duty

falling within the scope of that category, and may to that extent hold the bank responsible, as if he was so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved, and actual knowledge of that fact is brought home to the third party.

Concede that, and it follows that the cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer of shares of the capital stock, and that a person showing a *prima facie* legal right to claim such a transfer to himself may demand it from that officer or any other principal officer left in general charge and superintendence of the bank, during the regular hours appointed by the bank for the transaction of banking business. *Smith* v. *Northampton Bank*, 4 Cush. (Mass.) 1, 11; Morse on Banking (3d ed.), pp. 155, 177.

Authorities to show that the acts of a cashier or other officer of a bank, within the scope of the general usage, practice, and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it, are quite numerous, provided it appears that the persons dealing with the officer did not know at the time that he was transcending his authority. *Lloyd* v. *The West Branch Bank*, 15 Pa. St. 172; *The Bank of Vergennes* v. *Warren*, 7 Hill (N.Y.), 91; *Franklin Bank* v. *Steward*, 37 Me. 519, 522.

It may be fairly presumed, says Chancellor Walworth, that the principal officer or clerk in attendance at the bank during the usual hours of business is authorized to permit the transfer of shares when the case presented is one proper to be allowed. *The Commercial Bank of Buffalo* v. *Kortright*, 22 Wend. (N.Y.) 348, 350.

Assumpsit in the form of a special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal. *Kortright* v. *The Commercial Bank of Buffalo*, 20 id. 91; Angell & Ames, Corporations (9th ed.), sect. 381.

Enough has already been remarked to show that it is immaterial whether the declaration or petition is regarded as an action *ex contractu* or *ex delicto*, as it is clear that it is not barred by the prescription of one year, so that the point in

any view cannot avail the defendant bank. *The Pontchartrain Railroad Co.* v. *Heirne*, 2 La. An. 129 ; *Ware* v. *Barataria Co.*, 15 La. 169 ; *Etting* v. *The Commercial Bank of New Orleans*, 7 Rob. (La.) 459.

No further remarks are required to show that the refusal of the court to grant the first prayer of the defendant was not error, in view of the instruction given, as that given was quite as favorable to the defendant as the law would allow. Nor is there any just ground of complaint on the part of the defendant that the court refused to give the third request. Instead of giving that, the court instructed the jury that in order to enable the plaintiff to recover, they, the jury, must be satisfied from the evidence that the debt of the owners of the stock was still due and unpaid, and that if that has not been established the jury must find for the defendant.

Comment upon these instructions is needless, as it is clear that the verdict finds that the note is still unpaid.

Exceptions not assigned for error will be passed over without remark as not necessarily re-examinable in this court.

Nothing appears in the case to show that the defendant bank ever adopted any by-law providing for a lien on the shares of a stockholder in case of his indebtedness to the bank, nor is it even shown in this case that the debt, if any, of the owner of the shares to the bank was contracted before the stock was pledged to the plaintiff, nor is there any thing given in evidence by the defendant to show that it was inequitable for the plaintiff to claim the benefit of the collaterals which the bank held to secure the payment of the note they discounted for the owners of the stock.

Beyond all doubt, the validity of their debt is established by the verdict and judgment; and, if so, it requires neither argument nor authorities to show that the order given by the Circuit Court to provide for the payment of the amount recovered was proper and correct.

Judgment affirmed.

REMOVAL CASES.

MEYER *v.* CONSTRUCTION COMPANY; CONSTRUCTION COMPANY *v.* MEYER; RAILROAD COMPANY *v.* MEYER.

1. The provision in the first clause of the second section of the act entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875 (18 Stat., part 3, 470), "that any suit of a civil nature, at law or in equity, now pending . . . in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, . . . in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the Circuit Court of the United States for the proper district," construed, and *held* to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side, being all citizens of different States from those on the other, desire a removal, the suit may be removed.
2. Until a case requiring it arises, the court refrains from expressing an opinion upon the second clause of said section.
3. The petition for removal (*infra*, p. 463), held to be sufficient in form.
4. An application made before trial for the removal to the Circuit Court of a cause pending in a State court at the passage of said act of March 3, 1875, was in time if made at the first term of the court thereafter.
5. In order to bar the right of removal, it must appear that the trial in the State court was actually in progress in the orderly course of proceeding when the application was made.
6. The ruling in *Insurance Company* v. *Dunn* (19 Wall. 214), that a party who failing in his efforts to obtain a removal of a suit is forced to trial loses none of his rights by defending against the action, reaffirmed.
7. Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced.
8. A statement in a contract between a railroad company and a construction company that the former would pay the latter out of a certain fund, — the subscription of a particular county along the road — is not such a taking by the latter company of a collateral security as to vitiate its lien.

THE first case is here in error to the Supreme Court of the State of Iowa.

The remaining cases are appeals from the Circuit Court of the United States for the District of Iowa.

These cases present the following facts: On the 6th of August, 1870, the Delaware and St. Paul Railroad Company, an Iowa corporation, contracted with the Delaware Railroad Construction Company, also an Iowa corporation, for the construction of that part of its railroad lying in Delaware County, Iowa. The contract contained full specifications of the work to be performed and the prices to be paid, and concluded as follows: —

"The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract. In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad. The said party of the second part will pay in current money eighty per cent of the amount of said estimate; twenty (20) per cent of the estimates, as they are made to the party of the first part, may be retained by the party of the second part as damages in case of a forfeiture of this contract; which said (20) twenty per cent, together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part within thirty days after all the work herein contracted for is completed and accepted by the engineer. 'Qualified below.'

"The above payments on estimates shall be made every thirty (30) days, at the office of the president of said Davenport and St. Paul Railroad Company, in Davenport. The Davenport and St. Paul Railroad Company may stop all work at any time, without payment of damages, by giving thirty days' notice.

"Whenever five consecutive miles of work from the south line of Delaware County are completed by the party of the first part, and accepted by the party of the second part, the party of the second part shall pay the full amount of the contract price for said work on said five miles within thirty days after said work is accepted, without the deduction of said twenty per cent, and for every additional five consecutive miles of the south end of the work completed by said first party, said second party shall pay in like manner within

thirty days after the same has been accepted, and so on through the county from south to north.

"Signed this sixth day of August, A.D. 1870.

"R. EDDY, *Pres.*
"J. M. BRAYTON, *Sec'y*
"F. B. DOOLITTLE, *Treas.*
"*Board of Directors of the Delaware Railroad Construction Company.*

"All the money for the work hereinbefore specified to be paid by the citizens of Delaware County.

"H. PRICE,
"*Pres't Dav. and St. Paul R. R. Co.*"

The work under this contract was commenced Sept. 29, 1870, and completed Oct. 31, 1872. On the 20th of December, 1872, the construction company filed in the office of the clerk of the District Court of Delaware County the statements and accounts required by the laws of Iowa to secure a mechanic's lien on the part of the railroad which had thus been completed. The balance claimed to be due was $71,165.58.

On the 4th of June, 1872, there was filed for record in the office of the recorder of Delaware County a mortgage, bearing date July 1, 1871, but acknowledged May 16, 1872, whereby the railroad company conveyed its entire line of railroad, including with the rest that built by the construction company, to William Dennison, a citizen of the State of Ohio, and J. Edgar Thompson, a citizen of the State of Pennsylvania, as trustees, to secure the payment of a proposed issue of bonds, amounting in the aggregate to six millions of dollars. Provision was made for the appointment of a new trustee in case of the death of either of those named in the deed.

On the 15th of January, 1874, the construction company commenced a suit in equity in the Circuit Court for the county of Delaware, a State court to enforce its mechanic's lien, and in the petition priority was claimed for this lien over that of the mortgage. In this suit, the railroad company, Thompson and Dennison, as trustees, the Davenport Railway Construction Company, an Iowa corporation, and Lucius Howard, were named as defendants, but process was served only on the railroad company. On the 28th of January, the railroad company appeared and filed an answer, substantially admitting the allegations in

the petition except as to the amount due. Credits were claimed, however, beyond those acknowledged by the construction company, and a reference was asked for a statement of the accounts. To this answer a reply was filed January 30. On the 6th of February the construction company and the railroad company appeared by their respective counsel, and a motion by the railroad company for a reference being overruled, the court proceeded to receive evidence in the cause. In this state of the case, it was agreed between the parties then appearing, to wit, the construction company and the railroad company, as follows: —

"The case as to these parties is referred to Henry Harger, Esq., who appears in open court and accepts the appointment of referee, with power to examine witnesses, books, and papers and accounts, and upon the findings of said referee being reported to the judge of this court, a judgment, by agreement of said parties in open court, is to be entered for the amount due, and a decree for a mechanic's lien to be made establishing such lien, the hearing to commence on Monday morning, Feb. 9, 1874, at nine o'clock A.M., at the office of said Harger in Delhi, Iowa, and to continue from day to day until completed.

"And by said agreement of said parties the judgment is to be entered as of the last day of this January Term, 1874, of this court, and the cause is by order of court continued as to all the defendants except said Davenport and St. Paul Railroad Company."

The referee proceeded to the hearing and presented his report, which was approved by the circuit judge on the 13th of February, and the judge at the same time directed the clerk to enter a judgment in accordance with the finding as of February 6, the last day of the preceding term. On the 14th of February the referee filed his report and the indorsement of the judge thereon with the clerk, and the clerk entered a judgment in favor of the construction company for $51,930.54, with interest at six per cent from February 6, and establishing a lien upon the railroad in the county to secure the payment. A special execution for the sale of the property in accordance with this judgment was also ordered. On the 17th of February, such an execution was issued, and on the 4th of May the property was sold by the sheriff to the construction company for $53,000

and a conveyance made to its treasurer in trust. Afterwards the property was conveyed by the treasurer to the Delaware County Railroad Company, an Iowa corporation created and organized for the purpose of taking the conveyance and holding the property. This new corporation was composed of substantially the same stockholders as the construction company.

On the 6th of April, 1874, an affidavit was made and filed in the suit by the attorney of the construction company, to the effect "that personal service of original notice in said suit cannot be made upon the defendants, J. Edgar Thompson and William Dennison, trustees of certain bondholders of said railroad, within the State of Iowa, and they are non-residents of said State of Iowa." The next day a supplemental petition was filed in the cause, as follows: —

"And now comes the plaintiff in this suit and states that since the commencement of this suit, to wit, on the sixth day of February, A.D. 1874, a decree has been rendered by this court against the Davenport and St. Paul Railroad Company, a copy of said decree being hereto annexed, and made a part of this supplemental petition, by which judgment was rendered against said railroad company in favor of said plaintiff for the sum of $51,930.54, besides costs of suit, and the mechanic's lien claimed in the original petition in this suit was established as claimed in said petition.

"Wherefore plaintiff asks that the remaining defendants be foreclosed of all rights of redemption of the property described in said original petition; that said lien be established against the remaining defendants in said suit; that it be declared paramount to all claims of said defendant, and that plaintiff have such other and further relief as may be equitable."

Notice to these defendants of the pendency of the original and supplemental petitions was published in the "Delhi Monitor," a newspaper published weekly at Delhi, Delaware County, four successive weeks, commencing April 9 and ending April 30, requiring them to appear and answer before the 19th of May then next, or default would be entered against them, and judgment and decree rendered as prayed for. On the 22d of May, proof of the publication of this notice having been made, a decree was entered on default, granting the relief asked for, and foreclosing the defendants, Thompson and Dennison,

"from all right of redemption of, in, or to the said property, and every part thereof," and declaring that the rights of the construction company were "superior and paramount to any and all claims or rights of said defendants to the same or any part thereof." At the same time the cause was dismissed as to the defendant Lucius Howard. The Davenport Railway Construction Company never appeared in the suit, and it nowhere appears what its interest in the controversy was.

Thompson, one of the trustees, died May 23, the next day after this decree was entered, and on the 26th of January, 1875, the following proceedings were had in the cause on the application of Dennison: —

"Now, on this 26th day of January, 1875, comes William Dennison, the surviving trustee for certain bondholders of the Davenport and St. Paul Railroad Company, who were defendants in the above-entitled cause, and files with the clerk of this court a motion for a new trial in this cause, on behalf of the said William Dennison, surviving trustee as aforesaid, and brings into court a bond for security for costs of retrial of said cause, as required by the statute in such cases made and provided, and offers to be filed the answer of the said surviving trustee, William Dennison. Whereupon, it appearing to the court that the service upon the said surviving trustee was by publication only, and that he and those whom he represents are entitled to a new trial under the law; and it further appearing to the court that the said surviving trustee has furnished security for the costs of new trial herein satisfactory to the said plaintiff, it is ordered by the court that a new trial in this cause be granted to the said surviving trustee, William Dennison, that the answer offered by the said defendant be filed, and that this cause stand continued to the next term of this court."

On the 2d of February, the construction company filed a motion in the cause, to strike the answer of Dennison from the files because it was not verified. This motion was granted at the next term of the court, on the 17th of May, and the construction company thereupon asked for a judgment by default, but on the 19th of May an amended answer was filed on leave, in which a defence was set up against the priority of the lien of the construction company. On the same day, Lewis H. Meyer, a citizen of the State of New York, claiming to have been

appointed a trustee under the mortgage in the place of Thompson, moved the court to be substituted for Thompson as a party to the suit. On the same day, and during the regular term of the court, Meyer and Dennison filed with the clerk a petition as follows: —

"*In the Circuit Court of Delaware County, Iowa.*

"THE DELAWARE RAILROAD CONSTRUCTION CO.
v.
LEWIS H. MEYER and WILLIAM DENNISON, Trustees.

"Now come your petitioners, Lewis H. Meyer and Wm. Dennison, trustees, and state: —

"That the Delaware Railroad Construction Company and all persons who have come in as intervenors in the above entitled cause are citizens of the State of Iowa; that Lewis H. Meyer is a citizen of the State of New York, and William Dennison a citizen of the State of Ohio.

"That they have reason to believe and do believe that from prejudice or local influence they will not be able to secure justice, by reason of such prejudice or local influence.

"That said cause can be fully and finally determined in the United States Circuit Court for the District of Iowa.

"That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs, and they make and file in this court a bond, with good and sufficient security, for their entering in such Circuit Court, on the first day of its next session, a copy of the records in said suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, and they pray of said court to accept said petition and bond, and order the transfer of the said cause to the said Circuit Court of the United States."

This petition was not signed or sworn to, but was accompanied by a bond as follows: —

"*In the Circuit Court of Delaware County, Iowa.*

"Know all men by these presents, that we, Lewis H. Meyer and William Dennison, principals, and John E. Henry and Charles Whitaker, as sureties, are held and firmly bound unto the Delaware Railroad Construction Company, and all other persons whom it may

concern, in the penal sum of one thousand dollars, to which payment we bind ourselves and each of us by these presents. Given under our hands this fifteenth day of May, 1875.

"The conditions of this obligation are these: the said Lewis H. Meyer and William Dennison have applied to the Circuit Court of said county to remove a certain cause pending in said court, wherein the Delaware Railroad Construction Company are plaintiffs, and the said Lewis H. Meyer, trustee, successor to John Edgar Thompson, and William Dennison, trustees, and many others are defendants, from the said Circuit Court to the Circuit Court of the United States for the District of Iowa:

"Now, if said Meyer and Dennison shall enter in the said Circuit Court of the United States for the District of Iowa, on the first day of the next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said Circuit Court if it shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said Circuit Court in said suit if special bail was originally required therein, then this obligation shall be void; otherwise in full force.

"WILLIAM DENNISON and L. H. MEYER, *Trustees.*
"By GRANT and SMITH, *Their Att'ys.*
"C. WHITAKER,
"JOHN E. HENRY, *Sureties.*"

Whitaker, one of the sureties, made affidavit that he was a citizen of Iowa, and worth double the amount of the bond over and above all debts, and had property subject to execution. The further proceedings in the State court are thus described in the decree: —

"And now, further, on the twenty-first day of May, 1875, this cause coming on for further hearing, comes Lewis H. Meyer, by Grant & Smith and L. M. Fisher, and asks to be made a party defendant in this cause, and calls up his motion for that purpose, filed in this cause on the nineteenth day of May, 1875, whereupon plaintiff, by his attorney, objects to said Meyer being a party defendant in this cause, for the reason that no evidence of the appointment of said Meyer as trustee is before this court, and said motion and the objections thereto having been duly considered by the court, it is ordered that the application of said Meyer to be made a party defendant be refused, and the objections thereto be, and they are, sustained; to which ruling of the court said Meyer, by his

counsel, excepts, and asks that his exceptions in this behalf be made a matter of record in this cause, which is accordingly done. Plaintiff now offers in evidence the contract sued on in this cause, whereupon the defendant, William Dennison, trustee, asks leave to file an amended petition and bond for the transfer of this cause to the United States Circuit Court, a petition and bond for that purpose appearing to have been filed with the clerk of this court on the twentieth day of May, 1875, one of the regular days of the present term of court, to wit, on the twentieth day of May, 1875, aforesaid; but no notice of the filing of the same having been brought to the court, plaintiff, by its attorney, objects that the bond is insufficient, one surety being an attorney, and not eligible as a surety on a bond in court under the law; and further, that the application to transfer this cause is too late, the cause being now reached for trial, and the trial of the same commenced; whereupon the court sustained the objections of plaintiff in this behalf, to which ruling of the court the defendant, William Dennison, trustee, by his counsel, excepts, and asks that his exception be made a matter of record, which is accordingly done, when, pending further proceedings in said cause, court adjourns to May 22, 1875.

"And now, on this twenty-second day of May, 1875, it being one of the days of the regular May Term, 1875, of said court, the court proceeds with the further hearing of said cause; whereupon defendant William Dennison, trustee, now moves the court to proceed no further with the trial of said cause, and asks that said defendant be allowed to file a new bond for the transfer of said cause to the United States Circuit Court, or to deposit money for costs of the same. Plaintiff objects on the ground that the cause is now on trial on its merits. Objection sustained, and said defendant, by his counsel, excepts and asks that this, his exception, be made a matter of record, which is accordingly done; whereupon plaintiff, by his counsel, asks leave to file reply, to the filing of which defendant, Dennison, by his counsel, objects. Objection overruled, and defendant, Dennison, by his counsel, excepts and asks that this, his exception, be made a matter of record, which is accordingly done; whereupon plaintiff files reply, and thereupon defendant, Dennison, by his counsel, asks leave and files his amended answer, and the court now proceeds with the trial of said cause on the issues joined therein, and, after full hearing and argument of counsel, the same is duly submitted to the court, and by consent of parties the court takes the same under advisement, with the understanding that

judgment shall be rendered by the court in vacation, and entered as of the last day of this term. And the court finds the issues in favor of plaintiff, and files and renders his decision that plaintiff's lien is paramount to that of defendant, and orders judgment in favor of said plaintiff.

"It is therefore ordered and adjudged and decreed that the lien of said plaintiff is paramount to that of the defendant, William Dennison, trustee, &c.; and it is ordered, adjudged, and decreed that the former decree and judgment of this court, rendered at the May Term, A.D. 1874, be confirmed, and that the plaintiff's claim for a mechanic's lien, as prayed in his petitions, be established as against the said defendants, upon the property described in the decree in this suit at the February Term of this court, A.D. 1874, and as therein established, against the Davenport and St. Paul Railroad Company, and that the defendants be for ever barred and foreclosed of and from all right of redemption of, in, or to said property, and every part thereof; and that the rights of plaintiff be declared to be superior and paramount to any and all claims and rights of said defendants to the same or any part thereof; and that the defendant, William Dennison, trustee, &c., pay the costs of the retrial of this suit. Thus ordered, adjudged, and decreed, this fourteenth day of October, A.D. 1875."

From this decree Dennison appealed to the Supreme Court of the State, and there contended, among other things, that the court below lost its jurisdiction by the filing of his petition and bond for the removal of the cause to the Circuit Court. The court, however, decided otherwise and affirmed the decree below. To reverse this judgment of the Supreme Court a writ of error has been sued out of this court, and that cause is the first of those mentioned in the title.

After the refusal of the State court to withhold further proceedings in the cause, Meyer and Dennison obtained from the clerk of that court a copy of the record, and on the 9th of October filed it in the clerk's office of the Circuit Court of the United States for the District of Iowa. This was the second day of the next session of that court after the petition for removal, but the delay in filing was explained by an affidavit of the clerk of the State court exonerating the defendants from all blame. The cause was thereupon docketed in the Circuit Court of the United States. On the 13th of October, 1875,

the construction company moved that court to dismiss the suit for want of jurisdiction. This motion was overruled, and on the 14th of January, 1876, the parties stipulated that the case should stand "as it stood at the time of the trial in the court below after the filing of the petition for removal, but with Lewis H. Meyer, a defendant, joining in the answer of Dennison," this agreement, however, "not to be regarded as a waiver of the plaintiff's objections to the right of this court to try this cause." Some further amendments were made in the pleadings, and some further stipulations entered into by the parties to speed the cause, and on the 8th of June, 1876, after hearing both parties, a decree was rendered annulling the decrees of the State court and establishing the lien of the mortgage over that of the construction company. From that decree the construction company appealed to this court, and that appeal is the second of the causes named in the title.

On the 4th of May, 1875, proceedings were commenced by Meyer and Dennison in the Circuit Court of the United States for the foreclosure of their mortgage. To this suit the railroad company, the construction company, and the Delaware County Railroad Company, with others, were defendants. In an answer the construction company asserted the priority of its lien, and the Delaware County Railroad Company claimed title to the railroad in Delaware County under the sheriff's sale in the suit in the State court, free of the lien of the mortgage. On the 8th of June, 1876, this part of the controversy in the Meyer and Dennison suit was heard in the Circuit Court, and resulted in a decree establishing the superiority of the mortgage lien over that of the construction company and the setting aside of the decrees of the State court against Thompson and Dennison, as well as the sheriff's sale and deed under which the Delaware County Railroad Company claimed. From this decree the construction company and the Delaware County Railroad Company appealed, and that appeal is the last of the suits mentioned in the title. No other part of the suit commenced by Meyer and Dennison has been brought up on this appeal, except that which relates to the priority of liens and the title of the Delaware County Railroad Company.

Mr. George G. Wright and *Mr. Mason W. Tyler* for Meyer.
Mr. James Grant and *Mr. Joseph H. Choate*, *contra*.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

Three principal questions are presented by these cases. They are: —

1. Was the suit pending in the State court one which could by law be removed to the Circuit Court of the United States?

2. If it could, was the application for removal made in time, and was it sufficient in form to effect a transfer? and,

3. If the transfer was lawfully made, are the decrees of the Circuit Court, giving the mortgage priority over the mechanic's lien and the title of the Delaware County Railroad Company, right?

These will be considered in their order.

1. As to the right of removal.

The act of March 3, 1875 (18 Stat., part 3, 470), was in force when the application for removal was made, but not when the new trial was granted to Dennison. The second section of that act contains, among others, the following provision: "That any suit of a civil nature, at law or in equity, now pending . . . in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . . in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the Circuit Court of the United States for the proper district."

This we understand to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different

States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Company* v. *Blatchford*, 11 Wall. 174. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

In the present case, it appears that the suit was originally brought by a citizen of Iowa against another citizen of Iowa and citizens of Pennsylvania and Ohio. There were then, according to the pleadings, two matters about which there might be dispute, — one between the construction company and the railroad company, both citizens of Iowa, as to the amount due the construction company and the actual existence of a mechanic's lien, and the other between the construction company and the trustees of the mortgage, citizens of different States, as to the priority of the mortgage over the mechanic's lien. But before the trustees of the mortgage were actually brought into court by service of process, the dispute between the construction company and the railroad company had been finally disposed of. The amount due the construction company had been ascertained so far as that company and the railroad company were concerned, the mechanic's lien established, and the property sold under the lien to pay the debt. There was after that nothing left of the suit except that part which related solely and exclusively to the priority of the mortgage lien, and as to this the controversy was between the construction company on the one side, and the mortgage trustees on the other. If the railroad company still continued a party to the suit, it was a nominal party only, and its interests were in no way whatever connected with those of the trustees. It did not, therefore, occupy a position in the controversy on the same side with them. This being the case, it is apparent that in the then condition of the suit the only controversy to be settled was between the mortgage trustees, citizens of Pennsylvania and

Ohio, on one side, and the construction company and railroad company, citizens of Iowa, on the other. As such, under the construction we have given this provision of the statute, the suit was removable by reason of that provision. This makes it unnecessary to give an interpretation to that part of the same section of the act of 1875, which, for the purposes of statement, may be read as follows: —

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, . . . in which there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

We reserve the consideration of this provision until a case requiring it arises. This suit, when the petition for removal was filed, was one in which the only controversy to be decided was between citizens of different States, and therefore provided for in the first clause. Necessarily a removal would take the whole suit to the Circuit Court, because, in its then condition, the suit related to a single controversy only. Whether, as argued, a removal could also have been had under the last clause, we do not decide.

2. As to the removal.

The third section of the act of 1875, so far as it is applicable to this case, reads as follows: —

"That, whenever either party, . . . entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried, and before the trial thereof for the removal of such suit into the Circuit Court, to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering into such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said

court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court."

The petition filed in this case was sufficient in form. Enough appeared on its face to entitle the petitioner to his removal. While it included a statement of belief that, from prejudice or local influence, justice could not be secured by a trial in the State court, no affidavit to that effect was filed; and this statement could be rejected as surplusage, leaving still good cause for the removal on account of the citizenship of the parties. Although Meyer's name was included as a petitioner, that of Dennison was included also; and, as Meyer was not a party to the suit, his name could be rejected as surplusage, and the petition left to stand as that of Dennison alone. The paper was evidently drafted and put on file under the belief that Meyer would be substituted for Thompson as a party to the suit. This having been unexpectedly refused, it was presented to the court by the counsel of Dennison, without amendment, as in legal effect the petition of Dennison alone. This, we think, might lawfully be done. Under the circumstances, it was the duty of the court to treat the application as coming from Dennison only.

The petition was not signed. No objection was made on this account in the State court; and it came too late in the Circuit Court. If it had been made in the State court, the defect — if in fact there was one — would, no doubt, have been cured at once by the signature of counsel. The petition was in writing. On its face, it purported to be the petition of Meyer and Dennison; and it was in fact the petition of Dennison. This the court knew, because it was actually presented by the counsel of Dennison, and was accompanied by a bond purporting also to be signed in the name of Meyer and Dennison. In short, every thing in the whole proceeding showed that it was in

fact what, under the circumstances, it purported to be, — the application of Dennison, made in good faith, for the removal of the cause.

The bond was sufficient in form. The condition was such as the statute required. There was no special bail in the case. Nothing was, therefore, to be secured by the bond but the filing of the transcript in the Circuit Court, on the first day of its then next term, and the payment of any costs that might be awarded by that court, in case it should hold that the suit had been wrongfully or improperly removed. No objection was made to the sufficiency of the surety. The only complaint seems to have been that one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa and the practice of the State court. Without determining whether this would have justified the court in not accepting the bond, if he had been the only surety, it is sufficient to say that the act of Congress does not make it necessary that two persons should sign the bond as sureties. "Good and sufficient surety" is all that is required; and this is satisfied if there is one surety able to respond to the condition of the bond. The question here is not whether the court below had the right to pass upon the sufficiency of the surety, but whether, upon the facts as they appear in this record, it was justified in refusing to accept this bond. We are now examining the case after judgment below in reference to errors which are alleged to have occurred in the progress of the cause. If the State court refuses to accept a bond offered by a petitioner for removal which has "good and sufficient surety" in law, it is error that may be reviewed here. That court has no discretion in such a matter. Its action is governed by fixed rules. Here, as no objection was made to the pecuniary responsibility of the one person who signed as surety, and was competent under the laws of Iowa to do so, it was clearly error for the court to refuse to accept the bond because a second surety was an attorney of the court. Such being the case, we are clearly of opinion that, so far as the form of the application was concerned, the State court was not justified in refusing to accept the petition and bond, and in proceeding further in the cause.

We think also the application was made in time. It is con

ceded that the petition was filed during the first term of the court at which the suit could be tried, after the act of 1875 went into operation. It has, so far, as we know, been uniformly held on the circuit, and to our minds correctly, that, in suits pending when the act was passed, the application was in time, if made at the first term of the court thereafter. *Baker* v. *Peterson*, 4 Dill. 562; *Hoadley* v. *San Francisco*, 3 Saw. 553; *Andrews* v. *Garrett*, 2 Cent. Law Jour. 797; *The Merchants' & Manufacturers' National Bank* v. *Wheeler*, 13 Blatch. 218; *Crane* v. *Reeder*, 15 Alb. Law Jour. 103. This disposes of one objection made to the time when the petition was filed.

It has, however, been argued with great earnestness that the petition for removal was not actually presented to the court "before trial." We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule; but we think it clear that Congress did not intend, by the expression "before trial," to allow a party to experiment on his case in the State court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone.

Upon the facts in this case it is apparent, to our minds, that the trial had in no sense begun when Dennison presented his petition formally to the court for a removal. It is equally apparent that the counsel for the construction company attempted to get up a race of diligence with his adversary, in which he should come out ahead. As soon as the court decided not to admit Meyer as a party to the suit, he seems to have offered the contract sued on in evidence; but, unfortunately for him, in so doing he did not keep himself inside the orderly course of proceedings. It is evident that at that time the cause was not up for hearing on its merits; and it nowhere

appears that the court accepted then the offer of the counsel to put in his evidence. Before any action was taken by the court on that subject, Dennison presented his petition, which had been on file ready to be presented, as soon as the motion of Meyer was decided. Immediately after the application of Dennison was disposed of, the court adjourned until the next day; and, when it again met, Dennison renewed his application. This being refused, the construction company asked leave to file a reply, which up to that time had not been done, and which was necessary to complete the pleadings, and make up the issues for trial. That being done, and a motion by Dennison for leave to amend his answer overruled, the court proceeded "with the trial of said cause on the issues joined therein." A statement of these facts is sufficient to show that, when Dennison presented his petition in form to the court, the trial had in no just sense begun. As in the case of *Yulee* v. *Vose* (99 U. S. 539), "the most that can be said is, that preparations were being made for trial."

It is further claimed that the citizenship of Dennison in Ohio was not proved. As in the case of the sufficiency of the bond, the question here is not whether, if the statements of the petitioner in that particular had been denied, it would have been competent for the State court to institute an inquiry on that subject, but whether, on the facts as they appear on the face of this record, which also shows how they should have appeared to the court below, that court was justified in proceeding further in the suit. We fully recognize the principle heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right. But here, to say nothing of the statements in the petition which were not disputed, the record is full of evidence that Dennison was a citizen of Ohio. In the mortgage Thompson is described as of Pennsylvania, and Dennison as of Ohio. In addition to this, in order to bring them into court, the affidavit of the counsel for the construction company was put on file, in which it is directly stated, under date of April 6, 1874, that personal service of process could not be made on them within the State, and that they were non-resi-

dents. Under these circumstances, it was certainly error for the State court to retain the cause because it was not shown that the citizenship of the adverse parties was in different States. The citizenship of the two corporations in Iowa is averred by the construction company in its own pleadings.

It is still further claimed that even though the lower court ought to have accepted the petition and bond and withheld all further proceedings in the suit, that error was waived by the subsequent appearance of Dennison and going to a hearing, and that for this reason it was right for the Supreme Court not to reverse the judgment because of the original fault. This question is settled by the case of *Insurance Company* v. *Dunn*, 19 Wall. 214, where it is distinctly held that if a party failed in his efforts to obtain a removal and was forced to trial, he lost none of his rights by defending against the action. This record is full of protests on the part of Dennison against going on with the suit, and of exceptions to the ruling which kept him in court. Indeed, it is difficult to see what more he could have done than he did do to get out of court and take his suit with him. He remained simply because he was forced to remain, and is certainly now in a condition to have the original error of which he complained corrected in any court having jurisdiction for that purpose. In addition to this, we now know that he did take his suit to the Circuit Court and carried his adversaries with him. It is true, by reason of the fault of the clerk of the State court, he was unable to file his transcript of the record in the Circuit Court on the first day of the term, but he did so on the second, and had the cause regularly docketed, after which a trial was had, all parties appearing. It is also true that the construction company objected to the delay, but that objection was, as we think, properly overruled. While the act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected.

We must, therefore, hold that the Supreme Court of the State erred in not reversing the judgment of the Circuit Court of the county and sending the cause back with instructions to that court to proceed no further with the suit.

3. As to the priority of liens.

It is conceded that by the laws of Iowa a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise after the work was commenced. Such has been the uniform course of decisions by the highest court of the State.

It is also conceded that, by a statute of the State (Code 1874, sect. 385), there can be no mechanic's lien in favor of one who takes collateral security on the contract under which he does his work.

Such being the law, it is clear that as the mortgage was not recorded until June 4, 1872, and work under the contract of the construction company was commenced Sept. 29, 1870, the mechanic's lien must have precedence, unless the construction company took collateral security on their contract, or something equivalent was done.

It is contended that the words, "all the money for the work hereinbefore specified to be paid by the citizens of Delaware County," which appear above the signature of the president of the railroad company to the contract, give the construction company collateral security, and thus vitiate the lien. We cannot so interpret the contract. In the body of the instrument the obligation of the railroad company to pay is absolute and unconditional. The additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware County. No control is given the construction company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware County to discharge its obligations under the contract, and a corresponding obligation on the part of the construction company to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment.

In *Christmas* v. *Russell* (14 Wall. 69), we said: "An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. . . . The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee." It seems to us that this is conclusive of the present case. The railroad company has nowhere by its agreement given the construction company any power to collect. The amount due is nowhere specified; neither does it appear from the instrument itself what was the nature of the obligations the citizens of Delaware County were under to make the payment. It is not even said that the payments thus to be made grew out of any obligations of the citizens of Delaware County to the railroad company. According to the construction claimed, the addition of these somewhat indefinite words at the end of the contract, and after a part of the signatures had been affixed, must have the effect of changing the whole tenor of the contract as set out in the body of the instrument, and substituting the citizens of Delaware County as obligors and bound absolutely for the payment of the work to be performed, instead of the railroad company. Such we cannot believe was the intention of the parties, and every thing which occurred afterwards is entirely inconsistent with any such idea. It now appears from the evidence that there had been very considerable subscriptions to the capital stock of the railroad company by the citizens of Delaware County, and that taxes had been levied by the county, or some of the townships in the county, to aid in the construction of the railroad. It also appears that all of this money was collected by and paid to the railroad company. In no single instance, so far as we can discover, was it paid to the construction company. The full amount subscribed and levied was not sufficient to pay all that was due that company. Much of it was paid over, but all of it was not. Of the amount paid the construction company by the railroad company a very considerable portion was collected from other sources.

Without pursuing the subject further, it is sufficient to say that, in our opinion, the construction company has done noth

ing to waive or deprive it of the right to assert a mechanic's lien, and that the decrees of the Circuit Court establishing the superiority of the lien of the mortgage were wrong and must be reversed. As the sale under the execution from the State court, by which the Delaware County Railroad Company now holds and claims title was made in a suit to which the trustees of the mortgage were not at the time parties served with process, the sale did not cut off their interest as mortgagees of the property sold. Neither are they bound by the decree in the State court finding the amount due the construction company. The Delaware County Railroad Company took by its purchase only such title as the construction company had to convey, and as the interest of the mortgagees was not cut off by the sale to the construction company, it is not cut off by the transfer to the Delaware County Company.

We, therefore, order and adjudge as follows: —

1. That the judgment of the Supreme Court of Iowa be reversed with costs, and that the cause be remanded, with instructions to reverse the decree of the Circuit Court of Delaware County, and direct that court to proceed no further with the suit.

2. That the decree of the Circuit Court of the United States in the second of these cases be reversed with costs, and that the cause be remanded with instructions to ascertain the amount due the Construction Company under its contract, and to enter a decree establishing the lien of that company as prior in right to that of the mortgage, and in default of payment of the amount due by a day to be named, directing the sale of that part of the railroad company which lies in Delaware County, to pay the debt. Such provision for redemption is to be made as is allowed in such cases by the laws of Iowa.

3. The decree of the Circuit Court in the remaining case is also reversed with costs, and the cause remanded with instructions to enter a decree establishing the lien of the Construction Company as superior to that of the mortgage, and declaring the title of the Delaware County Railroad Company, by reason of the sheriff's sale in the State court to be invalid and not sufficient to pass title as against the

lien of the mortgage, and for such other proceedings as justice requires.

MR. JUSTICE STRONG concurred in the judgment, but not in the construction given by the majority of the court to the second section of the act of 1875, respecting removals from State courts.

MR. JUSTICE BRADLEY concurred in the judgment, and delivered the following opinion in which MR. JUSTICE SWAYNE concurred.

I concur in the judgment in these cases, but dissent from so much of the opinion as seems to assume that one condition of Federal jurisdiction, in the removal of a cause from a State court, under the first clause of sect. 2, act of 1875, is, that each party on one side of the controversy must be a citizen of a different State from that of which either of the parties on the other side is a citizen. This portion of the act gives the right of removal to either party, in any suit in which there is "a controversy between citizens of different States." In my judgment a controversy is such, as that expression is used in the Constitution, and in the law, when any of the parties on one side thereof are citizens of a different State, or States, from that of which any of the parties on the other side are citizens. It is true, if there are other parties on opposite sides of the controversy who are citizens of a common State, it may also be a controversy between citizens of the same State. In other words, a controversy may be, at the same time, both a controversy between citizens of the same State and between citizens of different States. But the fact that it is both, does not take away the Federal jurisdiction. Neither the Constitution, nor the law, declares that there shall not be such jurisdiction if any of the contestants on opposite sides of the controversy are citizens of the same State; but they do declare that there shall be such jurisdiction if the controversy is between citizens of different States. The gift of judicial power by the Constitution, and the gift of jurisdiction by the law, are in affirmative terms; and those terms include as well the case when only part of the contestants opposed to each

other are citizens of different States, as that in which they are all of different States. And I see no good reason why both the Constitution and the law should not receive a construction as broad as that of the terms which they employ. On the contrary, I think there is just reason for giving to those terms their full effect. The object of extending the judicial power to controversies between citizens of different States was, to establish a common and impartial tribunal, equally related to both parties, for the purpose of deciding between them. This object would be defeated in many cases if the fact that a single one of many contestants on one side of a controversy being a citizen of the same State with one or more of the contestants on the other side, should have the effect of depriving the Federal courts of jurisdiction. This absurdity became so glaring under the construction formerly given by this court to the Judiciary Act of 1789, in the case of corporations, when every stockholder was held to be a party, that the court was at length impelled to regard a corporation as a citizen of the State which created it, without regard to the citizenship of its members; — thus getting rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case.

If we give the same construction to the present law which was given to the Judiciary Act, we shall certainly meet with like embarrassment and difficulty in exercising the fair and proper jurisdiction of the Federal courts. No cases are more appropriate to this jurisdiction, or more urgently call for its exercise, than those which relate to the foreclosure and sale of railroads extending into two or more States, and winding up the affairs of the companies that own them; since, in addition to the convenience of a single jurisdiction having cognizance of the whole matter (which could readily be conferred, if it is not so) the local tribunals in such cases, however upright and pure, are naturally more or less favorably affected towards the interests of their own citizens: and yet, it is almost always essential, in order to do complete justice in these cases, to call before the court some parties on opposite sides of the controversy who are citizens of the same State. If this fact is to deprive the Federal courts of jurisdiction, without regard to

the numerous and important contestants on opposite sides who are citizens of different States, the value of the institution of national courts, for taking cognizance of controversies between citizens of different States, will be greatly impaired.

But it seems to me clear that, in construing the present law, we are not bound by the construction given to the old Judiciary Act. The words of that act, conferring jurisdiction upon the circuit courts in respect of citizenship, were not the same as those used by the present law or by the Constitution. It only conferred jurisdiction when "the suit is between a citizen of the State where the suit is brought and a citizen of another State." The singular number only was used; and the courts, in applying the law to cases in which there was a plurality of plaintiffs or defendants, construed it (perhaps justly) as requiring that each plaintiff and each defendant should have the citizenship required by the law. But, now, it is not so. The present law follows the words of the Constitution, and gives jurisdiction to the circuit courts in the broadest terms, namely, whenever, in any suit, there is "a controversy between citizens of different States;" and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different States.

The only objection to this construction which has been seriously pressed, is drawn from the argument *ab inconvenienti;* namely, that if in a controversy where the contestants are numerous, a single case of diverse citizenship between opposite parties should give Federal jurisdiction, the courts of the United States would be overwhelmed with business, litigants would be unnecessarily drawn away from the domestic tribunals, and the intent of the Constitution would be subverted. Now whilst I am satisfied that the apprehended inconveniences are greatly exaggerated, the inconveniences which would result from a contrary interpretation to that contended for would be at least equally great in depriving the Federal courts of jurisdiction by a single case of common citizenship between opposite parties, though a large majority of the opposing litigants are citizens of different States; and, thus, one inconvenience would balance the other, and we should still be left to

seek the true construction of the Constitution and the law from the words which they use. But the inconveniences would not be equal. To deprive the Federal courts of jurisdiction by a partial community of citizenship between the opposite parties would, in many instances, actually defeat the very object which the Constitution and the law have in view.

Even if it should happen that, upon the construction contended for, many cases might be brought into the Federal courts in which a partial community of citizenship did exist between the opposing parties, what harm would ensue? Ought it not to be presumed that the courts, which are courts of the common country of all the parties, will as well do equal and exact justice between them as the State courts could do? If the judicial force is not sufficient to meet the exigency, let it be increased. If the courts are not held at sufficiently convenient places, that difficulty can easily be removed. The phrase in question, "controversies between citizens of different States," is a constitutional one; and the construction which we may give to it will affect the judicial powers of the Federal government for all time; and any temporary inconvenience arising from existing arrangements, which can be remedied by legislation, ought not to stand in the way of a fair construction of the organic law.

But it is not necessary to pass upon this question in this case. The present controversy is wholly between citizens of different States; and we are all agreed as to the decision that ought to be made. When the question does come squarely before us, and it becomes necessary to decide it, it is to be hoped that it may receive the fullest consideration.

HAUENSTEIN *v.* LYNHAM.

1. In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue.
2. A., a citizen of Switzerland, died in 1861 in Virginia intestate and without issue. For want of an heir capable under the statutes of the State to inherit the lands there situate whereof he died seised in fee, they were sold by the escheator of the proper district. A.'s next of kin, B., a citizen of Switzerland, filed a petition to recover the proceeds of that sale. Upon consideration of the treaty between the United States and the Swiss Confederation of Nov. 25, 1850 (10 Stat. 587), — *Held*, 1. That the treaty is the supreme law of the land, and by its terms the incapacity of B. as an alien was so far removed as to entitle him to recover and sell the lands and "withdraw and export the proceeds thereof." 2. That his rights thus secured are not barred by the lapse of time, inasmuch as no statute of Virginia prescribes the term within which they must be asserted. 3. That where a treaty admits of two constructions, — one restrictive as to the rights that may be claimed under it, and the other liberal, — the latter is to be preferred. 4. That the treaty-making clause of the Constitution is retroactive as well as prospective. 5. That, in view of B.'s rights in the premises, the escheator is entitled only to the amount allowed by law for making sales of real estate in ordinary cases. 6. That counsel cannot be paid out of the fund in dispute.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The facts are stated in the opinion of the court.

Mr. William L. Royall for the plaintiff in error.

Mr. James G. Field, Attorney-General of Virginia, and *Mr. J. A. Lynham*, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Solomon Hauenstein died in the city of Richmond in the year 1861 or 1862, intestate, unmarried, and without children. The precise date of his death is not material. At that time, he owned and held considerable real estate in the city of Richmond. An inquisition of escheat was prosecuted by the escheator for that district. A verdict and judgment were rendered in his favor. When he was about to sell the property, the plaintiffs in error, pursuant to a law of the State, filed their petition, setting forth that they were the heirs-at-law of the deceased, and praying that the proceeds of the sale of the property should be paid over to them. Testimony was

taken to prove their heirship as alleged, but the court was of opinion that, conceding that fact to be established, they could have no valid claim, and dismissed the petition. They removed the case to the Court of Appeals. That court, entertaining the same views as the court below, affirmed the judgment. They thereupon sued out this writ of error.

The plaintiffs in error are all citizens of Switzerland. The deceased was also a citizen of that country, and removed thence to Virginia, where he lived and acquired the property to which this controversy relates, and where he died. The validity of his title is not questioned. There is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland. His original citizenship is, therefore, to be presumed to have continued. Best on Presumptions, 186. According to the record his domicile, not his citizenship, was changed. The testimony as to the heirship of the plaintiffs in error is entirely satisfactory. There was no controversy on this subject in the argument here. The parties were at one as to all the facts. Their controversy was rested entirely upon legal grounds.

The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. 2 Tucker's Blackst., App., Note C. By that law "aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them." 2 Bla. Com., 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, but such a title is always liable to be devested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603.

The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily in the States where the property is situated.

The Revised Code of Virginia of 1860, c. 115, sect. 1, provides that an alien upon declaring on oath before a court of record that he intends to reside in the State, and having the declaration entered of record, may inherit or purchase and hold real estate there as if he were a citizen.

Sect. 2 of the same chapter provides that such alien may convey or devise his real estate, and if he shall die intestate that it shall descend to his heirs, and if the alienee, devisee, or heir shall be an alien, that he may take and hold, by being in the State and making under oath and having recorded, within five years, a like declaration with that prescribed by the preceding section.

The sixth section declares that when by a treaty between the United States and any foreign country a citizen of such country is allowed to sell real estate in Virginia, he may sell and convey within the time prescribed by the treaty; and when by such treaty citizens of the United States are allowed to inherit, hold, sell, and convey real estate situate in such country, the citizens and subjects of that country may in like manner inherit, hold, sell, and convey real estate lying in Virginia, provided that these several provisions shall apply only to real estate acquired thereafter by the citizens or subjects of such foreign country.

Sect. 2 has no application to the present case, because the declaration which it permits has not been made by the plaintiffs in error, and sect. 6 has none, because all the real estate of the deceased was acquired before the date of the act.

The Revised Code of 1873 has obliterated nearly all the distinctions between aliens and citizens with respect to their rights as to both real and personal property. See c. 4, sect. 18, p. 130, and c. 119, sects. 4 and 10, pp. 917, 918. As it is not claimed that any of these provisions affect the present case, we shall pass them by without further remark.

This brings us to the consideration of the treaty between the United States and the Swiss Confederation, of the 25th of November, 1850. 11 Stat. 587. The fifth article has been earnestly pressed upon our attention, and is the hinge of the controversy between the parties.

The first part of the article is devoted to personal property,

and gives to the citizens of each country the fullest power touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows: —

"The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

The plaintiffs in error are exactly within the latter category. This is too clear to require discussion. A corresponding provision for like cases is found in article 2, in the previous treaty of the 18th of May, 1847, between the same parties. 9 Stat. 902. By that article it is declared "that if, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed him to dispose of such property and collect and withdraw the proceeds thereof, without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated."

It was clearly the intention of the clause in question in the treaty of 1850 to secure to the beneficiaries absolutely the right "to sell said property," and "to withdraw and export the proceeds thereof without difficulty." Otherwise the language used

is a sham and a mockery. The only qualification is as to the time within which the right must be exercised. It has been earnestly contended, in behalf of the defendant in error, that the State, having fixed no time within which this must be done, it cannot be done at all, and that the entire provision thus becomes a nullity, and is as if it were not.

The terms of the limitation imply clearly that *some time*, and not that *none*, was to be allowed. If it had been proposed to those who negotiated the treaty to express in it the effect of this construction in plain language, can it be doubted that it would have been promptly rejected by both sides as a solecism and contrary to the intent of the parties?

Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont*, 3 Pet. 242. Such is the settled rule in this court.

It was well remarked in the able opinion of the dissenting judge in the Court of Appeals, that if this case were to be decided under the treaty of 1847, there could not be a doubt as to the result. In this we concur, and we think the case is equally clear under the treaty of 1850, which governs the rights of the parties.

The provision as to time in the earlier treaty is, in effect, a statute of limitation. It applied with Procrustean sameness in all the States and in all the cantons. In the latter treaty this limitation was dropped, and the time was to be such "as the laws of the State or canton will permit." In other words, it was left to the laws of the several States and cantons respectively to fix the limitation in this as in other cases. This was consonant to the policy of our judiciary act of 1789, which gave to the State statutes of limitation the same effect in the local courts of the United States which they had in the courts of the States respectively that enacted them. The Procrustean uniformity prescribed by the former treaty was thus abandoned, and it is fair to presume that the harmonious results in this respect which must necessarily follow, everywhere within the territory covered by the treaty, both at home and abroad, were the considerations by which those who made the change were animated. If a State or canton had a law which imposed a

limitation in this class of cases, nothing more was necessary. If it had not such a law, it was competent to enact one, and until one exists there can be no bar arising from the lapse of time. A party entitled can sue whenever he chooses to do so, and he is clothed with all the rights of any other litigant asserting a claim where there is no statute of limitation applicable to the case. This we understand to be the position of Virginia, and such are the legal consequences necessarily flowing from it.

This construction of the treaty derives support from the fact that the treaty provides (sixth article) that any controversy which may arise among the claimants to the succession, "shall be decided according to the laws and by the judges of the country where the property is situated."

It remains to consider the effect of the treaty thus construed upon the rights of the parties.

That the laws of the State, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error.

The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: "If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that 'all treaties made or which shall be made under the authority of the United States, shall be *the supreme law of the land*, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions or to make them yield to the general government and to treaties made by their authority. A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall

before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, — that the will of a small part of the United States may control or defeat the will of the whole." *Ware* v. *Hylton*, 3 Dall. 199.

It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in *Ware* v. *Hylton*, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties "made and to be made."

We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in every thing said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country.

In *Chirac* v. *Chirac* (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* v. *Banks* (10 id. 181), and with respect to the British treaty of 1794, in *Hughes* v. *Edwards* (9 id. 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr* v. *Hodgeson*, 4 id. 453. By the British treaty of 1794, "all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union.

Fairfax's Devisees v. *Hunter's Lessee*, 7 Cranch, 627; see *Ware* v. *Hylton*, 3 Dall. 242." 8 Op. Att'ys-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it." Treat. on the Const. and Gov. of the U. S. 204.

If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to "enter into any treaty, alliance, or confederation." Const., art. 1, sect. 10.

It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also *Shanks* v. *Dupont*, 3 Pet. 242; *Foster & Elam* v. *Neilson*, 2 id. 253; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 Elliot's Constitutional Debates, 231; *The People, &c.* v. *Gerke & Clark*, 5 Cal. 381.

We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect. We forbear to pursue the topic further. In the able argument before us, it was insisted upon one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction. There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion.

During the argument here, our attention was called to the amount that might be taken from the fund for compensation to the escheator and to his counsel in the event of our judgment being in favor of the plaintiffs in error.

Under the circumstances, the escheator can have no claim as such, but he may properly receive the percentage allowed by

law for making sales of real property in ordinary cases. It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute.

The judgment of the Court of Appeals of Virginia, so far as it concerns the claim of the plaintiffs in error, will be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is

So ordered.

KIRTLAND *v.* HOTCHKISS.

1. This court can afford the citizen of a State no relief from the enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon Federal authority nor violate any right recognized or secured by the Constitution of the United States.
2. The Constitution does not prohibit a State from taxing her resident citizens for debts held by them against a non-resident, evidenced by his bonds, payment whereof is secured by his deeds of trust or mortgages upon real estate situate in another State.
3. For the purposes of taxation, a debt has its *situs* at the residence of the creditor, and may be there taxed.

ERROR to the Supreme Court of Errors, Litchfield County, State of Connecticut.

Charles W. Kirtland, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax-warrants levied upon his real estate in the town in which he resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds, executed in Chicago, and made payable to him, his executors, administrators, or assigns in that city, at such place as he or they should by writing appoint, and, in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the city of Chicago, by the said Charles W. Kirtland to the said Edwin A. Cummins, on the day of the date hereof." They were secured by

deeds of trust, executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustee having power by the terms of the deed to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State "or elsewhere" should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels, or effects, or any interest thereon; and that such personal property or interest thereon, being the property of any person resident in the State, should be valued and assessed at its just and true value in the tax-list of the town where the owner resides. The statute expressly exempts from its operation money or property actually invested in the business of merchandizing or manufacturing, when located out of the State. Conn. Revision of 1866, p. 709, tit. 64, c. 1, sect. 8.

The court below held that the assessments complained of were in conformity to the State law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted by Kirtland upon the ground, among others, that the statute of Connecticut thus interpreted and sustained is repugnant to the Constitution of the United States.

Mr. Ashbel Green, *Mr. William Cothren*, and *Mr. Julien T. Davies*, for the plaintiff in error.

The statutes of Connecticut in question are unconstitutional, because, —

I. They regulate commerce among the several States. Const. U. S., art. 1, subd. 3, sect. 8; Laws of Conn., Revision of 1866, p. 709, tit. 64, c. 1, sect. 8, p. 713, sect. 24; Laws of 1872, c. 113. The power to impose discriminating burdens upon property is a power to prohibit or destroy. The plaintiff in error was burdened on account of the foreign origin of his bonds and mortgages, and was therefore unconstitutionally taxed. *Welton* v. *State of Missouri*, 91 U. S. 275; *Brown* v. *Maryland*, 12 Wheat. 436; *Crandall* v. *State of Nevada*,

6 Wall. 35; *Case of the State Freight Tax*, 15 id. 232; *Cook* v. *Pennsylvania*, 97 U. S. 566. The grant of power by the Constitution to Congress to regulate commerce was intended to secure absolutely and uniformly free commerce between the States. *Crandall* v. *State of Nevada*, *supra*; *Erie Railroad Co.* v. *State*, 31 N. J. L. 531. Money is both the subject and instrument of commerce. Johnson, J., in *Gibbons* v. *Ogden*, 9 Wheat. 589; McLean, J., in *Nathan* v. *Louisiana*, 8 How. 80; Daniel, J., in *United States* v. *Marigold*, 9 id. 567. The unconstitutionality of a tax is determined by the subject upon which the tax is laid. *St. Louis* v. *Ferry Company*, 11 Wall. 423; *Ward* v. *Maryland*, 12 id. 418; *Case of the State Freight Tax*, *supra*. The tax falls, in this case, upon money that is exported from Connecticut. If it be constitutional, that State could, so far as loaning money is concerned, prescribe non-intercourse between her citizens and those of other States. For the purposes of taxation, no deduction from the assessed valuation of his real estate is permitted to a party in Illinois, by reason of his mortgage indebtedness. Connecticut attempts to regulate commerce among the several States, inasmuch as her statutes discriminate in taxation against resident mortgagees who loan in Illinois, where no such deduction is permitted, in favor of her own residents, making similar loans on lands within her own limits. Revision of 1866, tit. 64, c. 1, pp. 709, 715, sects. 8, 35, 36, 37.

II. They "abridge the privileges or immunities of citizens of the United States." Fourteenth Amendment Const., sect. 1. One of these "privileges or immunities" is the right to pass in and out of all the States. *Crandall* v. *State of Nevada*, *supra*. This right cannot exist in conjunction with a nullifying right by the State where the citizen resides to tax or impose discriminating burdens upon him for his acts, his lawful business, or his property in another State. *Lamb* v. *Bowser*, 7 Biss. 315, 372.

III. They tax property or business situated without the State of Connecticut.

The maxim that personal property follows the owner has no force, independent of comity. Savigny, System des Heutigen Römischen Rechts, vol. viii. p. 171, sect. 366; Wharton's Private International Law, sects. 11, 13, 297. See p. 126, id.

Green v. *Van Buskirk*, 7 Wall. 150; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Lewis* v. *Woodford*, 58 Tenn. 25; *Birtwhistle* v. *Vardill*, 3 Barn. & Cress. 438, 451.

It has no application to the taxation of visible tangible property, *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224; *Pacific Steamship Co.* v. *Commissioners of Taxes*, 46 How. Pr. (N. Y.) 315; *State Tax on Foreign-held Bonds*, 15 Wall. 300; nor to the taxation of negotiable choses in action. *State Tax on Foreign-held Bonds Case*, *supra; British Com. Life Ins. Co.* v. *Commissioners of Taxes*, 31 N. Y. 32; *State of Missouri* v. *St. Louis County*, 47 Mo. 594; *People* v. *Home Ins. Co.*, 29 Cal. 533; *Attorney-General* v. *Bowens*, 4 Mee. & W. 172. It does not apply to non-negotiable choses in action, in cases of administration of the assets of a deceased person, *Beers* v. *Shannon*, 73 N. Y. 292; *Noonan* v. *Bradley*, 9 Wall. 405; see Journal du Palais, Cour de Cassation, Aug. 27, 1850 (1851, p. 205); nor in cases of confiscation, *Miller* v. *United States*, 11 Wall. 268; *Brown* v. *Kennedy*, 15 id. 591; 3 Phillimore, International Law, sect. 567, p. 688; nor in cases of foreign bankruptcy, *Ogden* v. *Saunders*, 12 Wheat. 358; *Harrison* v. *Stenny*, 5 Cranch, 289, nor in cases of attachment. It has no proper application to non-negotiable choses in action in cases of taxation. *Attorney-General* v. *Dimond*, 1 Cromp. & J. 356; *Attorney-General* v. *Hope*, 8 Bli. N. S. 44; Burchese, Operations de la Bourse, Paris, 1877, pp. 248, 861; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Fisher* v. *Commissioners of Bush County*, 19 Kan. 414; *Varner* v. *Calhoun*, 48 Ala. 178; *Bridges* v. *Mayor*, 33 Ga. 113.

The tax in question does not fall upon a "person," because it is not a poll-tax. A tax upon a person, with reference to his property, falls upon the property. *Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200. It is not a tax upon property situated in Connecticut. 1. The money lent by the plaintiff in error belongs to his debtor. *Railway Company* v. *Jackson*, 7 Wall. 263. See 42 Conn. 438. 2. The bonds have always been in Illinois, and cannot be taxed by Connecticut. *Hoyt* v. *Commissioners*, 23 N. Y. 224; *State Tax on Foreign-held Bonds*, *supra*. 3. The debts evidenced by the bonds are not valuable independent of the debtor's property, which can be taxed only in Illinois, where it is situated.

4. The rights of the plaintiff in error, evidenced by his bonds, are protected only by Illinois, and hence cannot be taxed by Connecticut. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 440; *Catlin* v. *Hall*, 21 Vt. 122; *Fisher* v. *Commissioners of Bush Co.*, 19 Kan. 414; *Bridges* v. *Mayor*, 33 Ga. 113; *People* v. *Gardiner*, 51 Barb. (N. Y.) 352; *Varner* v. *Calhoun*, 48 Ala. 178. It really falls on acts of business performed and to be performed in Illinois, of which the bonds are the record and the evidence. Wolsey's Political Science, vol. i. p. 75. Those acts of business have an exclusive *situs* for taxation in Illinois, whose jurisdiction alone protects them.

IV. They are repugnant to the exclusive sovereignty of Illinois over property and acts of business within her borders, and hence are void under the provisions of the Constitution of the United States. 1. The laws of Connecticut should not be allowed to affect property and business whose *situs* is in Illinois. The power of Illinois to tax money within her limits, or an act of loaning and borrowing money there, must, under our form of government, exclude the power of another State from taxing Illinois money, or an act of loaning and borrowing in Illinois. *Mager* v. *Grima et al.*, 8 How. 490; Story's Confl. of Laws, p. 257; *The Appolon*, 9 Wheat. 370; *Ogden* v. *Saunders*, 12 id. 213; *Hervey* v. *Locomotive Works*, 93 U. S. 664; *Pennoyer* v. *Neff*, 95 id. 722; *Guillander* v. *Howell*, 35 N. Y. 657; *Lamb* v. *Bowser*, 7 Biss. 315; *Desmazes* v. *Mutual Ben. Life Ins. Co.*, 7 Ins. L. J. 927; *Baldwin* v. *Hale*, 1 Wall. 223; *Green* v. *Collins*, 3 Cliff. 494; *D'Arcy* v. *Ketchum*, 11 How. 73; *Whitcomb* v. *Phœnix Ins. Co.*, 8 Ins. L. J. 624. 2. No express provision of the United States Constitution is necessary, if its spirit sustains a prohibition upon the interference of one State with the sovereignty of another. *Ward* v. *Maryland*, 12 Wall. 427; *McCullough* v. *Maryland*, 4 Wheat. 416; *Crandall* v. *State of Nevada*, 6 Wall. 35; *Passenger Tax Cases*, 7 How. 283; *Weston* v. *City of Charleston*, 2 Pet. 462. 3. The tax laws of Illinois are, and those of Connecticut are not, a part of the contracts evidenced by plaintiff's bonds. Taxation of them by Connecticut lays a greater burden upon the contracts than Illinois has declared they shall bear. The statutes in question fail to give "full faith and credit" to the "public acts" of

Illinois. Const. U. S., art. 4, sect. 1; *Edwards* v. *Kearey*, 96 U. S. 595; *Walker* v. *Whitehead*, 16 Wall. 314.

V. They impair the obligation of the plaintiff's contract, and deprive him of a portion of its fruits. Such an impairment is forbidden by the Constitution of the United States. *Walker* v. *Whitehead*, 16 Wall. 314; *Planters' Bank* v. *Sharp*, 6 How. 301.

VI. They deprive the plaintiff in error of his property without due process of law. Fourteenth Amendment, Const. U. S. 1. The advertisement of sale by the defendant in error of plaintiff's land is the first step of a "taking" of his land. 2. Such advertisement was without "due process of law," because the statutes conferring the power to advertise being unconstitutional conferred no jurisdiction upon any person to tax or to sell the land. There can be no "due process of law," even in attempted taxation, without jurisdiction of the subject of taxation, and such jurisdiction does not exist in the absence of protection of that subject by the taxing power. *United States* v. *Rice*, 4 Wheat. 246; *Wicks* v. *Dinyee*, 7 Cranch, 481; *St. Louis* v. *Ferry Co.*, 11 Wall. 430; *State Tax on Foreign-held Bonds*, *supra*; *Tappan* v. *Merchants' Bank*, 19 id. 490; *Railroad Tax*, 18 id. 229; *Loan Association* v. *Topeka*, 20 id. 655. An arbitrary execution on a subject not within the jurisdiction of a State is not taxation but confiscation.

VII. They violate sect. 2, art. 4, of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." See art. 4 of Articles of Confederation; *Slaughter-House Cases*, 16 Wall. 75. The business of loaning money is thus guaranteed to a citizen of another State upon the same footing as to taxation with the citizens of the State within which the business is carried on. *Corfield* v. *Corzell*, 4 Wash. 371; *Paul* v. *Virginia*, 8 Wall. 168; *Williams* v. *Bruffy*, 96 U. S. 176; *Ward* v. *Maryland*, 12 Wall. 430; *Bradwell* v. *State*, 16 id. 130; *Crandall* v. *State of Nevada*, 6 id. 35

Mr. Morris W. Seymour, *contra*.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

We will not follow the interesting argument of counsel by

entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all limitations which exist upon the exercise of that power, whether they arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from the preceding statement of the more important facts of this case.

In *McCulloch* v. *State of Maryland* (4 Wheat. 428), this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in *Providence Bank* v. *Billings* (4 Pet. 563), "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis* v. *The Ferry Company* (11 Wall. 423), and in *State Tax on Foreign-held Bonds* (15 id. 300), the language of the court was equally emphatic.

In the last-named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited,

where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous.

Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage

upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds* (*supra*), the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein," &c. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. *Nathan* v. *Lousiana*, 8 How. 73; Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere.

Judgment affirmed

PARISH *v.* UNITED STATES.

1. The acts of the Assistant Surgeon-General, appointed under the act of Congress and located at St. Louis, are the acts of the Surgeon-General, and have the same validity until countermanded or revoked.
2. Where parties in the effort to fulfil an order for a large amount of ice for the use of the government, which by their contract they were bound to furnish, purchased ice which was lost by the *suspension* of the order of the Assistant Surgeon-General by his superior officer, they are entitled to recover the cost of the ice so lost and the expense of the care and attempt to preserve it.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. John B. Sanborn and *Mr. Ralph P. Lowe* for the appellant.

The Solicitor-General, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This action was commenced in the Court of Claims, under an act of Congress specially authorizing it, approved May 31, 1872.

There is nothing in the act which furnishes any rule for its decision, though some of its provisions are emphasized in the argument of counsel. The action was brought on the following contract: —

"Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical store-keeper, United States army, and acting medical purveyor, Washington, D. C., on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the city of St. Louis, State of Missouri, of the other part, witnesseth: —

"That the said Henry Johnson, medical store-keeper United States army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz.: —

"*First*, That said J. W. Parish & Co. shall deliver at Memphis, Tennessee; Nashville, Tennessee; St. Louis, Missouri; and Cairo, Illinois, the whole amount of ice required to be consumed at each

respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

"*Second*, That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars ($25).

"*Third*, That for each and every ton of ice delivered at St. Louis, Missouri, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of sixteen dollars ($16).

"*Fourth*, That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

"*Fifth*, That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

"*Sixth*, All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of the post where it is delivered, and such as does not conform to the specifications set forth in this contract shall be rejected.

"*Seventh*, That payments shall be made from time to time on receipted bills of lading and duplicate accounts certified to by the medical officer in charge of the post where it is delivered.

"*Eighth*, No member of Congress shall be admitted to any share herein or any benefit to arise therefrom.

"*Ninth*, It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to be allowed by the said Henry Johnson, medical storekeeper, United States army, as per charter-party or bill of lading of the vessel.

"In witness whereof, the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.] "HENRY JOHNSON,
"*Med. Store-keeper U. S. A. Acting Med. Purveyor.*
"J. W. PARISH & Co."

Under this contract, there was delivered and paid for by the government, at the stipulated prices, 12,768 tons of ice, about which there is no dispute.

The controversy grows out of the following correspondence and the acts of parties under it: —

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, March 25, 1863.

"Messrs. J. W. PARISH & Co.:

"GENTLEMEN,— I am instructed by the Assistant Surgeon-General to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz.: —

"At St. Louis . . . . . 5,000 tons,
"At Cairo . . . . . 5,000 tons,
"At Memphis . . . . . 10,000 tons,
"At Nashville . . . . . 10,000 tons,

making the total of 30,000 which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

"Very respectfully, your ob't servant,
"By order of the Assistant Surgeon-General:
(Sig.) "JOSEPH B. BROWN,
"*Surgeon United States Army.*"

A copy of this order being received at the Surgeon-General's office, the following telegram and letter were sent to Assistant Surgeon-General Wood: —

"SURGEON-GENERAL'S OFFICE,
"March 31, 1863.

"Parish & Co. have not contracted for 30,000 tons of ice. Suspend the order you gave him.
(Sig.) "W. A. HAMMOND, *Surgeon-General*
"Col. R. C. WOOD,
"*Asst. Surgeon-General U. S. Army, St. Louis.*"

"SURGEON-GENERAL'S OFFICE,
"WASHINGTON, D. C., March 31, 1863.

"SIR,— Your communication of the 25th instant to J. W. Parish & Co., in regard to the quantities of ice to be delivered at the different points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

"I am instructed to inform you that the contract with Parish &

Co. was made for such quantities as might be needed; and that the ice should be ordered from them, from time to time, to different points, in lots of a few hundred tons, as needed.

"Very respectfully, your obedient servant,

"C. H. ALDEN, *Assistant Surgeon, U. S. A.*

"Col. R. C. WOOD,

"*Assistant Surgeon-General, St. Louis, Mo.*"

"ASSISTANT SURGEON-GENERAL'S OFFICE,

"ST. LOUIS, MISSOURI, March 31, 1863.

"To J. W. PARISH & Co. (Care C. H. WICKER & Co.),

"Chicago, Ill.:

"I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

(Sig.) "R. C. WOOD, *Asst. Surgeon-General.*"

In the finding of facts by the Court of Claims, it is said that it does not appear that this last despatch was received by the claimants, though they had knowledge of the notice by oral information from the Assistant Surgeon-General at St. Louis, on the second day of April.

The sixth finding of fact by the Court of Claims, which is also important, is thus stated: —

"Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and after the delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the second day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammond, of March 31, he had purchased or contracted for the purchase of 23,000 tons of ice."

If we add to this that 10,000 tons of this latter purchase was made at Lake Pepin, on the upper Mississippi River, which was stored there at the time and which became a total loss, and that the order of the Surgeon-General *suspending* the order of the Assistant Surgeon-General remained in that condition and has never been revoked or modified, we have the main elements on which the case was decided in the court below by dismissing the claimants' petition.

The petitioners claim to recover the contract price of the

entire 30,000 tons, after deducting what they have been paid and the reasonable cost of delivering the ice not received by the government.

The opinion of the Court of Claims found in the record bases the dismissal of the petition on the ground that the Assistant Surgeon-General, in making the order on claimants for the 30,000 tons of ice, was acting so wholly without authority, that Parish & Co. had no right to treat it as of any validity or as one which they were bound to regard. In the argument of the case before us, the counsel for government abandons this view of the matter, and, we think, very properly. We apprehend if the case were reversed, and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General.

The office of Surgeon-General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found, in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments.

It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principal of some part of those duties that the office of assistant was created. In the immense increase of business in the office of Surgeon-General during the war, similar relief was found necessary, and the office of Assistant Surgeon-General was created.

For the very reason that the prompt exercise of the powers of the bureau was essential in the field of operations of the army, the assistant in this case was located at St Louis, over a thousand miles from the city of Washington. He was appointed for the purpose of exercising, at that place, the functions of the office of Surgeon-General. He was by law the

Assistant Surgeon-General. If no virtue attached to his acts until approved by the Surgeon-General in Washington, any inferior clerk would have answered the purpose as well. It is not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. But until so revoked or disapproved it was valid, and parties required to act under it had a right to rely on it.

The order of the 25th of March, made within twenty days after the contract was signed, was an unequivocal demand, under that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. No one familiar with the climate and the sources of supply could doubt that, to enable him to fulfil this demand, made at that season, required promptitude and diligence in securing the ice. If claimants had failed to have the amount thus demanded ready for use when required, the officers of the government would have procured it at any price in the market, a price which would have been enormously enhanced by this very demand, and the claimants would have been liable for the difference between what the government paid under these circumstances and the price fixed in the agreement. They were therefore under an imperative necessity to prepare to fulfil this requirement.

Impelled by this necessity, the Court of Claims finds that between the time they received the order and the second day of April, when they first learned of its suspension by the Surgeon-General, they purchased over 23,000 tons of ice. They were then informed, not that the order was revoked, but that it was suspended. It never was revoked. It remained suspended until the time during which the entire delivery was to be made was passed; and during that time 10,000 tons of the ice melted away at Lake Pepin, and was a total loss. As we have already stated, 12,768 tons were delivered and paid for; 10,000 tons perished by melting. What became of the 7,232 tons, neither received by the government nor lost at Lake Pepin, is not disclosed by the record, nor whether claimants

made by selling it to others or lost by it, in that or any other way.

What are the rights of the parties under these circumstances?

If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the government to the contract price for all those amounts, they should have delivered, or tendered, or offered to deliver, and demanded payment.

If the order had been revoked instead of suspended, and they intended to deny the right of the government to revoke it, they must clearly have offered a delivery to make the government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or rather, whether the government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

In point of fact, the order was never revoked but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made, or offered to make, delivery of the amount demanded by that order. The government did require, accept, and pay for part of it. The balance was never delivered or tendered.

Without elaborating the matter, we are of opinion that, as the claimants neither delivered or offered to deliver the remainder, they cannot recover either the contract price or the profits they might have made if they had done so. And as the government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost. So if they lost any thing on the other ice not purchased at Lake Pepin, but purchased before they learned of the order of suspension, they should recover that.

Bulkley v. *United States* (19 Wall. 37) is an analogous case. Bulkley had contracted to do all the transportation of supplies from Fort Leavenworth to army posts further west which might be required of him by the government. He was notified that 1,700,000 pounds would be needed, and made large preparations to meet this requirement. The United States did not need half this amount, and the freight was not delivered to him. He claimed the profits which he would have made by the terms of the contract if the freight had been delivered and carried. This court said he could not recover profits, but that, "in making ready to meet the requirements of the notice, he was subjected to the loss of time, to trouble and expense. He is entitled to be paid accordingly."

We think the case before us comes within that principle. Claimants are entitled to the expenses and losses incident to the preparation to meet the demand of the notice served on them. The cost of the ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 7,232 tons of ice purchased to enable them to meet that requirement, must form the measure of plaintiffs' recovery. Because these are not found by the Court of Claims, the judgment of that court will be reversed and the case remanded, that their damages may be ascertained and judgment rendered accordingly; and it is

So ordered.

UNITED STATES v. BOWEN.

1. The Revised Statutes of the United States must be accepted as the law on the subjects which they embrace as it existed on the first day of December, 1873. When their meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the revision.
2. Sect. 4820 of the Revised Statutes admits of no other reasonable construction than that only the invalid pensioners who had *not* contributed to the funds of the Soldiers' Home were bound to surrender to it their pensions while receiving its benefits. There is no occasion, therefore, to look at the pre-existing law on the subject.

APPEAL from the Court of Claims.

Charles Bowen filed in the court below his petition alleging that the United States unlawfully withheld from him $270, being the amount due him from Sept. 13, 1876, when he was admitted as an inmate of the "Soldiers' Home," to Dec. 4, 1877, upon his pension theretofore granted, by reason of a wound received by him in the military service of the United States.

That court found the following facts: —

1. The claimant was a private in Company B, Third Regiment United States Infantry, from the 9th of March, 1861, to the 9th of March, 1864, and during that time, under the provisions of sect. 7 of the act of March 3, 1859 (11 Stat. 434), there was deducted from his pay the sum of $4.57.

2. An invalid pension was granted to him March 13, 1865, at $8 per month, commencing March 9, 1864, by certificate No. 39,050; the monthly rate of such pension was increased from $8 to $15, Jan. 21, 1867, to commence June 6, 1866, and from $15 to $18, July 8, 1876, to commence June 4, 1872.

3. On the 13th of September, 1876, he was admitted as an inmate of the Soldiers' Home, and his pension from that date to the 4th of December, 1877, to wit, the sum of $264.60, was regularly paid to the treasurer of that institution.

The court found as a conclusion of law that the claimant should recover the sum of $264.60. Judgment in his favor having been rendered therefor, the United States appealed.

The fifth section of the act entitled "An Act to found a military asylum for the relief and support of invalid and disabled soldiers of the army of the United States," approved March 3, 1851 (9 Stat. 595), provides "that any pensioner on account of wounds or disability incurred in the military service, although he may not have contributed to the funds of the institution, shall be entitled to all the benefits herein provided, upon transferring his pension to said asylum for and during the period that he may voluntarily continue to receive such benefits."

The act of March 3, 1859, making appropriations for the support of the army for the year ending June 30, 1860 (11 id. 431), changes the name of the institution to "Soldiers' Home," and the sixth section declares that "all pensioners, on account of wounds or disability incurred in the military service, shall transfer and surrender their pensions to the institution, for and during the time they may remain therein, and voluntarily continue to receive its benefits."

Sect. 4820 of the Revised Statutes provides that "the fact that one to whom a pension has been granted for wounds or disability received in the military service, has not contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto; but all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits."

The Attorney-General for the United States.

The whole controversy arises from interpolating in the Revised Statutes "such" between "all" and "pensioners," where the latter words occur in the sixth section of the act of March 3, 1859; and its determination depends upon the answer to the inquiry, Did the revision of the statutes repeal the law requiring an inmate of the Soldiers' Home, who had contributed twelve and a half cents per month during his service, to transfer his pension to the institution, or did Congress merely intend to incorporate in them the then existing law?

The appellee contends that "such" works so manifest a change in the antecedent law, that the declared intent of the revision, namely, to "revise and consolidate the statutes in force on the 1st of December, 1873," is not to be regarded,

and that it is not of any importance what had been the settled law by clear expressions in the statutes for fourteen previous years. The appellant submits that these considerations, together with the otherwise rigid adherence in the chapter of the Revised Statutes entitled the "Soldiers' Home," to the language, chronology, and provisions of the antecedent law, demonstrate that the revisers only attempted to collate, and that Congress did not mean to change, the law as it stood at that date.

Spencer, J., in *Taylor* v. *Delancy*, 2 Cai. (N. Y.) Cas. 149, discussing the revision of 1801, lays down the following rule: "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change."

This rule was approved and adopted by Kent, himself one of the revisers of 1801, in *Yates's Case* (4 Johns. (N. Y.) 317, 359); and it has received the indorsement of all the courts which have considered the question. *Burnham* v. *Stevens*, 33 N. H. 247; *Ash* v. *Ash*, 9 Ohio St. 383; *Conger* v. *Barker*, 11 id. 1; *Croswell* v. *Crane*, 7 Barb. (N. Y.) 191; *Ennis* v. *Crump*, 6 Tex. 34; *Dominick* v. *Michael*, 4 Sandf. (N. Y.) 374; *Goodell* v. *Jackson*, 20 Johns. (N. Y.) 722; *Theriat* v. *Hart*, 2 Hill (N. Y.), 380; *Hoffman* v. *Delihanty*, 13 Abb. (N. Y.) Pr. 388; *In re Brown*, 21 Wend. (N. Y.) 316; *Allen* v. *Ramsey*, 6 Metc. (Mass.) 635.

It was competent, therefore, for the appellant to examine the prior statutes, to determine whether a radical change in them was intended by Congress by the insertion of the word in question.

Mr. Matt. H. Carpenter, *contra*.

The chapter of the Revised Statutes, entitled "The Soldiers' Home," in which sect. 4820 is found, was evidently intended as the only provision to regulate and govern that institution, and to repeal all existing laws relating thereto. Covering their whole subject, and embracing all that was intended to be preserved of them, it becomes a complete law in itself, providing every thing necessary to the perfect management and discipline of the "Soldiers' Home." Such is the natural inference

from its general character and particular provisions, and it leaves no room for doubt as to the intention of its framers. It therefore repeals all former statutes on the same subject. *Ellis* v. *Page*, 1 Pick. (Mass.) 45; Smith, Comm. on Stat. Constr., sects. 785, 786; *Boucicault* v. *Hart*, 13 Blatch. 52; *Holmes* v *Wiltz*, 11 La. Ann. 446; *United States* v. *Hammond*, 2 Woods, 203; *Jones* v. *Smart*, 1 Tenn. 44.

That section is expressed in clear, concise, and intelligible language, leaving nothing for interpretation or conjecture, and the construction for which the appellee contends has been uniformly given to it by the Commissioner of Pensions, who is charged with the duty of executing its provisions. His interpretation, to use the language of the court in *United States* v. *Moore* (95 U. S. 760), is "entitled to the most respectful consideration, and ought not to be overruled without the most cogent reasons."

It is unnecessary, however, to contend that the prior statutes are repealed by implication, for sect. 5596 repeals them in express terms. It declares, that "all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the sections applicable thereto shall be in force in lieu thereof."

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims in favor of appellee for $264.60, for pension money withheld by the government.

The action of the government officers in that respect was founded on their opinion that Bowen, who was cared for in the Soldiers' Home, belonged to the class who, by sect. 4820 of the revision, surrendered their pensions while inmates of the home. That section enacts that "the fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain there and voluntarily receive its benefits."

Bowen was the recipient of an invalid pension but *he had* contributed to the funds of the Soldiers' Home, and the single question in the case is whether that fact withdraws him from the clause which requires pensioners to surrender their pensions to the home while inmates of it.

If the qualifying word *such* is restricted to pensioners described in the sentence which immediately precedes it, then Bowen does not belong to that class, and is not bound to surrender his pension. There is no other class of pensioners described in that section to whom the word *such* can refer than those who have not contributed to the funds of the home, and Bowen does not belong to that class. The history of the institution affords good reason for that interpretation. The Soldiers' Home was bought and built, and is supported now very largely, by money deducted from the monthly pay of the soldiers of the regular army. But there is a class of persons who have received wounds in the military service, or incurred ill health while in such service, from whose pay no deduction was made as a contribution to the home, who received pensions as invalids, and, by virtue of this section, are entitled to be cared for at that place. There is a manifest propriety in a rule which requires of this class that, when supported out of the fund to which they did not contribute, their pensions should go to increase that fund; while those who have been giving of their monthly pay for years should receive its benefits when they come to need them, without giving also the pension which is the bounty of a grateful government. There is no antecedent use of the word "pensioners" in the chapter of which sect. 4820 is a part, and which embraces the legislation of Congress concerning the Soldiers' Home, to which the word *such* can refer, but the immediately preceding sentence in the same section. If the construction claimed by counsel for the government be correct, that word is useless, for it would express the idea with precision by reading, "But all pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits." The question, therefore, is whether we shall read the section "all pensioners" or "all *such* pensioners."

The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution, and no sound canon of construction will authorize us to disregard it, when to do so changes very materially the meaning of the section.

It is urged in opposition to this view that as the law stood prior to the revision, as shown by the act of March 3, 1859 (11 Stat. 431), *all* invalid pensioners who accepted the benefit of the home were bound to surrender to its use their pensions while there; and it must be conceded that such was the law.

But, as the revision embraces that act as well as all others on the subject, it is, by the express language of the repealing clause, sect. 5596, no longer in force. Counsel for government, admitting that it is no longer in force, independently of the section of the revision which we are called on to construe, insist that a resort may be had to the law which was the subject of revision, to interpret any thing left in doubt by the language of the revisers.

This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress. If, then, in the case before us, the language of sect. 4820 was fairly susceptible of the construction claimed by the government, as well as of the opposite one, the argument from the provision of the statute as it stood before the revision would be conclusive. But, for the reasons already given, we are of opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that only invalid pensioners who had *not* contributed to the funds of the Soldiers' Home

were bound to purchase its benefits by surrendering to it their pensions.

As the Court of Claims acted on this construction, its judgment is

Affirmed.

MOUNT PLEASANT v. BECKWITH.

1. Where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the State creating them.
2. Where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities, and severally liable for a proportionate share of all its then subsisting legal debts, and vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon.
3. The remedy of the creditors of the extinguished corporation is in equity against the corporations succeeding to its property and powers.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

In 1873, Charles Beckwith filed his bill in the court below, against the town of Mount Pleasant, the town of Caledonia, and the city of Racine, in Racine County, Wisconsin, to enforce the payment of certain bonds issued in the year 1853, by the town of Racine in said county, in payment of stock for which it subscribed in the Racine, Janesville, and Mississippi Railroad Company.

The legislature of the Territory of Wisconsin, by an act approved Jan. 2, 1838, among other things, established the towns of Racine and Mount Pleasant, and defined their boundaries; and by an act approved Feb. 7, 1842, created and established the town of Caledonia, and defined its boundaries and those of Racine and Mount Pleasant.

The legislature of the State of Wisconsin, by an act approved Aug. 8, 1848, incorporated the city of Racine and defined its boundaries.

By an act approved April 2, 1853, the town of Racine was authorized and empowered to subscribe to the capital stock of

the Racine, Janesville, and Mississippi Railroad Company, to the amount of $50,000, and to pay therefor in the bonds of the town, payable within twenty years, in the manner prescribed by said act; and on or about Dec. 6, 1853, it subscribed for and took $50,000 dollars of said stock, and issued its bonds accordingly.

In 1856, the legislature changed the boundaries of the towns of Mount Pleasant and Racine, and, in 1857, changed and defined those of the towns of Racine, Caledonia, and Mount Pleasant.

The board of supervisors of Racine County, Dec. 2, 1859, changed the name of the town of Racine to Orwell.

The legislature, by an act approved March 30, 1860, vacated Orwell, and attached its territory to Caledonia and Mount Pleasant, and, by an act approved March 17, 1871, took from the latter a portion of such territory and added it to the city of Racine.

On March 30, 1860, the value of property of individuals within the jurisdiction of the town of Orwell was: —

Real estate	$696,024.05
Personal property	37,925.00

There came within the jurisdiction of the town of Caledonia of this property: —

Real estate of the value of	$298,112.00
Personal property of the value of . . .	15,167.00

And within the jurisdiction of Mount Pleasant: —

Real estate of the value of	$397,912.05
Personal property of the value of . . .	22,757.00

In 1874, the value of property in the town of Caledonia, which was on that part of its territory attached in 1860, was: -

Real estate	$326,533.41
Personal property	34,893.00

And the value of property within Mount Pleasant on that part of its territory attached in 1860 from Orwell was: —

Real estate	$377,610.00
Personal property	35,470.00

And within the limits of the city of Racine on that part of its territory attached in 1871: —

Real estate	$125,528.00
Personal property	9,385.00

Neither Mount Pleasant nor Caledonia by any corporate act moved the legislature of Wisconsin for the passage of any of the laws changing any of the territorial boundaries above specified or referred to.

The defendants filed separate general demurrers to the bill, which were overruled. They then answered.

There was evidence tending to show that the stock of the Racine, Janesville, and Mississippi Railroad Company was worth from fifty to seventy-five per cent of its par value from 1853 to 1856, the date of the last transaction in stock proven, and that no records of the town of Orwell ever came to the possession of either the town of Mount Pleasant or the town of Caledonia.

Upon hearing, the court below, April 18, 1876, entered the following decree: —

"This cause came on to be heard on the twelfth day of May, A.D. 1875, upon the pleadings and proofs reported by the master, and, having been argued by counsel, the court took the same under advisement; and a further computation of the amount due to this date upon the bonds described in the complainant's bill and exhibited in the proofs having been directed and made and filed by the master, bearing date the eighteenth day of April, 1876; and it satisfactorily appearing to the court that the town of Racine, a municipal corporation in the county of Racine, in said Eastern District of Wisconsin, and then having within its boundaries and municipal jurisdiction the territorial area described in the complainant's bill, — on or about the sixth day of December, 1853, made, executed, and delivered the bonds described in his bill upon the consideration, under the authority, and in the manner in said bill set forth; that the said town of Racine continued in existence as such municipal corporation, and by the same name and with the changes in its territorial boundaries set forth in the complainant's bill, until on or about the second day of November,

1859, when the county board of supervisors of Racine County, within which county said town of Racine was located, by a resolution of said board, changed the name of said town from 'The Town of Racine' to 'The Town of Orwell,' and that the township and municipal corporation theretofore known as the town of Racine remained in existence in and by the name of the town of Orwell, and with the same territorial limits which the town of Racine had prior to such change of name, until on or about the thirtieth day of March, 1860, when the legislature of the State of Wisconsin, by an act approved March 30, 1860, vacated and extinguished the corporation and body politic known as the town of Orwell, in the county of Racine, and declared that said corporation should thereafter have no existence as a body politic and corporate. That in and by the same act of the legislature of said State, the whole territory of said town of Orwell, formerly known as the town of Racine, was attached to the defendants, the town of Mount Pleasant and the town of Caledonia, in the proportions and by the boundary lines in said act named, and that no provision was made in or by said act for the payment of the corporate debts of said township and body politic theretofore known by the names of the town of Racine and the town of Orwell. And it further appearing to the court that, on or about the seventeenth day of March, 1871, by an act of the legislature of Wisconsin, approved March 17, and published March 18, 1871, a portion of the lands and territory which had been within the town of Orwell at the time it was vacated, and which, by the act vacating Orwell, was attached to Mount Pleasant, was detached from the town of Mount Pleasant and attached to the defendant, the city of Racine, and in and by said act it was provided that the defendant, the city of Racine, should assume and pay so much of the municipal indebtedness of the former town of Racine, if any, as the lands described in the addition to said city might be or become legally chargeable with and liable to pay.

"And it further appearing that the complainant, at the time of filing his said bill, was and now is the owner in good faith and for value of the bonds in the bill mentioned, and upon which there is due at this date the sum of $23,080.20.

"Now, at the January Term of this court, to wit, on the eighteenth day of April, 1876, the court being sufficiently advised, and being of the opinion that the municipal indebtedness of said town of Racine, otherwise known as the town of Orwell, was not extinguished by said act of the legislature, vacating and disorganizing said township, and distributing its territory to other townships and municipal corporations, and that an equitable liability for such indebtedness accrued against the defendants, to which such territory was distributed, in the proportion which the taxable property received by each and the valuation thereof bore to the whole taxable property and the whole debt of such vacated town.

"Now, therefore, it is considered, adjudged, and decreed that the master's report of the amount due on the bonds set forth in complainant's bill, and of the respective proportions and valuations of the taxable property received by each of the defendants from said town of Orwell, or which belonged to said town immediately prior to the vacation thereof, be and the same is adopted, ratified, and confirmed.

"And it is further adjudged and decreed that the complainant, Charles Beckwith, do have and recover of and from the defendants, the town of Mount Pleasant, the town of Caledonia, and the city of Racine, the sum of $23,080.20, hereby adjudged due to him from them for principal and interest upon the bonds described in the complainant's bill, and which sum it is adjudged the complainant have and recover from the defendants severally, and that the defendants severally pay the same in the proportions and respective amounts following, to wit: —

"That the complainant, Charles Beckwith, have and recover of and from the defendant, the town of Caledonia, the sum of $9,281.50, and interest thereon from this date; and also the further sum of $58.37, being one-third of complainant's costs and disbursements of the action, as taxed, and hereby adjudged to the complainant.

"That the complainant, Charles Beckwith, have and recover of and from the defendant, the town of Mount Pleasant, the sum of $10,742.70, and interest from this date; and also the further sum of $58.37, being one-third of complainant's costs, as taxed.

"And that the complainant, Charles Beckwith, have and recover of and from the defendant, the city of Racine, the sum of $3,056, and interest thereon from this date; and also the further sum of $58.36, being one-third of complainant's costs, taxed and adjudged to him as aforesaid.

"And it is further adjudged that the complainant have execution against said defendants severally, to collect said several sums decreed to be paid by each, in the manner provided by law."

From this decree the town of Mount Pleasant and the town of Caledonia appealed to this court.

Mr. L. S. Dixon and *Mr. John T. Fish* for the appellants.

The court below erred, —

1. In holding the appellants liable to pay the debt of the town of Racine (or Orwell), incurred in the purchase of stock in a railroad company, or that such debt became that of the appellants, to be enforced against them upon any ground or in any form of proceeding. *Hampshire* v. *Franklin*, 16 Mass. 76; *Barkley* v. *Levee Commissioners*, 1 Woods, 254; *Girard* v. *Philadelphia*, 7 Wall. 1; *Atkins* v. *Randolph*, 31 Vt. 226; *Laramie County* v. *Albany County et al.*, 92 U. S. 307; *Town of Depere* v. *Bellevue*, 31 Wis. 120; *Milwaukee* v. *Milwaukee*, 12 id. 102; *Hasbruck* v. *Milwaukee*, 13 id. 37–43; *Mills* v. *Charton*, 29 id. 413; *State ex rel. McCurdy* v. *Tappan, Town Clerk*, id. 664; *People* v. *Batchellor*, 53 N. Y. 128; *Horton* v. *Town of Thompson*, 71 id. 513; *People* v. *Mayor*, 51 Ill. 17 *St. Louis* v. *Russell*, 9 Mo. 503; 1 Dillon, Municipal Corporations, c. 4, sect. 43; Cooley, Const. Lim., marginal p. 231 (4th ed. 284).

2. In holding that the property of individuals within the jurisdiction of the town of Racine (or Orwell) was the primary fund upon which the complainant had the right to rely for the payment of his debt; that the transfer of such property to the jurisdiction of the appellants transferred to them the liability to pay the claims of creditors of that town, and that such liability was that of individual debtors and not that of trustees. *Barkley* v. *Levee Commissioners et al.*, 93 U. S. 258; *Rees* v *City of Watertown*, 19 Wall. 107; *Heine* v. *The Levee Commissioners*, id. 655.

3. In holding that the power of taxation conferred upon the town of Racine by act of 1853 was by the act of 1860 transferred to the appellants, to be exercised by them severally upon all the taxable property within their jurisdiction. *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Mumma* v. *The Potomac Company*, 8 Pet. 281; *Railroad Company* v. *Maine*, 96 U. S. 499; *Railroad Company* v. *State of Georgia*, 98 id. 359; *Miller* v. *The State*, 15 Wall. 478; *Attorney-General* v. *Railroad Companies*, 35 Wis. 425; *Barkley* v. *Levee Commissioners*, 1 Woods, 254; s. c. 93 U. S. 258; *Broughton* v. *Pensacola*, id. 266; *Milner's Administrators* v. *City of Pensacola*, 2 Woods, 632; *Rees* v. *Watertown*, *supra*; *Heine* v. *The Levee Commissioners*, *supra*; 1 Dillon, Municipal Corporations, sect. 116, and cases cited in note.

4. In holding that it had jurisdiction in equity, or that the appellants were in equity and good conscience liable to pay the complainant's claim against that town. *Heine* v. *The Levee Commissioners*, *supra*.

Mr. William P. Lynde, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Explicit authority from the legislature was given to the supervisors of the town of Racine to subscribe for the stock of the railroad company mentioned in the act conferring the power, to an amount not exceeding $50,000, provided a majority of the legal voters of the municipality, at a meeting of the town duly called and held for the purpose, shall vote in favor of making the proposed subscription. Sess. Laws Wis. (1853) p. 11.

Pursuant to that authority, the proper officers of the town, on the 6th of December, 1853, subscribed for the capital stock of the railroad company to the amount of $50,000, and issued one hundred bonds of the corporation, each in the sum of $500, in payment of the subscription for the stock, the bonds being made payable in twenty years from date, with coupons attached for annual interest at the rate of seven per cent. Twenty of those bonds with their coupons are now held by the complainant, numbered from seventy to eighty-nine, inclusive, and of which he became the lawful holder within one month subse-

quent to their date, — all of which, as he alleges, remain wholly unpaid, principal and interest.

Various facts and circumstances are alleged in the bill of complaint of an equitable nature, and which the complainant insists are of a character to show that he has no remedy at law, and which tend strongly to show that he is entitled to relief in equity. Appended to those several allegations is the prayer of the complainant, that the three respondents may answer the matters charged, and that the court will ascertain the respective liabilities of the respondents to the complainant, and decree the amount due to him from each of the respondent municipalities, and for general relief.

Service was made, and the respective respondents appeared and separately demurred to the bill of complaint. Hearing was had, and the court overruled the several demurrers and directed that the respondents should answer the matters charged in the bill of complaint by a given day. Separate answers were accordingly filed by the respective respondents, no objection being made that they were not filed in time.

Sufficient appears to show that on the 2d of January, 1838, the town of Racine and the town of Mount Pleasant were by the same act created municipal corporations, with boundaries as set forth in the bill of complaint. Private Laws Wis. (1838) 168.

Four years later, the town of Caledonia was incorporated, her territory being taken from the two towns before mentioned, without any provision being made that the new town should bear any portion of the indebtedness of either of the old towns. Id. (1842) 10.

Both parties concur in these propositions, and it appears that the city of Racine, which is a distinct municipality from the town by the same name, was incorporated by the act of the 8th of August, 1848, with boundaries as correctly set forth in the transcript. Id. (1848) 80.

Subsequent changes, if any, made in the boundaries of these municipalities, not herein made the subject of comment, are regarded as immaterial in the present investigation.

Additional territory was subsequently taken from the town of Racine and was annexed to the city of Racine, and by a still

later act another fraction of her territory was annexed to the town of Mount Pleasant, neither act containing any regulations as to existing indebtedness. Id. (1856) 148-416.

Prior to that, to wit, on the 6th of March in the same year, the legislature of the State, by an act of that date, annexed a much larger tract, taken from the towns of Racine and Mount Pleasant, to the city of Racine, as described in the record; but the Supreme Court of the State decided that a certain feature of the act was unconstitutional and void. *Slauson* v. *The City of Racine*, 13 Wis. 398.

In consequence of that decision, the towns from which the territory annexed was taken continued to exercise jurisdiction over it for the period of fifteen years longer, until a portion of the same territory then constituting a part of the town of Mount Pleasant was again annexed to the city of Racine, on the condition that the city "shall assume and pay so much of the municipal indebtedness of the town as the lands described in the first section of that act may be or become legally chargeable with and liable to pay." Private Laws Wis. (1871) 723.

Throughout these several changes, except the last, the annexation in every instance was made without any regulation that the town to which the territory was annexed should pay any portion of the indebtedness of the town from which the territory annexed was taken. Still not satisfied, the legislature, by the act of the 23d of February, 1857, rearranged the boundaries of each of the three towns, as therein is fully set forth and described. Id. (1857) 103.

Two years later, the county supervisors changed the name of the town of Racine to Orwell; but the prior name will be used throughout in this opinion, as less likely to produce confusion in the statement of facts. From the time the legislature rearranged the boundaries of the three towns they remained without alteration until the legislature, March 30, 1860, by a public act, vacated and extinguished the corporation and body politic known as the town of Racine, then called Orwell, and enacted that thereafter it should have no existence as a body politic and corporate. Sess. Laws Wis. (1860) p. 218.

Sect. 2 of the act also provided that all that part of the terri-

tory of the town lying north of the described line should be annexed to and hereafter form a part of the town of Caledonia, and that all that part of the territory lying south of that line should become and continue to be a part of Mount Pleasant.

Each of the respondent towns refer in their answer to the legislation of the State in respect to their incorporation and boundaries, which need not be reproduced, as they are accurately set forth in the preceding statement.

Two of the respondents, to wit, the town of Mount Pleasant and the town of Caledonia, deny in their answers that any statute of the State has ever been passed which would authorize the municipal authorities of those towns to levy and collect a tax to pay either the principal or interest of the bonds described in the bill of complaint, and allege that the corporate authorities of those towns have never assumed or undertaken any trust or duty in the premises, or have ever, in any way, recognized the acts of the town which issued the bonds or the validity of the same. Nor does the answer of the other respondent, to wit, the city of Racine, differ very materially from those filed by the two towns first named, except that the pleader avers that the city was only made liable for such portion of the indebtedness of the old town as is described in the act enlarging the limits of the respondent city, and pleads as a separate defence that the complainant has an adequate remedy at law.

Replications were filed by the complainant, and the parties entered into a stipulation that the proofs should be taken by the master, and that they might be read and used at the final hearing as the evidence in the case, subject to legal objection. Proofs were accordingly taken by the master, and he reported the depositions of the witnesses examined, with an agreed statement of facts. Arguments of counsel followed, and the Circuit Court entered a decree in favor of the complainant against each respondent.

Two of the towns, to wit, Mount Pleasant and Caledonia, appealed to this court, and assign for error the following causes: 1. That the Circuit Court erred in holding that the appellants are liable to pay the debt of the town of Racine incurred in the purchase of stock in the aforesaid railroad company, or that the debt of that town became the debt of the appel-

lants, to be enforced against them in any form of proceeding. 2. That the Circuit Court erred in holding that the property of the individuals within the jurisdiction of that town constituted the primary fund to which the complainant had the right to look for the payment of his debt, and that the transfer of their property to the jurisdiction of the appellants rendered them liable to pay the debts due to the creditors of the town whose powers and jurisdiction terminated by the transfer. 3. That the Circuit Court erred in holding that the power of taxation previously vested in the town which issued the bonds in question was, by the act annexing its territory to the appellant towns, transferred to the appellants to be severally exercised by them upon all the taxable property within their respective jurisdictions. 4. That the Circuit Court erred in holding that it had jurisdiction in equity of the case, or that the appellants are in equity and good conscience liable to pay the claim of the complainant against the town whose territory was annexed to the appellant corporations.

Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the State.

Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. Corporate rights and privileges are usually possessed by such municipalities; and it is equally true that they are subject to certain legal obligations and duties, which may be increased or diminished at the pleasure of the legislature, from which all their powers are derived.

Institutions of the kind, whether called cities, towns, or

counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between themselves and the legislature of the State, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with every thing partaking of the nature of compact.

Instead of that, the constant practice is to divide large municipalities and to consolidate small ones, or set off portions of territory from one and annex it to another, to meet the wishes of the residents or to promote the public interests as understood by the legislature, — it being everywhere understood that the legislature possesses the power to make such alterations and to apportion the common property and burdens as to them may seem just and equitable.

Alterations of the kind are often required to promote the public interests or the convenience and necessities of the inhabitants; and the public history shows that it has been the constant usage in the States to enlarge or diminish the power of towns, to divide their territory by set-off and annexation, and to make new towns whenever the legislature deems it just and proper that such a change should be made. Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alteration of the boundaries, as fixed by any prior law.

State legislation may regulate the subject; but if the legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the pub

lic property, except what falls within her boundaries, and to that the old corporation has no claim whatever. *Laramie County* v. *Albany County*, 92 U. S. 307; *Bristol* v. *New Chester*, 3 N. H. 521.

Apply these principles to the admitted facts of the case, and it is clear that every one of the described changes made in the limits and boundaries of the respondent municipalities become wholly immaterial in this investigation, except the last two, as hereafter more fully explained.

Before the passage of those two acts, the claim of the complainant against the town of Racine was, beyond all question, valid and collectible. Nobody controverts that proposition, and it is clear that no defence to the action could have been sustained for a moment. By the act of March 30, 1860, the legislature of the State vacated and extinguished the corporation and body politic formerly known as Racine, then called Orwell, and annexed the whole area of the territory included in the municipality to the two adjacent towns of Mount Pleasant and Caledonia, in the proportions and by the boundary lines described in the second section of the legislative act. Had legislation stopped there, it is clear that the city of Racine would not have been liable for any portion of the debt of the extinguished municipal corporation; but it did not stop there, as appears by what follows.

Prior to the passage of that act, the old town of Racine was the sole obligor in the bonds held by the complainant; and there certainly is nothing in the provisions of that act which tends in the least degree to create any liability on the part of any other municipality for the indebtedness of that town, except the towns of Mount Pleasant and Caledonia. Nothing had previously occurred to create any liability on the part of the city of Racine to pay any proportion of the debts of the old town of Racine, which issued the bonds described in the bill of complaint.

Until the passage of the act of the 17th of March, 1871, the rights of all parties remained unchanged. By that act a portion of the territory formerly belonging to the old town of Racine was set off from the town of Mount Pleasant and was annexed to the city of Racine. Appended to that act,

and a part of it, was the provision that the city to which the described territory was annexed "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay." Private Laws Wis. (1871) 723.

Enough appears in that provision of direct legislation to show that the city of Racine was thereby made liable for the debts of the extinguished town of Racine in the proportion therein described; and the clear inference from the provision is that the town of Mount Pleasant, prior to the passage of that act, was liable for the debts of that old municipality in proportion to the whole extent of the territory annexed to her by the prior act which extinguished the old municipal corporation. None, it is presumed, will deny the liability of the city of Racine for those debts in the proportion described in the act creating the liability, and hence it is that the corporate authorities of the city acquiesced in the decree of the Circuit Court without appeal.

Parties who do not appeal from the final decree of the Circuit Court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous. *The Stephen Morgan*, 94 U. S. 599.

Concede that, and it follows that the only question open in the case for examination is whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon* v. *Lewis*, 2 Sum. 143; *McMicken* v. *Perin*, 18 How. 507. Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett* v. *Brockett*, 3 id. 691.

Viewed in that light, as the case should be, it is clear that

if the appellants are liable at all they are liable for the respective amounts specified in the decree. *Harding* v. *Handy*, 11 Wheat. 103; *Story* v. *Livingston*, 13 Pet. 359.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, that it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan* v. *Beloit, City and Town*, 7 Wall. 613, 617.

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Town of Depere and Others* v. *Town of Bellevue and Others*, 31 Wis. 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the Supreme Court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson* v. *Abbott*, 61 Mo. 176, 177.

Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being

that the successor who takes the benefits must take the same *cum onere*, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. *Swain* v. *Seamens*, 9 Wall. 254, 274; *Pickard* v. *Sears*, 6 Ad. & Ell. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim. (4th ed.) 232.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton* v. *Pensacola*, 93 U. S. 266, 269.

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moities of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester* v. *Seaber*, 3 Burr. 1866.

Neither argument nor authority is necessary to prove that a State legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the Constitution are as sacred as the Constitution that protects them from infraction, and yet

the defence in this case, if sustained, will establish the proposition that the effect of State legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment.

Suppose it be admitted that the act of the State legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public

property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and, when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose, — the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over every thing belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general State law; and it is clear that their powers and duties differ in some important particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the crown, and acquired many of their privileges by prescription, without any aid from Parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no pro

vision is made, every one must submit to the will of the State, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill* v. *The Village of Corning*, 15 N. Y. 297; *Mayor* v. *State, ex rel. of the Board of Police of Baltimore*, 15 Md. 376; *City of Olney* v. *Harvey*, 50 Ill. 453; *Borough of Dunmore's Appeal*, 52 Pa. St. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. *North Hempsted* v. *Hempsted*, 2 Wend. (N. Y.) 109; *The Hartford Bridge Company* v. *East Hartford*, 16 Conn. 149, 171.

Extensive powers in that regard are doubtless possessed by the legislature; but the Constitution provides that no State shall pass any "law impairing the obligation of contracts," from which it follows that the legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 Dillon, Municipal Corp. (2d ed.), sect. 41; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, 554; *Lee County* v. *Rogers*, 7 id. 181, 184; *Butz* v. *City of Muscatine*, 8 id. 575, 583; *Furman* v. *Nichol*, id. 44, 62.

Where a municipal corporation has the power to contract a debt, it has, says Dixon, C. J., by necessary implication, authority to resort to the usual mode of raising money to pay it, which undoubtedly is taxation. *State, ex rel. Hasbrouck*, v. *The City of Milwaukee*, 25 Wis. 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the Constitution. *Soutter* v. *The City of Madison*, 15 id. 30.

State control over the division of the territory of the State into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the Constitution. *Chandler* v. *Boston*, 112 Mass. 200; 6 Cush. (Mass.) 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts. *The Western Saving Fund Society* v. *The City of Philadelphia*, 31 Pa. St. 175, 185.

Text-writers concede almost unlimited power to the State legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 Dillon, Municipal Corp., sect. 128; *Blanchard* v. *Bissell*, 11 Ohio St. 96; *Lansing* v. *County Treasurer*, 1 Dill. 522, 528.

Concessions of power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control without limitation, unless the legislature oversteps the limits of the Constitution. *Layton* v. *New Orleans*, 12 La. Ann. 515.

Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the Federal Constitution, as impairing the obligation of contracts. *Brooklyn Park Com.* v. *Armstrong*, 45 N. Y. 234, 247.

Laws passed by a State impairing the obligation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority. Cooley, Const. Lim. (4th ed.) 241; Angell & Ames on Corp. (9th ed.), sects. 332, 333.

Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. Without officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been transferred by the authority of the legislature to the appellants, the principles of equity and good conscience require that inasmuch as they are, and have been for nearly twenty years, in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans* v. *Clark*, 95 U. S. 644, 654.

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns, and school districts, and the legislature of every State is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations in such a case continue, though it may be that the charters are much changed, and that the inhabitants of the territory

annexed or set off fall under different officers and new and very diverse regulations. *Beckwith* v. *City of Racine*, 7 Biss. 142, 149.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled, from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness.

Decree affirmed.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BRADLEY, dissenting.

I am of opinion that it requires legislation to make a legal obligation against the new town, and make the apportionment of the debt; and I dissent on that ground from the judgment and opinion of the court in this case.

NOTE. — *Mount Pleasant* v. *Cornell*, on appeal from the Circuit Court of the United States for the Eastern District of Wisconsin, was argued at the same time and by the same counsel as was the preceding case.

MR. JUSTICE CLIFFORD, in delivering the opinion of the court, remarked, that it embraced substantially the same facts as that case, and must be decided in the same way.

Decree affirmed

UNITED STATES v. MURRAY.

1. Owing to the partial exhaustion of the appropriation, A., a clerk in the Treasury Department, was granted leave of absence without pay for five months from Feb. 1, 1874. He performed no service thereafter. His name was continued on the rolls to allow his transfer to some other bureau, should an opportunity offer. He was, June 30, informed in writing by the Secretary of the Treasury that his services had terminated January 31. *Held*, that he has no claim against the United States after the last-mentioned date.
2. The joint resolution approved June 23, 1874 (18 Stat., part 3, p. 289), providing for two months' pay to clerks and employés of the executive departments at Washington, applied to such only as should be discharged at the close of the fiscal year by reason of the reductions made necessary by the legislation of that session of Congress.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. John N. Oliver, *contra*.

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

On the 3d of May, 1873, Murray, the claimant, was appointed to a clerkship of class 1 in the Treasury Department, for a probationary term of three months. At the end of that period, the board of examiners having reported favorably on his fitness for a clerkship of that class, he was, on the 5th of November, reappointed, and assigned to duty in the office of the Commissioner of Internal Revenue from the 3d of that month.

Owing to the abolition by law of the offices of assessor and assistant assessor of internal revenue, in May, 1873, a large additional amount of labor was thrown on the office of the commissioner, to meet which more clerical force became necessary, and was employed during the summer, fall, and winter following. This unusual demand upon the appropriation for clerical service in that office for the year ending June 30, 1874, caused an only partial exhaustion of that appropriation, and created a necessity to dispense with the services of a number of the clerks employed in that office from different

dates in January and February, 1874, till the close of the fiscal year. In consequence of that necessity, leave of absence without pay was given some of the clerks until the end of the year. Murray was included among the rest, and his leave dated on the 1st of February. Leave of absence was granted instead of an absolute dismissal from office, as a favor to the clerks, and to give them an opportunity of getting a transfer to some other bureau, if opportunity offered. The order of leave was accompanied by a notice that, if a transfer should not be effected, dismissal would occur at the end of the year.

On the 23d of June, 1874, Congress passed the following joint resolution: —

"That the Secretary of the Treasury be, and he is hereby, authorized to pay, when discharged, two months' pay to such clerks and employés of the executive departments in Washington, D. C., as shall be discharged at the close of the present fiscal year without fault on their part, but by reason of the reductions made necessary by the legislation of the present session of Congress: *Provided*, that the amount paid under this resolution shall be deducted from the salary of any person receiving the same who shall be reappointed within six months from the date of such discharge."

Murray performed no service after the date of his furlough, and at the end of the fiscal year was dismissed, with a note from the Secretary of the Treasury as follows: —

"SIR, — The necessity for your services in the office of the Commissioner of Internal Revenue no longer existing, they terminated Jan. 31, 1874, on which date you ceased to serve."

This suit was brought to recover pay for the time included in the furlough, and also for the two months allowed by the joint resolution of Congress. The Court of Claims being divided in opinion, gave a *pro forma* judgment for the full amount of the claim, and from that judgment the United States appealed.

To our minds it is clear the judgment below was wrong. While under the regulations of the department an employé is not entitled to a leave of absence with pay for more than thirty days in any one year, there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the

exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal. If he desires to be free from all obligations to serve in the future, he may resign; but if he permits his name to continue on the rolls, it must be on such terms as are imposed by the department. In this case, an extraordinary demand for clerical service caused an early partial exhaustion of the appropriation for the year, and it became necessary to dispense with a part of the force, so as to reduce the expenses of the office. Absolute dismissals were not made, but, as a favor to the clerks, their names were kept on the rolls without pay. Murray remonstrated against what was done, but seems to have preferred the furlough to an absolute discharge. Under these circumstances, having rendered no service, he cannot claim compensation.

Neither do we think the case comes within the provision of the joint resolution of Congress. That resolution contemplated the extra pay only when discharges occurred in consequence of a reduction of clerical force made necessary by the legislation of that session of Congress. It nowhere appears that Murray was discharged on any such account. On the contrary, the fair inference from the findings below is that he was appointed originally on account of the necessary temporary increase of force brought about by the abolition of the offices of assessor and assistant assessor, under a law of the previous session, and that he was discharged because the additional labor was no longer required. He was kept on furlough in order that he might, if possible, effect a transfer to some other branch of the service. This clearly implies that the special work to which he had been assigned was finished. At any rate, it does not appear affirmatively or by any fair implication that his discharge was made necessary on account of any legislation which was had at the session of Congress at which the resolution was adopted.

The judgment of the Court of Claims is reversed, and the cause remanded with instructions to dismiss the petition.

So ordered.

PEOPLE v. WEAVER.

1. The provision in sect. 5219 of the Revised Statutes of the United States, that State taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon.
2. The statute of a State, therefore, which establishes a mode of assessment by which such shares are valued higher in proportion to their real value than other moneyed capital, is in conflict with that section, although no greater percentage is levied on such valuation than on that of other moneyed capital.
3. The statutes of New York which permit a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, tax them at a greater rate than other moneyed capital, and are, therefore, void as to them.

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

The facts are stated in the opinion of the court.

Mr. George F. Edmunds and *Mr. Matthew Hale* for the plaintiff in error.

Mr. R. W. Peckham, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The law of the State of New York for taxation in the county of Albany, enacted in the year 1850, contained the following section : —

"SECT. 9. If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In the year 1866, the legislature of that State enacted on this subject another law, the first section of which reads as follows: —

"SECT. 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein: said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And, in making such assessment, there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. *And provided further*, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

William J. Weaver, Edward Brennan, and Robert H. Weir, the defendants in error, constituting the board of assessors of the city of Albany for the year 1875, assessed against Chauncey P. Williams, the relator, the sum of $38,250, for taxation on account of shares owned by him in the National Albany Exchange Bank, organized under the general banking act of Congress. He appeared before this board in due time, and demanded the reduction of this sum to the amount of one dollar, and accompanied the demand with this affidavit: —

"CITY AND COUNTY OF ALBANY, *ss.*:

"I, Chauncey P. Williams, being duly sworn, do depose and say that the value of personal estate owned by me, including my bank stock, after deducting my just debts and my property invested in the

stock of corporations or associations liable to be taxed therefor, and my investments in the obligations of the United States, does not exceed the sum of one dollar.

"C. P. WILLIAMS.

"Subscribed and sworn before me, this twenty-eighth day of September, 1875.

"JAMES MAHER, *Notary Public.*"

The defendants refused to make this deduction; and, under the procedure in the courts of New York, which allows of an amicable suit on an agreed statement of facts, the case finally came to the Court of Appeals of that State. The judgment there being in favor of defendants, the People of the State of New York, on the relation of Williams, bring the record to this court by writ of error. Three questions were raised and decided in the Supreme Court, and its judgment was affirmed in the Court of Appeals. They are thus stated in the record: —

"The case coming on for argument on the submission thereof, after hearing Mr. Hale, of counsel for relator, and Mr. Peckham, of counsel for defendants, the court decides: —

"1st, That it was not the duty of the defendants, as assessors of the city of Albany, to comply with the demand made by said relator, and reduce his assessments to the sum of one dollar, and answer the first question submitted in the negative.

"2d, That, under the law of the State of New York, referred to in the second question, and passed April 23, 1866, the defendants, as such assessors, were justified in refusing to reduce the relator's assessment on his shares of bank stock mentioned in said submission to the sum of one dollar, and answers the second question in the affirmative.

"3d, That the said law of the State of New York, passed April 23, 1866, is not in violation of any law of the United States relating to the amount of taxes on shares of national banking associations, and answers the third question submitted in the negative.

"Judgment is therefore ordered for the defendants against the relator, with costs."

Of the second of these propositions this court has no jurisdiction, but must accept the decision of the highest court of the

State, that the act of 1866 took the money invested in bank shares out of the general provision of the law of 1850, which allowed a deduction of the debts owing by the shareholder from the value of the personal property as a basis for laying the tax. In that respect, we are bound by the decision of the Court of Appeals as the true construction of the State statute. The first proposition is but the necessary result of the case, if the other two are decided in favor of defendants by that court. We have thus left for our consideration the third proposition, which, being decided against a right asserted by plaintiff under the act of Congress establishing the national banking system, presents a question reviewable by this court. We proceed to consider it.

The Court of Appeals delivered no formal opinion in the present case; but, in the entry of their judgment, which is part of the record, they say, "This judgment is upon the authority of the former decision of this court, rendered in the case of *The People* v. *Dolan and Others*, 36 N. Y. 59."

The opinion in that case is before us. It decides directly the question now presented, and, if sound, justifies the judgment of the court in this case. We have given it the careful consideration which the high character of the court demands at our hands. The question arises on the provision of the national bank law concerning taxation of the shares of the banks, which is thus expressed in sect. 5219 of the Revised Statutes, in force at the time of this assessment: —

"Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located, . . . subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It cannot be disputed, — it is not disputed here, — nor is it denied in the opinion of the State court, that the effect of the State law is to permit a citizen of New York, who has money

capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor, inasmuch as nearly all the banks in that State and in all others are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress, in passing the act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result.

That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch* v. *The State of Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 id. 738; *Weston* v. *The City Council of Charleston*, 2 Pet. 449.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the States to tax these shares, it was foreseen — the cases we have cited from our former decisions showed too clearly — that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from any thing beyond their equal share of the public burdens, said, you may tax the real estate

of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the act of Congress and by skilfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State government to fall with unequal weight on the subject of taxation thus surrendered to it by the national government?

The argument by which this view is supported is founded on the assumption that while Congress limited the State authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of State regulation. The State can, therefore, adopt any arbitrary or conventional system of valuation as a basis of taxation, however unequally or unjustly it may operate and however it may discriminate against bank shares, provided the percentage of the tax levied in this valuation is the same in all cases. If, for instance, the tax is two per cent on all personal property, the argument is, that the act of Congress is not violated if the valuation on the money of the citizen invested in State bonds is, by statute, one-half its real value, and that on bank shares is its full value, or, as in the statute of the State now under consideration, the taxpayer is allowed an exemption from taxation in whole or in part, as regards his State bonds, while none is allowed in reference to bank shares.

"Taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Seizing upon the word "rate" in this sentence as if disconnected

from the word "assessment," and construing it to mean percentage *on any* valuation that might be made, the Court of Appeals arrive at the conclusion that, since that percentage is the same in all cases, the act of Congress is not infringed. If this philological criticism were perfectly just, we still think the manifest purpose of Congress in passing this law should prevail. We have already shown what that was. But the criticism is not sound. The section to be construed begins by declaring that these shares may be "included in the valuation of the personal property of the owner, in assessing taxes imposed by authority of the State within which the association is located." This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment, and a *valuation;* and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital.

"When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge, against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes *listing* the persons, property, &c., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. . . . Taxation by valuation cannot be apportioned without it." Cooley, Taxation, 258, 259; Burroughs, Taxation, p. 198, sect. 94. So, also, Judge Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual. Levying a tax. 1 Bouvier, 154. These definitions show that in the best use of the language employed by Congress we are justified in looking to the rule of valuation adopted by the State in assessing taxes on these shares, as well as to the uniformity of percentage to ascertain whether the congressional restriction has been violated.

It is said, however, that the judgment of the State court is supported by the decision of this court in *People* v. *The Commissioners*, 4 Wall. 244. The specific question now before us was not involved in that case. The only matter before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative, and it is all that was decided, or could be decided. The sentence in Mr. Justice Nelson's opinion, on which the argument is founded, reads thus: "The answer is, that, upon a true construction of this clause of the act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

If we give to the phrase "rate of taxation" in this sentence no more than its proper force, and if we observe that the learned judge speaks of the proportion or percentage *in* the valuation, not *on* it, as it is misquoted, we have the idea which we have already supposed to be the true one in the minds of the law makers. However this may be, we feel quite sure that the question of limiting the effect of the act of Congress to a discrimination in the percentage levied as a tax, without regard to equality in the valuation on which that tax was levied, was not before the court, and was not intended to be decided. And in our view such a proposition is untenable.

We are, therefore, of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those

who have moneyed capital otherwise invested, is in conflict with the act of Congress, and the judgment of that court will be reversed and the case remanded for further proceedings in conformity to this opinion.

So ordered.

WILLIAMS *v.* WEAVER.

The decision of the Court of Appeals of the State of New York, that, in the absence of fraud or intentional wrong, the members of the board of assessors for the city of Albany are not personally liable in damages to a party for any error they commit in officially assessing his shares of national bank stock, does not present a Federal question, and cannot be reviewed here.

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

The facts are stated in the opinion of the court.

Mr. George F. Edmunds and *Mr. Matthew Hale* for the plaintiff in error.

Mr. R. W. Peckham, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This suit, though between Williams, the relator in the preceding case, and the same defendants as there, and coming before us, by writ of error to the same court, is of a very different character. The plaintiff seeks to hold the defendants individually liable for the sum which he was compelled to pay as taxes on shares of national bank stock, by reason of the wrongful assessment for the year 1874, made by them in their official character as the board of assessors for the city of Albany.

The errors in assessments complained of are numerous and of a varied character, most of them having relation to an improper discrimination to the prejudice of the rights of the plaintiff and his assignors, as holders of such shares.

The Court of Appeals, in its opinion, conceding the assessment to be in many respects erroneous and to the prejudice of plaintiff, holds that, in the absence of fraud or intentional wrong, the defendants were not personally liable in damages

for any error in the assessment. Whether that court decided that question correctly or not, it is not a Federal question, but one of general municipal law, to be governed either by the common law or the statute law of the State. In either case it presents no question on which this court is authorized to review the judgment of a State court.

That decision is also conclusive of the whole case. If the defendants, in assessing property for taxation, incur no personal liability for any error they may commit, the fact that the error consisted in a misconstruction of an act of Congress can make no difference. An officer whose duty personally, as the Court of Appeals of New York holds, is mainly judicial, is no more liable for a mistaken construction of an act of Congress than he would be for mistaking the common law or a State statute.

We may observe, also, that the Federal right mainly relied on here as having been violated, namely, the right to have plaintiff's indebtedness deducted from the valuation of his bank shares, was not raised, because he did not, as in the previous case, make the necessary affidavit and demand.

On the whole, there is no error which this court can review.

Judgment affirmed.

NEWTON v. COMMISSIONERS.

1. By an act of the legislature of Ohio, passed Feb. 16, 1846, it was provided that, upon the fulfilment of certain terms and conditions by the proprietors or citizens of the town of Canfield, in Mahoning County, the county seat should be "permanently established" at that town. Those terms and conditions having been complied with, the county seat was established accordingly. On April 9, 1874, the legislature passed an act providing for the removal of the county seat to Youngstown. Certain citizens of Canfield thereupon filed their bill setting forth that the act of 1846, and the proceedings thereunder, constituted, within the meaning of the Constitution, an executed contract the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. *Held*, 1. That no such contract existed. 2. That the act of 1846 was a public law relating to a public subject with respect to which the legislature which enacted it had no power to bind a subsequent one. 3. That if that act and the proceedings under it constituted a contract, it was satisfied on the part of the State by establishing the county seat at Canfield, with the

intent that it should remain there. 4. That there was no stipulation that the county seat should remain there in perpetuity. 5. That the practical interpretation of the phrase "permanently established," which has been in long and frequent use in the statutes of Ohio with respect to county seats established otherwise than temporarily, is, though by no means conclusive, entitled to consideration.

2. In the interpretation of statutes like that of 1846 (*supra*), the rule is that, as against the State, nothing is to be taken as conceded but what is given in express and explicit terms, or by an implication equally clear.

ERROR to the Supreme Court of the State of Ohio.

The controversy relates to the removal of a county seat in Ohio from one town to another.

The case, briefly stated, is this: On Feb. 16, 1846, the General Assembly of that State passed "An Act to create the county of Mahoning." The first section creates the county and defines its boundaries, including among other towns Canfield and Youngstown, and declares that it "shall be known by the name of Mahoning, with the county seat at Canfield."

The fifth and eighth sections are as follows: —

"SECT. 5. That the Court of Common Pleas and Supreme Court of said county shall be holden at some convenient house in the town of Canfield until suitable county buildings shall be erected."

"SECT. 8. That before the seat of justice shall be considered permanently established at Canfield, the proprietors or citizens thereof shall give bond with good and sufficient security, payable to the commissioners of said county, hereafter to be elected, for the sum of $5,000, to be applied in erecting public buildings for said county, and that the citizens of Canfield shall also donate a suitable lot of ground on which to erect public buildings."

To secure the permanent establishment of the county seat at Canfield, numerous citizens of that town, — some of whom are plaintiffs in this suit, — in compliance with the provisions of said sect. 8, duly executed their bond for $5,000, which was accepted by the county commissioners. A suitable lot of ground on which to erect the county buildings was also, by their procurement, conveyed to the county.

Thereupon said citizens erected on the lot a commodious court-house suitable for the transaction of the public business of the county, at a cost of more than $10,000, which, on June 29, 1848, the commissioners accepted in behalf of the

county, in full satisfaction of the bond, and as a full compliance with said sect. 8 ; and thenceforward the court-house was used as a seat of justice, and Canfield continued to be the county seat of the county.

April 9, 1874, the General Assembly of the State of Ohio passed the following act : —

"An Act to provide for the removal of the seat of justice of Mahoning County from the town of Canfield to the city of Youngstown in said county.

"SECT. 1. Be it enacted by the General Assembly of the State of Ohio, that from and after taking effect of this section of this act as hereafter provided, the seat of justice in the county of Mahoning shall be removed from the town of Canfield, and shall be fixed, until otherwise provided by law, at the city of Youngstown, in said county.

"SECT. 2. That the foregoing section of this act shall take effect and be in force when and so soon as the same shall be adopted by a majority of all the electors of said Mahoning County, voting at the next general election after the passage thereof, and when suitable buildings shall have been erected, as hereinafter provided.

"SECT. 3. That the electors of said Mahoning County, at the next general election after the passage of this act, shall indorse or otherwise place on their tickets either the words 'for removal' or 'against removal;' and if a majority of all the electors of said Mahoning County, voting at said election, shall vote for removal, the first section of this act shall thereafter be considered and holden to be adopted by such majority: *Provided*, that all tickets upon which the words 'for removal' shall not be indorsed or otherwise placed shall be taken and considered as votes 'against removal' as fully as though the words 'against removal' were indorsed or otherwise placed thereon.

"SECT. 4. That judges and clerks of election in the several townships, wards, and voting precincts in said county at the said general election shall cause all votes that may be so given for or against removal to be correctly counted, in doing which, all tickets upon which the words 'for removal' are not indorsed or otherwise placed shall be counted as votes 'against removal,' and shall enter and certify in their respective poll-books of said general election the number of votes so counted for as well as against such removal, which poll-books shall be returned and opened as required by the act regulating said general election and the open-

ing of the returns thereof; and the officers opening the same shall, at the same time they make, certify, and sign the abstracts required by law, also make, certify, and sign a separate abstract of all votes so returned for or against removal, showing the number so given in each township, and the footings or aggregate number given in all the townships, which abstract shall be forthwith deposited in the clerk's office of said county, and be by him forthwith recorded in the journal of the Court of Common Pleas of said county, which record, or a duly certified copy thereof, shall be taken and received as evidence for all purposes as the result of said election.

"SECT. 5. That in case a majority of the electors of said county of Mahoning shall vote 'for removal,' as heretofore provided, the seat of justice and county seat shall be deemed and taken to be removed from Canfield in said county to the city of Youngstown in said county, and to be located at said city of Youngstown: *Provided, however*, that nothing in the act shall be so construed as to authorize the removal of said seat of justice to the city of Youngstown, until the citizens of the city and township of Youngstown, and of sufficient size and suitably located to accommodate the court-house, jail, and necessary offices for said county, and shall have erected thereon, or shall have caused to have erected thereon, and completed thereon, suitable buildings for court-house, jail, and all offices and rooms necessary for the transaction of all the public business of said county, at a cost for said buildings of not less than $100,000, and to the satisfaction and acceptance of the commissioners of said county, and all such buildings shall be fully completed within two years from the date of the election at which this act shall be ratified, and said commissioner shall not, nor shall any other authority of said county, levy any tax on the taxable property of said county for said land or building: *Provided*, that the citizens of Youngstown may, within said two years, build said public buildings, and tender the same to said county commissioners.

"SECT. 6. It shall be the duty of the sheriff or coroner, as the case may be, to cause proclamation to be made to the qualified electors of said county of the time of holding said election, in the same manner as by law he is required to do in other elections, notifying said electors to vote as aforesaid on the question by which this act is submitted to them.

"SECT. 7. The sections of this act subsequent to the first section shall take effect and be in force from and after their passage."

At the next general election a majority of votes cast in the county was in favor of the removal.

Thereupon Newton, and a number of other citizens of the town of Canfield, filed their petition in the Court of Common Pleas for Mahoning County praying for an injunction restraining the board of county commissioners from removing the county seat to Youngstown. The court denied the injunction and dismissed the petition. That decision having been affirmed by the Supreme Court of the State, the petitioners brought the case here.

Mr. James A. Garfield for the plaintiffs in error.

The question for the determination of the court in this case is whether the act of the General Assembly of Ohio of Feb. 16, 1846, worked a contract for the permanent location of the county seat at Canfield. *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How. 416. The rule that legislative grants and contracts are to be construed most favorably to the State does not tolerate the defeating of the grant or contract by any hypercritical construction. *The Binghampton Bridge*, 3 Wall. 51. Laws which amount to a proposition on the part of the State become, when accepted by individuals, binding contracts. Cooley, Const. Lim. 284; *Woodruff* v. *Trapnall*, 10 How. 190; *State Bank of Ohio* v. *Knoop*, 16 id. 369; *Furman* v. *Nichol*, 8 Wall. 44; *New Jersey* v. *Yard*, 95 U. S. 104.

The strength of the case of the plaintiffs in error lies in the fact that it is an exception to the general policy of the State in relation to the location of county seats, — a privilege, franchise, or property secured to them by a positive stipulation for a specified consideration paid to and appropriated by the State for the public benefit. Such, then, being the nature of the contract, — there being in 1846 no limitation on the power of the legislature to make it except what is claimed to be implied as necessary to the preservation of the government, — it cannot be excluded from the protection afforded by the Constitution of the United States to other contracts made by a State with its citizens. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Farrington* v. *Tennessee*, 95 U. S. 679; *New Jersey* v. *Yard*, *supra*.

That the eighth section of the act, when complied with by

the citizens of Canfield, constituted a contract between them and the State for the permanent location or establishment of the county seat at that place, is beyond controversy. The contract arises out of the very words of the enactment, and the inducement held out to the citizens was to make the location permanent, upon the performance by them of the specified conditions. *New Jersey* v. *Yard*, *supra*.

Permanency both in the consideration and in the location of the county seat was contemplated and stipulated for by the parties. *Commissioners of Lucas County* v. *Hunt*, 5 Ohio St. 496.

The power of the legislature to make the contract on behalf of the State cannot be denied. *Ohio Life Insurance and Trust Co.* v. *Debolt*, *supra*; *Slaughter-House Cases*, 16 Wall. 36; *Matheny* v. *Golden*, 5 Ohio St. 361; *State Bank of Ohio* v. *Knoop*, *supra*.

The case of *East Hartford* v. *Hartford Bridge Company* (10 How. 511), relied on by the defendants in error, has no application here. There the question turned on the public character of the parties to the grant.

Mr. Thomas W. Sanderson for the defendants in error.

I. If the act of February, 1846, under which the plaintiffs assert their right, did in terms amount to or express a contract or a grant, as they claim, then to that extent it was unconstitutional and void under the Constitution of the State of Ohio in force at the time of its enactment. Constitution of Ohio of 1802, art. 7, sect. 3.

1. The Supreme Court of Ohio recognize the right to remove county seats as one conferred by the Constitution of the State. *State* v. *Choate*, 11 Ohio, 512; *Commissioners of Putnam County* v. *Auditor*, *&c.*, 1 Ohio St. 324; *Ohio*, *ex rel. Evans*, v. *Dudley*, id. 445.

2. The legislature of Ohio claimed the same constitutional right and power, and continuously exercised it from the organization of the State during the existence of the Constitution of 1802. 9 Ohio Local Laws, 10; 3 Chase, Stats. 2101; 22 Ohio Local Laws, 44; 16 id. 93; 31 id. 199.

3. The construction of the Supreme Court and of the General Assembly of the State, as to the existence and scope of

the power of removing seats of justice, will not be reviewed here. *Pennsylvania College Cases*, 13 Wall. 190; *Railroad Company* v. *Georgia*, 98 U. S. 359.

4. The General Assembly, in enacting a mere local law, could not, by any contract or grant created thereby or arising therefrom, abrogate or repeal the constitutional power to remove seats of justice.

5. That power, existing at the time of the passage of the act of 1846, entered into and became a part of any contract or grant intended to arise from the act; and all parties were bound thereby. *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Peck* v. *Weddell*, 17 Ohio St. 275.

6. The cases decided in the Supreme Court of Ohio, and in this court, known as the "Tax Cases," do not conflict with the foregoing. *Matheny* v. *Golden*, 5 Ohio St. 361; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Gorden* v. *The Appeal Tax Court*, 3 id. 133; *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 id. 416; *New Jersey* v. *Yard*, 95 U. S. 104; *Farrington* v. *Tennessee*, id. 679. In all these cases, the exemptions or partial exemptions from taxation were, by statutes, uniformly held to be valid and authorized by the State Constitutions; whereas, in the case at bar, it is claimed that whatever characteristic of immovability was attempted to be impressed upon the county seat at Canfield was unconstitutional.

7. The constitutional power of removal was wholly inconsistent with that of rendering a county seat immovable. The two repugnant powers could not exist in the same constitution.

II. The creation, maintenance, and regulation of courts, including the times and places of holding them, their removal from one place to another, to answer the public convenience or necessities, are matters connected with the police power of the State; and she cannot divest herself of the right, at any time, to exercise such power.

1. What is the extent and scope of the police power of the State? *Beer Company* v. *Massachusetts*, *supra*, and cases there cited; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659.

2. Courts, and the power to establish and locate them, are necessary adjuncts to an unrestricted exercise of the police

power of the State, and the power to create and maintain implies the power to remove them. The same may be said of jails and other prisons.

3. If in the exercise of this power valuable rights or franchises which have been conferred by valid enactment are destroyed or divested, no compensation can be claimed. Sedgwick, Stat. and Const. Law, 533, 534; 2 Dillon, Mun. Corp., sects. 93, 455; *Boyd* v. *Alabama*, 94 U. S. 645.

III. The word "permanently," as used in the eighth section of the act of Feb. 16, 1846, had, at the time of the passage of the act, a well-defined legislative signification.

1. It had been used to denote the manner of the location of more than thirty-five county seats in the State before that time. 3 Chase, Stats. 2100–2146.

2. Many of the seats of justice thus permanently located, by special acts of the General Assembly, were subsequently removed by similar special enactments. 63 Ohio Laws, 58; 58 id. 10; 5 Ohio St. 490.

IV. Was any contract or grant made or intended by the legislature of 1846, by the terms of the enactment in question?

1. The rule of construction to be adopted in order to construe the act is stated in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 446; *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How. 416; *The Binghampton Bridge*, 3 Wall. 51; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659.

2. The intent of the General Assembly was to do, by the act of Feb. 16, 1846, the same thing as would have been done under the General Statutes, by commissioners. 1 Chase, Stats. 353; 2 id. 1080; 2 Swan & Critch. Stats. of Ohio.

V. The defendant further claims that no contract or grant was created by the act of 1846, for the reason that there were no persons, party, or parties, that could legally accept a grant, or become a party or parties to a contract of the kind asserted. *Jackson, ex dem. Cooper*, v. *Cory*, 8 Johns. 385.

VI. What is a county? *C. W. & Z. R. R. Co.* v. *Commissioners, &c.*, 1 Ohio St. 77; *Commissioners of Hamilton County* v. *Mighels*, 7 id. 109; *Hunter et al.* v. *Commissioners, &c.*,

10 id. 515; *Boalt et al.* v. *Commissioners, &c.*, 18 Ohio, 16; *Granger* v. *Pulaski, &c.*, 26 Ark. 37; *McKim* v. *Odom*, 3 Blandf. 407; *St. Louis* v. *Allen*, 13 Mo. 400; *Maryland* v. *B. & O. R. R. Co.*, 3 How. 534; *Laramie County* v. *Albany County et al.*, 92 U. S. 307.

VII. The contract or grant claimed by plaintiffs is not within the protection of sect. 10 of art. 1 of the Constitution of the United States. *Dartmouth College Case*, 4 Wheat. 518; *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 547, 548; *Butler* v. *Pennsylvania*, 10 How. 416; *Trustees, &c.* v. *Rider*, 13 Conn. 87; *The People* v. *Roper*, 35 N. Y. 629; *Billings* v. *Hall*, 7 Cal. 1; *Dingman* v. *People*, 51 Ill. 277; *Armstrong* v. *Commissioners, &c.*, 4 Blackf. (Ind.) 208; *Alley* v. *Denson*, 8 Tex. 297; *Adams* v. *Logan*, 11 Ill. 336; *Harris* v. *Shaw*, 13 id. 456; *Hambrick* v. *House*, 17 Ga. 56; *Muses* v. *Kearney*, 31 Ark. 261; *Philadelphia* v. *Fox*, 64 Penn. 180; Story, Com. Const., sects. 1392, 1393; Cooley, Const. Lim. 101, 203; *Twiford* v. *Alamakee County*, 4 Greene (Iowa), 60; *Terrett* v. *Taylor*, 9 Cranch, 51; *Attorney-General* v. *Supervisors, &c.*, 33 Mich. 289.

MR. JUSTICE SWAYNE delivered the opinion of the court.

It is claimed in behalf of the plaintiffs in error that the act of the 16th of February, 1846, and what was done under it, constituted an executed contract which is binding on the State; and that the act of April 9, 1874, and the steps taken pursuant to its provisions, impair the obligation of that contract, and bring the case within the contract clause of the Constitution of the United States. Art. 1, sect. 10.

These allegations are the ground of our jurisdiction. They present the only question argued before us, and our remarks will be confined to that subject.

The case may be properly considered under two aspects: —

Was it competent for the State to enter into such a contract as is claimed to have been made?

And if such a contract were made, what is its meaning and effect?

Undoubtedly, there are cases in which a State may, as it were, lay aside its sovereignty and contract like an individ-

ual, and be bound accordingly. *Curran* v. *State of Arkansas*, 15 How. 304; *Davis* v. *Gray*, 16 Wall. 203.

The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private act of incorporation, or one or more of its clauses, is a contract within the meaning of the Constitution of the United States. There is no such restraint upon the British Parliament. Hence the adjudications of that country throw but little light upon the subject.

The *Dartmouth College Case* was the pioneer in this field of our jurisprudence.

The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a *public law* relating to a *public subject* within the domain of the general legislative power of the State, and involving the *public rights* and *public welfare* of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the *Dartmouth College Case*. Mr. Chief Justice Marshall said: —

"That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State legislatures were forbidden 'to pass any law impairing the obligation of contracts;' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description, — to cases within the mischief it was intended to remedy.

"The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the

instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. . . . If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."

The judgment of the court in that case proceeded upon the ground that the college was "a private eleemosynary institution, endowed with a capacity to take property for purposes *unconnected with the government*, whose funds are bestowed by individuals on the faith of the charter."

In the later case of *East Hartford* v. *The Hartford Bridge Company* (10 How. 511), this court further said: "But it is not found necessary for us to decide finally on this first and most doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and so could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal corporations on the other. They were acting, too, in relation to a *public object*, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the *subject-matter* of their action, we think that the doings of the legislature as to this ferry must be considered rather as *public laws* than as *contracts*. *They related to public interests.* They *changed* as those *interests* demanded. The grantees likewise, the towns being mere organizations for *public purposes*, were liable to have their public powers, rights,

and duties *modified* or *abolished* at any moment by the legislature. . . .

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as *supervision over its subordinate public bodies.*"

The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler et al.* v. *Pennsylvania*, 10 How. 402.

The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. Cooley, Const. Lim., pp. 232, 342; *The Regents* v. *Williams*, 4 Gill & J. (Md.) 321.

In all these cases, there can be no contract and no irrepealable law, because they are "governmental subjects," and hence within the category before stated.

They involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must necessarily be of the same character.

If one may be bargained about, so may the other. In this respect there is no difference in principle between them.

The same reasoning, pushed a step farther in the same direction, would involve the same result with respect to the seat of government of a State.

If a State capital were sought to be removed under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction.

It is true a State cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though the State cannot be sued, its officers, whose acts were illegal and void, may be. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203.

A proposition leading to such consequences must be unsound. The parent and the offspring are alike. *Armstrong* v. *The Commissioners* (4 Blackf. (Ind.) 208) was, in some of its features, not unlike the case before us. The act declared that "so soon as the public buildings are completed in the manner aforesaid, *at the place designated*, the same shall *be for ever* thereafter the permanent seat of justice of said county of Dearborn." Certain private individuals there, as here, had stipulated to build a court-house, and their compliance was a condition precedent. The condition had been performed. It was held that "the act did not create a contract." The subject was fully considered. It was held further, that a subsequent legislature might competently pass an act for the removal of the county seat so established. In that case, both had been done and both were sustained. The reasoning of the court was substantially the same with ours touching the eighth section of the act of 1846 here in question. *Elwell and Others* v. *Tucker* (1 id. 285) was also a case arising out of the removal of a county seat. The court said, "the establishment of the time and place of holding courts is *a matter of general legislation*, respecting which the act of one session of the General Assembly cannot be binding on another." See also *Adams* v. *The County of Logan*, 11 Ill. 336, and *Bass* v. *Fanthroy*, 11 Tex. 698. They are to the same effect.

Secondly, But conceding, for the purposes of this opinion, that there is here a contract, as claimed by the plaintiffs in error, then the question arises, What is the contract; or, in other words, to what does it bind the State?

The rules of interpretation touching such contracts are well settled in this court. In *Tucker* v. *Ferguson* (22 Wall. 527) we said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require." There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language. *Providence Bank* v. *Billings*, 4 Pet. 514; *Gilman* v. *City of Sheboygan*, 2 Black, 510.

It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure. *Christ Church* v. *Philadelphia*, 24 How. 300. No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420.

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659.

The eighth section of the act of 1846 declares, "That before the seat of justice shall be considered permanently established at the town of Canfield, the proprietors or citizens thereof shall" do certain things, — all of which, it is admitted, were done in due time. This is the whole case of the plaintiffs in error. It will be observed that there is nothing said about the county seat *remaining*, or being *kept*, at Canfield *for ever*, or *for any*

specified time, or "permanently." At most, the stipulation is that it shall be *considered as permanently established there* when the conditions specified are fulfilled. If the legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. We cannot — certainly not in this case — interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the State is, that when the conditions prescribed were complied with, the county seat should be then and thereupon "permanently established" at the designated place. We are, therefore, to consider what is the meaning of the phrase "permanently established." Domicile is acquired by residence and the *animus manendi*, the intent to remain. A *permanent residence* is acquired in the same way. In neither case is the idea involved that a change of domicile or of residence may not thereafter be made. But this in no wise affects the pre-existing legal *status* of the individual in either case while it continues. So the county seat was permanently established at Canfield when it was placed there with the *intention* that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the State changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. It did not stipulate *to keep* the county seat at Canfield perpetually, and the plaintiffs in error have no right to complain that it was not done. *Keeping it there* is another and a distinct thing, in regard to which the eighth section of the act is wholly silent. In *Mead* v. *Ballard* (7 Wall. 290), land was conveyed on the 9th of August, 1848, "upon the express understanding and condition" that a certain institution of learning then incorporated "shall be permanently located on said land," between the date of the deed and the same day in the succeeding year. The trustees passed a resolution, within the year, locating the institution on the premises, and at once contracted for the erection of the necessary buildings. The buildings were completed, and the institution was in full operation by November, 1849.

In the year 1857 the buildings were destroyed by fire and

were not rebuilt. A part of the land was sold by the grantee. The heir of the grantor sued in ejectment to recover the premises. This court, speaking by Mr. Justice Miller, said: "It is clear to us . . . that when the trustees passed their resolution locating the buildings on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institution, within the true construction of the contract. Counsel for the plaintiff attach to the word 'permanent' a meaning inconsistent with the obvious intent of the parties, — that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land for ever, or for a very indefinite time. This could not have been the intention of the parties."

In *Harris* v. *Shaw* (13 Ill. 463), land was conveyed on condition that the county seat should be "permanently located" upon it. The location was made accordingly with that intent, but some years later the county seat was removed. The grantor sued to recover the land. The court said it was no part of the contract that the county seat should *remain for ever* on the premises; that the grantor must be presumed to have known that the legislature had the power to remove it at pleasure, and that he must be held to have had in view at least the probability of such a change when he made the deed.

There is no point arising under either the former or the present Constitution of Ohio which in our judgment requires any remark.

The results of the elaborate research of one of the counsel for the defendants in error show that the phrase "permanently established" is a formula in long and frequent use in Ohio, with respect to county seats established otherwise than temporarily. Yet it is believed this is the first instance in the juridical history of the State in which such a claim as is here made has been set up.

This practical interpretation of the meaning of the phrase, though by no means conclusive, is entitled to grave and respectful consideration.

Judgment affirmed.

MEEKS *v.* OLPHERTS.

1. The statute of California which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs.
2. When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him, and he represents their interests.

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

The facts are stated in the opinion of the court.

Mr. Montgomery Blair for the plaintiff in error.
Mr. S. M. Wilson, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This action was brought, Sept. 30, 1872, by Meeks against Olpherts and others to recover possession of a hundred-vara lot in the city of San Francisco.

On a stipulation waiving a jury, the case was submitted to the court, which, on its findings of fact incorporated in this record, further found as a conclusion of law that the plaintiff's action was barred by sect. 190 of the Probate Act of California. Judgment was rendered for the defendants. Meeks sued out this writ of error.

The material facts in the case are few and easily understood.

George Harlan died intestate July 8, 1850, seised of the title to the lot in question, except as that title may have been nominally in the United States. By the act of Congress of 1864 his title was confirmed, and it inured to the benefit of any one rightfully holding under him.

On the 19th of August, 1850, Henry C. Smith was duly appointed administrator of Harlan's estate, and having afterwards resigned, Benjamin Aspinall was appointed in his place, June 15, 1855.

On the seventh day of January, 1856, Aspinall, by an order

of the Probate Court, sold the lot in question, with many others. Under this sale the defendants, or those under whom they claim, entered into possession, which they have held uninterruptedly to the present time. Aspinall remained administrator until May 12, 1864, when he settled up his accounts and was discharged. Joel Harlan and Lucien B. Huff, appointed in his place, are now administrators.

On the 6th of November, 1869, an order of distribution of the estate was made in the Probate Court, by which the lot in question was distributed to plaintiff. To this proceeding no objection is made as to its regularity.

It will thus be seen that the defendants had purchased the lot in controversy at a sale ordered by the Probate Court, and had paid their money for it, and been in the peaceable adverse possession of it since 1856, a period of sixteen years; and the court held that, whether the probate sale was valid so as to confer title or not, the Statute of Limitations applicable to such cases was a bar to plaintiff's right of recovery.

As the only question in the case is the one thus stated by the Circuit Court, and as the Supreme Court of California had decided that the probate sale was invalid and conferred no title, we proceed to examine the defence of the statute.

The special statute of limitations of three years, contained in the Probate Act of California, is as follows: —

"SECT. 190. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale.

"SECT. 191. The preceding section shall not apply to minors or others, under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability."

As the plaintiff in this case claims title as heir and by purchase from other heirs of the decedent, and brings his suit sixteen years after an administrator's sale sanctioned by a probate court, it would seem at first blush that the case came within the provision of the first section.

Counsel for plaintiff, however, has argued with much earnestness and force —

1. That no suit could be brought by the heirs, or any one claiming through them, until the order of distribution was made, because until that time, or until administration was closed, the right of possession was in the administrator.

2. That until then the heirs were under a disability, which by sect. 191 protected their right of action from the operation of sect. 190.

The first proposition, and, indeed, the argument of the learned counsel, concedes, that by virtue of the statutes of California the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does, and that while the administrator can only sell real estate upon an order of the Probate Court, the possession and control, the perception of the rents and profits, and the right to sue to recover possession of it when held adversely, belongs solely to the administrator. Indeed, a section or two of the Probate Act, which we copy, makes this very plain.

"SECT. 114. The executor or administrator shall have the right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents and profits of the real estate, until the estate shall be settled, or until delivered over by the order of the Probate Court to the heirs or devisees, and shall keep in good tenantable repairs all houses, buildings, and fixtures thereon which are under his control."

"SECT. 195. *Actions for the recovery of any property, real or personal, or for the possession thereof*, and all actions founded upon contracts, may be maintained *by and against executors and administrators*, in all cases in which the same might have been maintained by or against their respective testators or intestates."

And by section 194 of the Probate Act of California the administrator is again required to "take into his possession all the estate of the deceased, real and personal."

While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of

the heirs and of the creditors of the estate, and as such had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs, or any one else injured by that failure.

Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by his sale as administrator to the defendants. Instances are numerous of persons making sales that are invalid, avoiding them by the very act of bringing an action of ejectment. Such are the cases of infants and married women who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowl edgments of the deeds.

There was, then, up to the date of the order of distribution, or until it was barred by the statute, a right in the administrator of the estate of Harlan to sue for and recover the possession sought in the present action.

This being so, it is not easy to perceive why that right of action was not barred in three years from Jan. 7, 1856, the day on which defendants purchased and took possession. This would make the bar complete Jan. 7, 1859. During all that time Aspinall was administrator and for five years afterwards, and nothing obstructed his legal right to sue for and recover the possession. Nor is the case otherwise if the right of action began with the relinquishment of title by the act of Congress of 1864.

It is argued, however, that sect. 190 does not apply to suits brought by the administrator, and, therefore, the statute does not run against the right of action while it remains in him.

The argument is that the language used, namely, "no such action shall be maintained by *any heir, or other person* claiming under the deceased testator or intestate," means by an heir or one holding under the heir, and that the words "other person" do not include the administrator.

But no sufficient reason is to be found why it should not. If the administrator can by such an action avoid his own irregu-

lar or void sale, the reason for limiting the time within which it should be done by him is as strong, or perhaps stronger, than it is against another.

It is as important to the purchaser for whose benefit the statute was enacted, that he should be protected against the administrator as against the heirs. The words "other person" mean some one other than the heirs, and instead of meaning some one like the heirs or claiming under the heirs, the words expressly refer to some one "claiming under the deceased testator or intestate." These last words are unnecessary in reference to heirs, for they can claim in no other way but under the intestate. The words "other person," therefore, almost of necessity refer to the administrator, for they can refer to no one but the heirs or some one claiming under them, or to the administrator.

He is, therefore, within the spirit and the literal meaning of that section, and the bar is good against him. This was decided in the case of *Harlan & Huff* v. *Peck*, in the Supreme Court of California, 33 Cal. 515. Harlan and Peck, as we have already seen, were the successors of Smith and of Aspinall as administrators of George Harlan's estate. They brought suit to recover one of the lots sold by Aspinall at the same time with the sale in question in this case. The defendants relied on the sale and the limitation of sect. 190 of the Probate Act. The court below gave judgment for plaintiffs; but the Supreme Court, while it held the sale void, reversed the judgment, on the ground that this statute of limitations barred the administrator. This is a construction of the statute by the highest court of the State.

The legal disability mentioned in sect. 191 manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves; such as infancy, coverture, and the like. Whatever is a disability under the general statute of limitations is a disability under this statute. Sect. 352 of the Code of Civil Procedure of California describes this class, among which are minors, *femes covert*, insane persons, and persons imprisoned, and it describes them as persons *entitled* to bring an action. The disability cannot have reference to a person in whom no

right of action exists. Such use of the term "disability" is without support in reason or precedent.

The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. "In all suits for the benefit of the estate he represents both the creditors and the heirs," said the Supreme Court in *Beckett* v. *Selover*, 7 Cal. 215.

Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of *cestui que trust* thus represented is also barred. This doctrine is clearly stated in Hill on Trustees, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American.

Among those specially applicable to this case are *Smilie* v. *Biffle*, 2 Pa. St. 52; *Couch's Heirs* v. *Couch's Administrator*, 9 B. Mon. (Ky.) 160; *Rosson* v. *Anderson*, id. 423; *Darnall* v. *Adams*, 13 id. 273.

In the first of these cases, land was devised to executors, with a power of sale, which was imperfectly executed, by one of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the Statute of Limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in *Lewellen* v. *Mackworth* (2 Eq. Cas. Abr. 579), the court says: "Therefore, where *cestui que trust* and trustees are both out of possession, for the time limited, the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land, to take the rents, issues, and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee-simple and appropriate the interest of the purchase-money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect, the title of Nicholson, the pur-

chaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He, therefore, held adversely to both *cestui que trust* and trustee, and consequently obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gainsaid."

In the case of *Rosson* v. *Anderson* (*supra*), the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor.

One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the Statute of Limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors, and, as more than five years had elapsed after they had qualified as such, the statute was a bar against them, and as they would have been barred by the statute, so was the heir, though a minor when the cause of action accrued.

In *Darnall* v. *Adams* (*supra*), which concerned a devise of slaves, the same court held that the disability of coverture in the devisee could not prevent the running of the Statute of Limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which bars the executor. *Coleman* v. *Walker*, *&c.*, 3 Metc. (Ky.) 65, and *Edwards* v. *Woolfolk's Administrator*, 17 B. Mon. (Ky.) 376, are cases which assert the same doctrine, and in the latter the principle is fully and ably discussed and its soundness well maintained.

A very strong case of the same character is that of *Croxall* v. *Sherrard* (5 Wall. 268), where a remainder-man was held barred by the Statute of Limitations of New Jersey, on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainder-man brought suit immediately on the death of his ancestor. This was, however, based on the peculiar wording of that statute.

In *Cuningham* v. *Ashley* (45 Cal. 485), it was held that an administrator, who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action.

On the whole, we are of opinion, both upon sound principles of construction, as well as upon the decisions of the Supreme Court of California construing the statute of the State, that the Circuit Court was justified in holding that the plaintiffs were barred by the adverse possession of defendants.

Judgment affirmed.

MONTGOMERY *v.* SAWYER.

In Louisiana, if a person dies pending suit against him, and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them; if, without reference to the revival of the suit, it be entered only against the deceased *eo nomine*, and be so recorded, it is as a judicial mortgage void against third persons.

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

The facts are stated in the opinion of the court.

Mr. Benjamin F. Jonas, *Mr. Henry B. Kelly*, and *Mr. Henry L. Lazarus* for the appellants.

Mr. Joseph B. Hornor, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The controversy in this case relates to a certain plantation in the parish of Plaquemines, called the "New Hope or Cedar Grove Plantation." The appellee, Sawyer, claims it as purchaser at sheriff's sale under a judgment rendered in February, 1872, by the Fifth District Court of Orleans, at the suit of one James E. Zunts against William and Haywood Stackhouse. The appellant claims under a mortgage executed in 1873, by

Sarah F. Brooks, widow of Haywood Stackhouse, and tutrix of his minor heirs. It is conceded that the plantation belonged to William and Haywood Stackhouse at the time of the latter's death in December, 1869; and that after that it belonged to the said William and the succession of Haywood up to and after the time of Zunts's judgment. It is contended by the appellants that this judgment was void as against the undivided half of Haywood Stackhouse, because he was dead when the judgment was rendered, and the suit, as they contend, had never been revived against the succession of his estate.

The circumstances of the case are briefly as follows: —

William and Haywood Stackhouse were partners owning several plantations, and in January, 1865, to secure to Zunts the payment of certain notes amounting to $50,000, executed to him a mortgage on a plantation called the "Bellechasse Plantation." The notes not being paid, Zunts, in January, 1867, attempted to collect the same by executory process against the Bellechasse plantation. The Stackhouses set up a defence, filed a counter petition, and obtained an injunction. The decision being against them, they appealed to the Supreme Court of Louisiana, and pending this appeal, in December, 1869, as before stated, Haywood Stackhouse died. His widow, Sarah F. Brooks, in her own right and as tutrix of their minor children, was made a party in the cause, and the suit proceeded to judgment, the papers being entitled, as before, in the name of William and Haywood Stackhouse *v.* James E. Zunts. In May, 1871, the Supreme Court annulled the judgment of the District Court, and remanded the cause for a new trial. On the 20th of February, 1872, the District Court rendered the judgment in question, which was entered and signed in these words: —

"FIFTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

"W. & H. STACKHOUSE
v.
JAMES E. ZUNTS. } No. 18,850.

"In this case, for the reasons assigned in the written opinion of the court, this day delivered and on file, it is ordered, adjudged, and decreed that there be judgment in favor of defendant; that the injunction herein be dissolved with costs, and that the said defend-

ant, James E. Zunts, do have and recover of plaintiffs, William and Haywood Stackhouse, and their surety in the injunction bond, *in solido*, twenty per cent damages on the amount of the judgment herein enjoined, together with eight per cent interest as allowed in the order of seizure and sale.

"It is further ordered that the claim for attorney's fees herein be dismissed.

"Judgment rendered Feb. 20, 1872.

"Judgment signed March 3, 1872.

(Signed) "CHAS. LEAUMONT,

"*Judge Fifth District Court, Parish of Orleans.*"

A certified copy of this judgment, in the above words, was recorded in the recorder's office of Plaquemines on the 17th of April, 1872.

Meanwhile, the plaintiffs moved for a new trial, and that being refused, on the 13th of March, 1872, they moved for and obtained a suspensive appeal. The order allowing the appeal was as follows, the appeal bond being signed by all the appellants: —

"W. & H. STACKHOUSE *v.* JAMES E. ZUNTS *et al.* } No. 18,850.

"On motion of Roselius & Philips and Horner & Benedict, of counsel for Wm. Stackhouse, Sarah F. Brooks, widow in community of Haywood Stackhouse, deceased and natural tutrix of her minor children, Herbert, Maude, Blanche, and Mabel Stackhouse, and Lilla Stackhouse, wife of J. W. Bryant, duly authorized and assisted by her husband, and the legal heirs of James P. Waters, dec'd, to wit, Henrietta A. Waters, wife of William Stackhouse, and by her husband duly assisted and authorized Mrs. Widow Mary Upton, widow of Wheelock S. Upton, dec'd, and William H. Waters, and on suggesting to the court that said appearers and movers have been informed and believe that there is error to their prejudice in the final judgment rendered in the above-entitled case by this hon. court, on the 20th February, 1872, and that they are desirous of appealing suspensively from the same to the Supreme Court of the State of Louisiana, and on showing that the clerk requires time till the third Monday of April next to make the transcript of appeal, it is ordered that a suspensive appeal be accorded to said appearers and movers from said final judgment to

the Supreme Court of Louisiana, the same to be therein returnable on the third Monday of April, 1872, upon said appearers giving bond and security conditioned according to law in the sum of $30,000."

The cause then proceeded in the Supreme Court, entitled as before. On the 31st of May, 1873, the court affirmed the judgment below. A petition for a rehearing was presented in the names of all the appellants; and, amongst other things, stated, that pending the first appeal Haywood Stackhouse died, and that the petitioners were made parties to the appeal by means of an order which they recite; but that, when the cause went back to the court below for retrial, Zunts omitted to make the petitioners parties to the proceedings in that court, and that they never made themselves parties by voluntary appearance by counsel or personally; that, on the contrary, the case was proceeded with by Zunts and his counsel, and by the former counsel of William and Haywood Stackhouse, as if the latter were alive; and the petition, in a labored argument, contended that the making of the petitioners parties to the first appeal did not make them parties to the subsequent proceedings. All the points taken in this suit on the subject of want of parties were taken in the said petition for a rehearing.

On the 15th of December, 1873, the petition for rehearing was refused, and the judgment of the District Court stood affirmed. No notice was taken by the court of the point referred to. Whether it was regarded as untenable, or whether the judgment was left to stand at Zunt's own risk, — good, at all events as against William Stackhouse, — does not appear.

After the recording of the judgment of the District Court, to wit, on the 7th of May, 1872, a partition was made between William Stackhouse and the succession of Haywood Stackhouse, of the various pieces of property belonging to the firm of W. & H. Stackhouse, by which the Bellechasse plantation was set off to William, subject to the Zunts's claim; and the New Hope plantation was set off to the succession of Haywood.

On the 6th of February, 1873, Sarah F. Brooks, as widow and tutrix as aforesaid, mortgaged the New Hope plantation to Ernst & Co., to secure the payment of certain notes specified in the mortgage.

On the 20th of January, 1875, Zunts filed a petition in the District Court of Plaquemines for executory process against the New Hope plantation and other property, to obtain satisfaction of the amount of damages recovered by the judgment of Feb. 20, 1872, being $10,833.66, claiming that the same was a judicial mortgage against all the property in the parish belonging to William Stackhouse and the succession of Haywood Stackhouse. A writ was issued accordingly, and the said New Hope plantation, together with certain shares of bank stock, secured by mortgage thereon, were sold by the sheriff to the appellee, Silas W. Sawyer, and an act of sale, dated 28th April, 1875, was duly passed and recorded.

The appellants, Montgomery and Leng and Ogden, having become the owners of the notes secured by the mortgage given by Sarah F. Brooks to Ernst & Co., on the 15th of December, 1876, filed a bill in the Circuit Court of the United States against her as widow and tutrix, and against one of the heirs who had become of age and married, praying for the issue of executory process for the sale of the undivided half of the New Hope plantation belonging to the succession of Haywood Stackhouse, conceding that Zunts's judgment was a valid judicial mortgage as against the other undivided half belonging to William Stackhouse; and a writ of seizure and sale was issued pursuant to the prayer of the bill.

It was to enjoin proceedings under the last-named writ, and to establish his own title, that the appellee, Sawyer, filed the bill in this case.

All the material facts appear from the documents submitted by the parties, and the question is one of law alone.

From this statement it would seem to be very clear that the widow and heirs of Haywood Stackhouse were parties to the proceedings in which the judgment was rendered, which, therefore, might have been, though it was not, rendered against the succession of Haywood Stackhouse jointly with William Stackhouse. But even if valid to bind said succession in any way, the question remains as to its effect against third persons. It is in form a judgment against William Stackhouse and another person not in being, but who had died more than two years before it was rendered. And in this form it was recorded. By

the law of Louisiana a judgment, at least as to third persons, has no effect as a judicial mortgage until it is recorded. When recorded it has that effect against all the immovables of the debtor situated in the parish. Civil Code, arts. 3922, 3346. Here one of the nominal debtors against whom the judgment was rendered was dead, and of course had no immovables to be affected thereby. Without the existence of some very artificial rule of procedure, it is difficult to see how such a judgment, *quoad* the deceased person, or his estate in succession, can have any binding effect without being amended.

By the common law, if a defendant died after the commencement of a term, a judgment entered against him during the term had relation back to the first day of the term, and was deemed valid. This fiction was allowed to subserve the ends of justice. But no such rule can be invoked in the present case. Here the judgment could have no effect against the general immovable property of the debtor until it was recorded. The record is all that third persons have to look to for their protection; and in this case it only showed a judgment against a person not in existence, and did not show a judgment against his succession; and did not show that his representatives had been made parties to the cause.

In *Norton* v. *Jamison* (23 La. Ann. 102), a case somewhat similar, differing in the fact that the heir accepted the succession purely and simply, and did not appear in the proceedings until after the judgment in question was entered, the Supreme Court of Louisiana said: "If defendant die after issue joined, his heir should be cited; until this is done, judgment cannot be given against the succession. 5 N. S. 431. A judgment against one, who, though cited, dies before issue joined, is null. 8 An. 80. When H. R. W. Hill died, it was necessary to make the legal representative a party, otherwise the judgment was inoperative as to either, and the recording of it created no judicial mortgage on the property left by H. R. W. Hill. The fiction of law or its express enactment, by which he was a party to the proceedings, did not make his heirs or legal representatives parties in his person, and the insertion of the word 'heirs' in the decree gave no force to the judgment against his heir and legatee, any more than a judgment against any person, *eo nomine*,

who is not cited. The subsequent appearance of J. D. Hill as a party to the proceedings, in order to appeal from the Circuit Court to the Supreme Court, may have made him personally liable under the judgment rendered on appeal, but it could not retroact so as to give force to the inscription of the judgment of the District Court. Inscriptions of mortgages are *stricti juris*, and must, of themselves, be complete and give all the information which the law intends is necessary for third parties. 5 N. S. 112; 7 An. 533. The judgment recorded was against H. R. W. Hill; but plaintiff alleges that H. R. W. Hill died before the judgment was rendered. . . . The inscription does not contain the name of J. D. Hill [heir of H. R. W. Hill]. At the time of the rendering and recording of the judgment against H. R. W. Hill, the property did not belong to him, and no judgment against J. D. Hill was recorded at the date of his sale to defendant. Consequently, no judicial mortgage attached to the property sold by J. D. Hill to the defendant by recording the judgment in question against H. R. W. Hill, rendered after his death."

It seems to us that the views here expressed are conclusive so far as relates to the validity of the judgment as a judicial mortgage operating against the appellants. Whether the judgment may not in some manner, or to some extent, be binding against the succession of Haywood Stackhouse, it is not necessary to inquire. The difficulty consists in the fact that no judgment has been rendered or recorded against said succession. The mere entitling of the suit against William and Haywood Stackhouse might not have prejudiced the effect of the judgment, had it been *rendered* against the proper parties. The title of the suit is employed only for the purpose of identification of the cause. But here the judgment itself is defective. It is conceded to be good as against the interest of William Stackhouse; but as to third persons, at least, it is void as a judicial mortgage against the property of Haywood Stackhouse or his estate in succession.

It follows from this that the appellee, Sawyer, by his purchase at sheriff's sale, acquired only the undivided half interest of William Stackhouse, and that his bill should have been dismissed.

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

So ordered.

DICKERSON *v.* COLGROVE.

A., the owner in fee of lands in Michigan, died in February, 1853, leaving his two children B. and C. his only heirs-at-law. On March 3, C. and her husband conveyed the lands by warranty deed to D., who put it upon record March 6, 1854, and entered into possession of them April 1 of that year. D. learning of the existence of B., and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1, 1856, the latter addressed from California to his sister C., in Michigan, a letter, wherein he said, "You can tell D. for me he need not fear any thing from me. . . . You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." The contents of that letter becoming known to D., he, for a valuable consideration and by deeds with covenants of warranty, conveyed in fee the lands to E. and others, who thereunder have ever since occupied and improved them. July 9, 1865, B. conveyed the undivided half of them by quitclaim deed to F., who, March 6, 1873, brought ejectment. *Held*, 1. That B.'s letter of April 1, 1856, operates as an estoppel *in pais* which precludes him from setting up a claim to them, and is an available defence to the action. 2. That F. was not a *bona fide* purchaser, and that whatever title he acquired was subject to the legal and equitable rights of D. and those claiming under the latter.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. George W. Lawton for the plaintiff in error.

Mr. M. J. Smiley, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action of ejectment brought by Dickerson and Wheeler. The latter died during the progress of the suit. The parties agreed in writing to submit the case to the court without the intervention of a jury. The court found the facts. So far as it is necessary to state them, they may be thus summarized: Micajah Chauncey owned the land in controversy. He died on the —— day of February, 1853, leaving two children,

Edmund Chauncey and Sarah Kline. They were his only heirs-at-law. He is the common source of title of all the parties in this litigation. On the 3d of March, 1853, John Kline and Sarah his wife conveyed by warranty deed the entire premises to Lowell Morton. The deed was duly recorded on the 6th of March, 1854, and on the 1st of April, 1854, Lowell Morton entered into possession of the premises. He and the defendants have ever since been in actual possession, claiming to own and hold the property as tenants in common. The latter were in possession at the commencement of this suit, claiming title through conveyances from Lowell Morton. Prior to the 1st of April, 1856, Lowell Morton learned that Edmund Chauncey was one of the children of Micajah Chauncey, and that he lived in California. Whereupon Lowell Morton procured Eleazer Morton to write to Edmund Chauncey to learn whether he made any claim to the premises. On the 1st of April, 1856, Edmund Chauncey, still living in California, addressed a letter to his sister, Sarah Kline, then living in Michigan, wherein he disavowed, in strong terms, the intention ever to assert such a claim.

The contents of this letter subsequently came to the knowledge of Lowell Morton, who thereafter conveyed to the defendants by warranty deeds. Under these deeds they have since held and claimed title, and have occupied and improved the property. On the 9th of July, 1865, Edmund Chauncey conveyed the undivided half of the premises, by quitclaim deed, to Orlando B. Dickerson and James Witherell. On the 1st of May, 1868, Witherell conveyed all his right, title, and interest to William W. Wheeler, one of the original plaintiffs. The suit was instituted on the 6th of March, 1873. Lowell Morton and the defendants had then been in possession eighteen years and eleven months. The court below held as conclusions of law that the action was barred by the Statute of Limitations of Michigan of 1863, and by an estoppel *in pais*, and gave judgment accordingly. The plaintiff thereupon sued out this writ of error.

Both the conclusions of law are relied upon as errors for the reversal of the judgment. Our remarks will be confined to the point of estoppel.

This defence is founded upon the letter of Edmund Chauncey. The contents of the letter of Morton, to which it refers, are not given in the finding of facts, but the subject of that letter and the inquiry which it made appear clearly in the letter of Chauncey. He said: "Mr. Morton wrote me a letter. He wanted to know if I intended to claim any of the Conger farm" (meaning the premises in controversy). "You can tell Mr. Morton for me, he need not fear any thing from me. Thank God, I am well off here, and you can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." The phrase, "I intended to give," &c., implies that he knew his half of the farm had already been sold to Morton, and that he could not, therefore, give his sister, to whom the letter was addressed, any part of that property. It does not appear that there was any other property held by them as coparceners. He says further, that he intended to give her more if she needed it. All this was communicated to Lowell Morton. What was the effect upon him? He was lulled into security. He took no measures to perfect his title, nor to procure any redress from the Klines, who had conveyed and been paid for the whole of the property while they owned but the half. On the contrary, he gave thereafter deeds of warranty to all the defendants, — who are sixty-two in number, — and he and they occupied and improved the premises down to the commencement of this suit. Between that time and the date of the letter was a period of nearly seventeen years. What improvements were made and how far the property had risen in value are not disclosed, nor does it appear what stimulated Chauncey to violate his promise and commence this attack on the defendants.

The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for pro-

tection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked. Here, according to the finding of the court, the time of adverse possession lacked but a year and a month of being twenty years, — when, it is conceded the statutory bar would have been complete.

In *Faxton* v. *Faxon* (28 Mich. 159), a mortgagee holding several mortgages prevailed on a son of the deceased mortgagor, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held to be estopped by his assurances upon which the son had acted. The court said: "The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do or abstain from doing any thing involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. In *Harkness* v. *Tbulmin* (25 id. 80) and *Truesdale* v. *Ward* (24 id. 117) this principle was applied, in the former case, to the extent of destroying a chattel mortgage, and in the latter, of forfeiting rights under a land contract, where parties were led to believe they were abandoned. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." Cooley, J., was inclined to doubt the sufficiency of the proof, but said, finally: "His" (the mortgagee's) "assurances have undoubtedly been relied upon and acted upon by the defendants, and, considering the great lapse of time without any claim under the mortgages on the

part of the complainant, I am not disposed to dissent from the conclusion of my brethren." The case before us arose also in Michigan. In *Evans et al.* v. *Snyder et al.* (64 Mo. 516), the heirs assailed an administrator's sale. No order of sale could be found. This was held to be a fatal defect. But the Supreme Court of the State held that where they stood silently by for years, while the occupant was making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, they would be estopped from afterwards asserting their claim. Here, as by Judge Cooley, stress is laid upon the lapse of time. This is also a feature of the case in hand.

Other authorities to the same effect are very numerous. They may be readily found. It is unnecessary to extend this opinion by referring to them.

We think the facts disclosed in the record make a complete case of estoppel *in pais*.

But it is said this objection to the plaintiff's claim is not available at law, and must be set up in equity.

"This is certainly not the common law. Littleton says: 'And so a man can see one thing in this case, that a man shall be estopped by matter of fact, though there be no writing, by deed or otherwise.' Lord Coke, commenting hereon, gives an instance of estoppel by matter in fact, — this very case of partition. Co. Litt. 356, sect. 667. And such an award has been held sufficient to estop a party against whom ejectment was brought. *Doe d. Morris et al.* v. *Rosser*, 3 East, 15." *Brown* v. *Wheeler*, 17 Conn. 345, 353.

In *City of Cincinnati* v. *Lessee of White* (6 Pet. 431), the proprietors of the city plat, in 1789, dedicated the ground between Front Street and the Ohio River to the public for commercial and other purposes. The legal title had not then emanated from the government of the United States. In this state of things the Statute of Limitations does not run. White long subsequently acquired the legal title and brought ejectment for the premises. This court said (p. 441): "This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by eject-

ment. Adams, Eject. 32; Starkie, part 4, 505–507." This is the rule laid down by Lord Mansfield, in *Atkyns* v. *Hoarde*, 1 Burr. 119. "Ejectment," says he, "is a possessory remedy, and only competent where the lessor of the plaintiff may enter, and every plaintiff in ejectment must show a right of possession as well as of property." If the plaintiff in the present case was not entitled to possession, how, according to this authority, could he recover? If he had recovered, and a court of equity would have enjoined him from executing the judgment by a writ of possession, we ask, again, how could he recover in this action? Is not the concession that relief could be had in equity fatal to the proposition we are considering? In *Stoddard* v. *Chambers* (2 How. 284), it was said by this court: "On a title by estoppel, an action of ejectment can be maintained." We do not overlook the fact that a land-claim had been conveyed before it was confirmed by an act of Congress to the assignor and his legal representatives. It was held that on such confirmation the legal title became vested in the former, "and inured, by way of estoppel, to his grantee and those who claimed by deed under him." In that case, as in this, there was no formal transfer of the title. The transfer was made, as under a statute of limitations, when the bar is complete, by operation of law. *Leffingwell* v. *Warren*, 2 Black, 599. Why may not a like transfer be held to have been made in this case? The reason given for the rule of inurement and estoppel by virtue of conveyances is, that it avoids circuity of action. Does not the same consideration apply, with equal force, in cases of estoppel *in pais?* Why is it necessary to go into equity in one case and not in the other?

It has never been held that the Statute of Frauds applies to cases of inurement, and it has been conceded that it does not affect cases of dedication. Where is the difference in principle in this respect between those cases and the one before us? But here this point cannot arise, because the promise relied upon was in writing. In *City of Cincinnati* v. *Lessee of White* (*supra*), this court, speaking of the dedication there in question, said, "The law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication," and that a grant might have been presumed, "if that

had been necessary, and the fee might be considered in abeyance until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated." Here there was a grantee capable of taking the fee all the time from the date of the letter. The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths.

The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel *in pais* where land is concerned.

This subject has been carefully examined in Bigelow on Estoppel, pp. 533, 537. The learned author comes to no final conclusion whether in cases like this the defence may be made at law, or whether a resort to equity is necessary. The former is our view. Whether the title passed or not, the fact that the plaintiff was not entitled to possession of the premises was fatal to the action.

Chauncey conveyed to the plaintiff in error by deed of quitclaim. He is not, therefore, a *bona fide* purchaser. *Piatt* v. *Oliver*, 3 How. 333; *May* v. *Le Claire*, 11 Wall. 217. Morton and the defendants were in possession. For both these reasons, he took whatever title he acquired subject to all the rights, legal and equitable, of Morton and of the defendants, who deraigned their titles from the latter.

Judgment affirmed.

COUNTY OF CASS v. GILLETT.

1. The court adheres to its rulings in *County of Henry* v. *Nicolay* (95 U. S. 619), that the provisions of sect. 14, art. 11, of the Constitution adopted by Missouri in 1865, which require the assent of two-thirds of the qualified voters of a county to a subscription on its behalf for stock in a corporation, do not apply to cases where such subscription is made for stock in a railroad company pursuant to the power conferred by its charter granted prior to the adoption of that Constitution, notwithstanding the contemplated road is a branch road, the construction of which, although authorized by such charter, is undertaken as an independent enterprise under the act of March 21, 1868, entitled "An Act to aid in the building of branch railroads in the State of Missouri."
2. Where the company authorized a committee to take charge of the construction of such road, and solicit subscriptions in the name of the company to the use of such branch, and it subsequently assigned a portion of its franchises to another company, — *Held*, that the branch being thus organized and invested with the powers and privileges conferred by the charter of the company to enable it to prosecute the work, a subscription by a county through which such road passed is not rendered invalid by the fact that when made such partial assignment by the company of its franchises had taken place.
3. Where the county court made an order to subscribe to the capital stock of the company for the use of one of its branches, and issued county bonds which were accepted by the construction committee, in payment, — *Held*, that an actual manual subscription on the books of the company was not necessary to entitle the county to the stock, or to bind it as a subscriber thereto.
4. A *bona fide* purchaser of negotiable securities before their maturity is not affected with constructive notice of a suit respecting them. *County of Warren* v. *Marcy* (97 U. S. 107) cited on this point and approved.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This action was brought against the county of Cass, Missouri, on certain interest coupons or warrants detached from bonds purporting to be issued by the county court of that county. The following is a copy of one of the bonds and of a coupon thereto annexed: —

"UNITED STATES OF AMERICA.

"$1,000.] [County Bond No. 66

"COUNTY OF CASS, STATE OF MISSOURI.

"*Interest ten per cent per annum, payable on the first days of August and February, in New York.*

"Know all men by these presents, that the county of Cass, in the State of Missouri, acknowledges itself indebted and firmly

bound to the Tebo and Neosho Railroad Company, to the use and benefit and in the name of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, in the sum of $1,000, which sum the said county, for value received, hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in building the said branch railroad, at the National Park Bank, in the city of New York, in the State of New York, on the first day of February, A.D. 1891, redeemable, however, at the option of the county court of said county at any time after the lapse of five years after the date hereof, together with interest thereon from the first day of February, 1871, until paid, at the rate of ten per centum per annum, which interest shall be payable semi-annually, on the first days of August and February of each year, on presentation and delivery at said bank of the coupons of interest hereto severally attached. This bond is issued under and in pursuance of an order of the county court of the county of Cass, in the State of Missouri, and in pursuance of and by authority of an act of the General Assembly of the State of Missouri, entitled 'An Act to incorporate the Tebo and Neosho Railroad Company,' approved Jan. 16, 1860, and of an act of the General Assembly of the State of Missouri, entitled 'An Act to aid in the building of branch railroads in the State of Missouri,' approved March 21, A.D. 1868. In testimony whereof, the said county of Cass has executed this bond, by the presiding justice of the county court of Cass County, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court, at the town of Harrisonville, county of Cass, aforesaid, this first day of February, A.D. 1871.

"JEHIEL C. STEVENSON,
"*Presiding Justice of the County Court of Cass County, Missouri.*
"Attest:
[SEAL OF CASS COUNTY COURT.] "C. H. DORE,
"*Clerk of the County Court of Cass County, Missouri.*

"$50.] *Harrisonville, Cass County, Missouri*, Feb. 1, 1871. [$50.

"The County of Cass acknowledges itself to owe and promises to pay to the bearer fifty dollars, on the first day of August, 1873, at the National Park Bank, in the city and State of New York, being semi-annual interest on bond No. 66.

"C. H. DORE,
"*Clerk of Cass County Court, Missouri.*"

The Tebo and Neosho Railroad Company mentioned in the bond was incorporated Jan. 16, 1860, by an act of the General

Assembly of Missouri (Acts of Mo., 1860, p. 402), the eighth section of which reads as follows: "The 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, and 22d sections of an act entitled 'An Act to incorporate the Osage Valley and Southern Kansas Railroad Company, approved Nov. 21, 1857,' are hereby re-enacted, and declared to be applicable to the company hereby incorporated; and all powers therein contained are extended to the Missouri, Tebo, and Neosho Railroad Company." The charter of said Osage Valley, &c., Railroad Company is set forth in the acts of that State for 1857, p. 50, and its fourteenth section provides that "it shall be lawful for the county court of any county in which any part of the route of said railroad or its branches may be, or any county adjacent thereto, to subscribe to the stock of the company; and, for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same." The act of incorporation authorizes the company to construct a road between certain points, and "to extend branch railroads into and through any counties that the directors may deem advisable."

The fourteenth section of the eleventh article of the Constitution of Missouri, adopted in 1865, declares that "the General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

The act of March 21, 1868, recited in said bonds in connection with the act of Jan. 16, 1860, as the authority for issuing them, is set forth in the case of *County of Henry* v. *Nicolay*, 95 U. S. 619.

Proceeding under its charter and the provisions of the branch railroad act, the directory of the Tebo and Neosho Railroad Company adopted, on the 6th of June, 1870, a resolution establishing a branch, to be known as the "Clinton and Kansas City Branch," designating its point of intersection with the main line and its general course. A copy of it was filed with the Secretary of State. At the same time, a committee was

appointed to take charge of the construction of the branch, and authorized to solicit subscriptions in the name of the company to the use of the branch.

On the 11th of October, 1870, the Tebo and Neosho Railroad Company entered into a contract with the Missouri, Kansas, and Texas Railway Company, organized and doing business under the laws of the State of Kansas, by the terms of which the former company sells and conveys to the latter "all its privileges, rights, powers, franchises, real estate, and other property, the whole or a part of which is in this State, excepting only such as belong to the extension of the Tebo and Neosho line, north from Sedalia *via* Boonville," &c., "and doth consent to a merger of the same with the franchises, property, and rights of said party of the second part; and the said Missouri, Kansas, and Texas Railway Company, party of the second part, shall have, exercise, and enjoy all the rights, powers, privileges, and immunities of the original charter of the Tebo and Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as has heretofore been exercised and enjoyed by the said party of the first part, or by the several shareholders in said company, whose stock shall be exchanged as herein provided, either or both; and the said party of the second part does hereby accept the terms and conditions of the within instrument." The contract was filed and recorded in the office of the Secretary of State on the 4th of January, 1871.

On the 28th of February, 1871, upon the application of the committee appointed by the resolution of June 6, 1870, the county court of Cass County, by an order of record, subscribed for "three thousand shares of the capital stock of the Tebo and Neosho Railroad Company (now in part the Missouri, Kansas, and Texas Railway Company), in the name of and for the use and benefit of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, and to aid in the construction thereof, each share being of the denomination of $100, and amounting in the aggregate to the sum of $300,000," &c.

The remaining facts are set forth in the opinion of the court.

The case was tried by the court, which made a special finding of the facts. A judgment was rendered for the plaintiff below, and the county then sued out this writ.

The following are the errors assigned:—

1. The charter of the Tebo and Neosho Railroad Company did not authorize the county court of Cass County to issue the bonds in question, in the absence of the assent of two-thirds of the qualified voters of said county, and the court below erred in holding that such power existed.

2. The act of the Missouri legislature of Jan. 14, 1860, required as a condition precedent to the subscribing of stock to a railroad company, and the issue of bonds to pay therefor, that an election should be held in the county to test the sense of the tax-payers of the county, on the question of making the subscription and issuing the bonds, and the court erred in holding otherwise.

3. Said company, at the time of the subscription by Cass County to the stock of the branch road, had sold all its interest in and control over the alleged branch road, and had no authority to receive subscriptions of stock for such branch road, or to contract for the issue of bonds on account of such subscription, nor could the branch road receive such subscriptions or make such contract; and the court erred in holding otherwise.

4. The county court had no authority to issue the bonds in question, because, by the judgment of a court of competent jurisdiction, they have been restrained from issuing said bonds; and the court below erred in holding otherwise.

5. It does not appear from the finding of the facts by the court that the county court of Cass County made any valid contract with said company, or any other person or company, for the issue of stock to said county, nor that there was, in fact, any valid subscription by said county court to the stock of any company; and the court therefore erred in rendering judgment for the plaintiff below, on the special finding of facts.

The case was argued by *Mr. James O. Broadhead* for the plaintiff in error, and by *Mr. Thomas K. Skinker* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case is almost precisely similar to that of *County of Henry* v. *Nicolay* (95 U. S. 619), the authority for issuing the bonds being claimed under the same charter (that of the Tebo and Neosho Railroad Company), and being pursued under the same general act of March 21, 1868, as in that case; and the same defence (amongst others) being set up, to wit, that the subscription to the capital stock of the company was made and the bonds were issued by the act of the county court alone, without a vote of the people, as required by the Constitution of 1865. This is the ground relied on in the first assignment of error.

The only material difference between the present case and that of Henry County, in reference to the point in question, arises from the circumstance that in this case the order of the county court for making the subscription was not adopted until after the assignment by the Tebo and Neosho Railroad Company of a portion of its franchises to the Missouri, Kansas, and Texas Railway Company; whilst in the Henry County case the order for a subscription was prior in date to the said assignment. But we do not regard this difference as material. In both cases, the branch railroad was authorized to be constructed by a resolution of the board of directors of the Tebo and Neosho Railroad Company before the assignment, and a committee was appointed to take charge of its construction and solicit subscriptions therefor; and in both cases the bonds of the county were issued after the said assignment. The authority of the Tebo and Neosho Railroad Company to establish independent branches under its charter, and pursuant to the provisions of the act of March 21, 1868, entitled "An Act to aid in the building of branch railroads in the State of Missouri," was considered in the Henry County case, and need not be again discussed. The resolution for establishing the branch road, to aid which the bonds now in question were given, was adopted on the 6th of June, 1870, and was as follows: —

"*Resolved*, by the board of directors of the Tebo and Neosho Railroad Company, that it is the desire of this company to build a branch railroad from a point on the main line of the road of said

company, at or near the town of Clinton, Henry County, northwestwardly in the general direction of Kansas City, to a point either on the Pacific Railroad easterly of said city, or to a point at said city on the line of road lately known as the Cameron and Kansas City Railroad, said branch railroad to be designated and known as the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, and that the same is designated and established under the provisions of the charter of this company and the act of the General Assembly of Missouri, entitled 'An Act to aid in the building of branch railroads in the State of Missouri,' approved," &c.

The findings also show that the Tebo and Neosho Railroad Company authorized a committee to take charge of the construction of said branch road, and to use the name of the company, and to solicit subscriptions in its name to the use of said branch. As far, therefore, as depended upon the Tebo and Neosho Railroad Company proper, its powers were exerted, before the assignment of its franchises, in the establishment and organization of the branch road. The branch being thus organized and set in operation, became invested with the powers and privileges conferred by the charter of the company, to enable it to lay out and construct its road, and to procure the requisite means of accomplishing these objects; and the counties through which it was located thereupon became authorized to subscribe stock in aid of its construction. These powers, having thus been brought into existence, were not extinguished by the subsequent partial assignment of its franchises by the parent company to the Missouri, Kansas, and Texas Railway Company. Whether the application to the county for aid was made before or after said assignment could make no difference. As stated in the Henry County case, the Tebo and Neosho Railroad Company still continued in existence, invested with a large portion of its franchises.

The county of Cass thus having the power to subscribe capital stock in aid of the branch road, the county court, on application made to it for that purpose, on the 28th of February, 1871, did order and adjudge "that the county of Cass do subscribe for and agree to take three thousand shares of the capital stock of the Tebo and Neosho Railroad Company (now

in part the Missouri, Kansas, and Texas Railway Company), in the name of and for the use and benefit of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, and to aid in the construction thereof, each share being of the denomination of $100, and amounting in the aggregate to the sum of $300,000, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the act of the General Assembly of the State of Missouri, entitled 'An Act to aid the building of branch railroads in the State of Missouri,' approved March 21, 1868, and in accordance with the resolutions and orders of the board of directors of said Tebo and Neosho Railroad Company establishing said branch railroad and authorizing subscriptions to said capital stock to aid in the construction thereof, adopted on the sixth day of June, 1870; the said stock to be paid for by the issue and delivery to the committee appointed to construct said branch railroad, or to their successors in office, of the coupon bonds of the county of Cass of the denomination of $1,000 each, bearing date the first day of February, 1871, with interest at the rate of ten per cent per annum, payable semi-annually," &c.

The order then prescribed certain conditions as to the time and circumstances under which the bonds were to be delivered, which are not relevant to the point under consideration.

In pursuance of this order, the bonds were signed by the officers of the county, and were issued in August, 1871; and the court finds that the plaintiff is an innocent holder for value of the coupons sued on.

We think that the case is entirely within the decision in *County of Henry* v. *Nicolay* (*supra*), and that the constitutional provision does not apply to it.

But the defendant, in its second assignment of error, relies on the act of the Missouri legislature passed Jan. 14, 1860, which required as a condition precedent to the subscription of stock to a railroad company, and the issue of bonds to pay therefor, that an election should be held in the county to test the sense of the tax-payers on the question of subscription.

The same objection was raised in *County of Schuyler* v. *Thomas* (98 U. S. 169), and we overruled it on the author

ity of *Smith* v. *The County of Clark*, 54 Mo. 58. We see no reason to change that opinion. The act of 1860 was an amendment to the general railroad law, and is held not to apply to companies having special charters, in which special power is given to counties and townships to subscribe stock in aid thereof.

The third assignment of error relates to the supposed effect of the assignment by the Tebo and Neosho Railroad Company of its franchises to the Missouri, Kansas, and Texas Railway Company, which has already been sufficiently discussed.

The fourth assignment is based on the fact that the bonds were issued pending and in violation of an injunction of the Circuit Court of the county of Cass, directed to the justices of the county court; and it is argued that this was notice to all the world of the objections to the regularity and validity of the bonds. It seems that the bonds were in the keeping of the National Park Bank of the city of New York, which was not made a party to the injunction suit. It also appears by certain proceedings of the county court of Cass County, had on the twenty-fifth day of September, 1871, and set forth in the findings of fact, that the bonds were delivered to the construction committee of the branch railroad; but under what circumstances they were delivered is not shown. The coupons subsequently came into the hands of the plaintiff as an innocent purchaser for value. The question of *lis pendens* as applicable to negotiable securities was fully considered by us in the case of *County of Warren* v. *Marcy* (97 U. S. 107), and we there held that a *bona fide* purchaser before maturity is not affected with constructive notice of a suit respecting such paper. That decision applies to the present case, and the objection cannot prevail to invalidate the plaintiff's title.

To the fifth and last assignment of error it may be answered, that it does appear that the county court on behalf of the county made an order to subscribe to the capital stock of the Tebo and Neosho Railroad Company for the use of the Clinton and Kansas City branch; that it dealt with the construction committee of the branch road, and that the bonds in question were issued to the said committee in payment of said stock. That this was a transaction which entitled the county to the

amount of stock subscribed cannot be doubted. An actual manual subscription on the books of the company was not necessary to entitle the county to the stock, or to bind it as a subscriber thereto. In *County of Moultrie* v. *Rockingham Ten Cent Savings Bank* (92 U. S. 631), where the board of supervisors of the county ordered that a subscription to the stock of a railroad company be made by the county, and that bonds should be issued in payment thereof; and the order was recorded in the minutes of the board, and bonds were actually issued to the railroad company in pursuance thereof, though no subscription to the stock was actually made on the books of the company, — we held that, whether the action of the board was in substance and legal effect a subscription, or only an undertaking to subscribe, accepted by the company, a valid contract existed between the county and the company. The committee of construction in the present case represented the branch railroad as a separate interest from that of the parent company, and the acts of the committee were, as to the branch, the acts of the company which the latter could not control or gainsay. The stock subscribed, or agreed to be subscribed, for the use of the branch, was separate stock, not under the control of the parent company, but under the control of the committee. As the dealings of the county court were with the committee, though the name of the company was used, the transaction was complete without any confirmatory action of the company, and the county was entitled to its stock whether certificates therefor were actually issued or not. We think that this assignment of error cannot be sustained.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

RAILROAD COMPANY *v.* COLLECTOR.

1. The tax on interest paid by corporations under sect. 122 of the internal-revenue law, as amended by the act of July 13, 1866 (14 Stat. 138), is an excise tax on their business, to be paid by them out of their earnings, income, and profits.
2. In order that its payment might be secured, this tax was laid on the subjects to which these earnings were applied in the usual course of business of such corporations; namely, dividends, interest on funded debt, construction, or some reserve fund held by the company.
3. Such a tax is not invalidated by the provision that the amount of it may be withheld from the dividend or the interest due or payable to the stockholder or the bondholder, who is a citizen or a subject of a foreign government, with no residence in this country.

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

This is a suit by the Michigan Central Railroad Company against Charles W. Slack, collector of internal revenue for the third collection district of Massachusetts, to recover a tax or duty of $860.33, paid to him, under protest, on the twenty-eighth day of February, 1870; which tax was assessed on or about the 19th of that month on sterling bond interest paid by said company in London in gold, in the previous month of January, by cashing certain coupons which then fell due.

The coupons were attached to certain sterling bonds issued by said company, to the amount of £95,700, and negotiated by their agents in London in 1852, or early in 1853. The bonds were due in July, 1872, and paid at maturity, in gold, in London.

So far as the company know, not one of them was ever held by any person in the United States, or by other than non-resident aliens, and the interest accruing was regularly paid in gold in full in London, without rebate or reservation of the United States internal-revenue tax.

Appeal was duly made to the Commissioner of Internal Revenue before this suit was brought.

The court below found for the defendant, whereupon the company brought the case here, and assigns for error that the court below erred in finding that Congress had power to impose

the tax in controversy, and that, upon the facts, judgment must be for the defendant.

Mr. Francis W. Palfrey for the plaintiff in error.

It is a conceded proposition that the United States has not the power to tax non-resident aliens directly. As persons, they are not liable to our taxation. But it is alleged that their property was within our jurisdiction, and therefore taxable. The reply to this proposition is: —

1. That it is settled law in this court that the internal-revenue taxation on coupon interest is a tax on income, and so a tax on persons.

2. That the money set apart by the railroad company to pay the coupon interest due to its non-resident alien bondholders was not taxable property within the jurisdiction of the United States.

In support of the first proposition, it can hardly be necessary to do more than to cite *Haight* v. *Railroad Company*, 6 Wall. 15; *Railroad Company* v. *Jackson*, 7 id. 262, 269; *Barnes* v. *The Railroads*, 17 id. 294; *United States* v. *Railroad Company*, id. 322; *Stockdale* v. *Insurance Companies*, 20 id. 323, 330, 337; *Railroad Company* v. *Rose*, 95 U. S. 78.

And in support of the second: *State Tax on Foreign-held Bonds*, 15 Wall. 300, 324, 325; *Murray* v. *Charleston*, 96 U. S. 432; *Caruthers* v. *Humphrey*, 12 Mich. 270; *Van Husan* v. *Kanouse*, 13 id. 303; *Union Bank* v. *The State*, 9 Yerg. (Tenn.) 490; *Oliver* v. *Washington Mills*, 11 Allen (Mass.), 268, 273.

The Solicitor-General, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.

The tax was assessed under sect. 122 of the internal-revenue law, as amended by the act of 1866. What is pertinent to this case reads as follows: —

"Any railroad, canal, turnpike, canal-navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years

after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends due and payable, as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupon on the bonds, or other evidences of their indebtedness so held by any person or party whatever, except where said companies have contracted otherwise." 14 Stat. 138.

The agreed statement on which the case was tried shows that the tax was for interest paid by the company on sterling bonds in London, which bonds were issued long before the internal-revenue law was enacted, and it is perhaps fairly to be inferred from the statement that the bonds were held at the time by foreigners.

It is on this latter feature of the case that resistance to the tax is founded. It is urged that it is a tax on the property — if property it may be called — of persons not subject to the jurisdiction of this government, and therefore beyond the power of Congress to levy or enforce.

That the tax was actually collected without resistance, and the present suit is brought to recover it back, is sufficient answer to the assertion that it could not be enforced.

Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the government no allegiance, is a question which we do not think necessary to the decision of this case.

The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing road-ways and water-ways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies. How were these "earnings, profits, incomes, or gains" to be most certainly ascertained? In every well-conducted corporation of this character these profits were disposed of in one of four methods; namely, distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hands. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them. The books and records of the company are thus made evidence of the profits they have made, and the corporation itself is made responsible for the payment of the tax.

Manifestly such a mode of ascertaining the net earnings of the company would not be complete unless the sums paid as interest on their bonded debts were taken into the account.

Of course it was competent for Congress to tax only the earnings after *deducting* this interest paid on their debt, or to treat the sum so paid as part of the net earnings, and paid out of them as dividends were. It adopted the latter policy.

It results from this course of observation that the tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest.

It is very true that the act went further, and declared that, except when the company had contracted otherwise, it might deduct this tax from the amount due the bondholders. And where the bondholder was subject to congressional legislation, by reason of citizenship, residence, or *situs* of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration

would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects, is bound by the legislative and political departments of its own government. The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it; and being lawfully assessed and paid, it cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

Judgment affirmed

JONES v. BLACKWELL.

Manufactured tobacco shipped in bond from the manufactory and stored in an export bonded warehouse on the 14th of June, 1872, was subject to the tax of thirty-two cents per pound, prescribed by the internal-revenue act of July 20, 1868. 15 Stat. 152.

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

This action was brought by Blackwell against Stockdale, collector of internal revenue for the first collection district of Louisiana, and, on his death, revived against Jones, his executrix.

Judgment having been rendered against her, she sued ou this writ of error.

The facts are sufficiently stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the plaintiff in error.
Mr. J. D. Rouse and *Mr. William Grant*, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

The tobacco described in the petition was shipped by Blackwell, the plaintiff below, in bond, from the manufactory in Virginia to the port of New Orleans, and was there entered in bond in an export bonded warehouse on June 13, 1872. On the 1st of July next thereafter he, by his agents, applied to the collector of internal revenue for the first collection district

of Louisiana, including the city of New Orleans, to withdraw the tobacco for sale or consumption, offering to pay a tax on the same at the rate of twenty cents per pound, as prescribed in the act of June 6, 1872. 17 Stat. 249. The collector refused to permit its withdrawal unless a tax at the rate of thirty-two cents per pound was first paid, as prescribed by the act of July 20, 1868. 15 id. 152.

Upon the trial in the court below the jury were instructed, among other things, that, on and after July 1, 1872, and prior to March 3, 1873, the only tax imposed by law upon manufactured tobacco was twenty cents per pound. The principal question before us is as to the correctness of that instruction.

By the first section of the act of July 20, 1868, a tax of thirty-two cents per pound was imposed upon all manufactured tobacco. The same act provided for a system of export bonded warehouses, to be designated and established by the Commissioner of Internal Revenue, at any port of entry in the United States, "for the storage of manufactured tobacco and snuff in bond intended for exportation." Manufactured tobacco, after being removed in bond from the manufactory to an export bonded warehouse, could, however, be withdrawn, upon payment of tax, for sale or consumption.

Up to Nov. 21, 1871, on which day the Commissioner submitted his annual report of the operations of the internal-revenue system for the fiscal year ended June 30, 1871, there had been established and were in operation sixteen of such export bonded warehouses. They were located in Massachusetts, New York, Pennsylvania, Maryland, Virginia, Louisiana, California, and Oregon. From the report of the Commissioner, of which we may take judicial notice, it appears that during that fiscal year 10,621,183 pounds were withdrawn for exportation from the several export bonded warehouses, while the quantity withdrawn from them for consumption during the same period was 11,499,659 pounds, — showing that less than one-half of the tobacco and snuff received in bond from the manufactory was actually exported. The Commissioner stated that from the eight bonded warehouses, established at the several ports of Philadelphia, Baltimore, New Orleans, San Francisco, and Portland, Oregon, in which were stored during the fiscal year

ended June 30, 1871, 9,437,257 pounds of manufactured tobacco, only 437,495 pounds during that period were withdrawn for exportation, while 8,480,656 pounds were withdrawn for consumption. "The practical operation," said he, "of this system of bonded warehouses hitherto has been to give to a few individuals and firms, more particularly the proprietors of the warehouses, the same facilities for storing tobacco, *without the prepayment of tax*, as were given by the former system of class B, bonded warehouses, abolished by the act of July 20, 1868." He therefore recommended the abolition of the system of export bonded warehouses, as required by the best interests both of the government and of the manufacturer. The benefits to result from such abolition were that "a large portion of the expenses now [then] incurred by the manufacturers in exporting their goods would be saved, the government would receive the taxes on all goods *when removed from the place of manufacture*, all jobbers and dealers in manufactured tobacco would be placed on the same footing with regard to the traffic in tax-paid goods, and the special privileges and advantages enjoyed by a few individuals and firms would be removed."

It was doubtless because of these official recommendations from the head of the internal revenue system that Congress made the numerous amendments of the act of July 20, 1868, which appear in the act of June 6, 1872.

The contention of the defendant in error is, that while all manufactured tobacco stored in export bonded warehouses and withdrawn for sale or consumption *before* the first day of July, 1872, was subject to the tax prescribed by the act of July 20, 1868, all found stored in such warehouses on the 1st of July, 1872, without regard to the date of its deposit therein in bond, was subject, upon withdrawal *on* and *after* that date, for sale or consumption, to the reduced tax prescribed by the act of June 6, 1872. To this construction of the statute we cannot yield our assent.

It is true that the act of June 6, 1872, which took effect on the 1st of August, 1872, "except where otherwise provided," declares "that on and after the first day of July next," that is, July 1, 1872, there shall be assessed and collected on manufactured tobacco a tax of twenty cents per pound. But the sec-

tion (sect. 31) which so declares must be interpreted in connection with other provisions of the act, and with reference to the reasons which caused the radical changes made by that act in the internal-revenue system as previously established. We have already seen that the attention of Congress was called to the evils which had grown up under the system of export bonded warehouses, and to the necessity of its abolition. The act of June 6, 1872, gave effect to the recommendations of the Commissioner, and made such provisions as would enable him to dispense with such warehouses altogether. But a specific provision was made as to tobacco which had been previously placed in export bonded warehouses under the act of June 20, 1868. It was declared, "All tobacco and snuff *now* stored in any export bonded warehouse shall, on and after July 1, 1872, be subject to the same tax as is provided by this act, and shall, within six months after the passage of this act, be withdrawn from such warehouse upon payment of the tax, or for export, under the regulations of the Commissioner of Internal Revenue now in force concerning withdrawals of tobacco or snuff from bonded warehouses. And any tobacco or snuff remaining in any export bonded warehouse for a period of more than six months after the passage of this act shall be forfeited to the United States, and shall be sold or disposed of for the benefit of the same in such manner as shall be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury." We entertain no doubt as to the object of this provision. It evidently refers only to tobacco stored in export bonded warehouses *at the date of the passage of the act*, and not, also, as claimed by the defendant in error, to that stored in such warehouses after that date, and before the 1st of July, 1872. If Congress intended that *all* manufactured tobacco, whether at the manufactory or in an export bonded warehouse, should, on the 1st of July, 1872, have the benefit of the reduced tax of twenty cents, there would have been no necessity for a special declaration that tobacco "now" — that is, at the passage of the act — stored in export bonded warehouses should, *on* and *after* July 1, 1872, be subject to the tax prescribed by the act of June 6, 1872. The necessity for such declaration lay in the fact that unless tobacco, deposited in export bonded warehouses

prior to that act, was, in express terms, given the benefit of the reduced tax, it would be liable to the tax of thirty-two cents imposed by the act of July 20, 1868. This will become perfectly clear when attention is given to the regulations which the Commissioner of Internal Revenue had prescribed, and which were then in force, in reference to the shipment of tobacco in bond from the manufactory to an export bonded warehouse. Before any shipment could take place, it was necessary that an inspector should inspect, weigh, and mark each package of tobacco proposed to be shipped to an export bonded warehouse. His report of inspection indicated the marks and numbers of each package, the number of packages and their contents, the number of pounds, *the rate* and *amount of tax.* All these items were carried into the transportation bond which the shipper was required to execute. They appeared also in the report of inspection when the tobacco reached its destination; and, finally, when the tobacco was received by the storekeeper at the export bonded warehouse, the shipper was required to execute bond, with surety, binding him to pay "the amount of taxes due and owing" on the tobacco, the rate and amount of tax due thereon being described *on the face of the bond*, and being the same as that shown in the certificate of the inspector. So that as to all tobacco in export bonded warehouses on 6th June, 1872, the government then held bonds obligating the parties thereto to pay the tax, as to rate and amount, which appeared on all the official documents connected with the transportation from the manufactory to the bonded warehouse. Hence the specific provision giving the owners of tobacco, stored in export bonded warehouses on 6th June, 1872, the benefit, on and after the 1st of July, 1872, of the reduced tax, as well as the privilege of keeping it there for six months without removal or payment of tax.

But when Congress declared that tobacco stored in such warehouses, at the date of the passage of the act of June 6, 1872, should be subject to the tax provided by that act, it does not at all follow that tobacco stored in export bonded warehouses after the passage of that act, and before July 1, 1872, when the reduced tax took effect, was entitled to the benefit of the reduction. Such a construction of the act would be

inconsistent with the policy which dictated the abolition of the system of export warehouses, as well as with the necessary implications arising from the specific provision as to tobacco stored in such warehouses at the date of the act. It deprives the word "now" in the clause we have quoted of all meaning. If the tobacco in question had remained in the manufactory until July 1, 1872, it would have been subject to a tax of only twenty cents; but it could not on that day, and under the act of June 6, 1872, have been removed therefrom for sale or consumption except upon payment of the tax. If, however, Blackwell chose not to wait until that date, when the reduction would take effect as to all tobacco in the manufactory, but preferred to ship it in bond to an export bonded warehouse, between June 6, 1872, and July 1, 1872, he must abide by the terms of the bond given at the time his tobacco was deposited in such warehouse. His bond, upon its face, recites — if the statute was complied with — the rate and amount of tax prescribed by the law in force when the bond was executed. He could not satisfy its terms except by paying the amount it called for. That Congress gave the owners of tobacco stored in bonded warehouses on 6th June, 1872, the benefit of the reduced tax constitutes no reason why such reduction should be applied to tobacco stored in such warehouses after that date, when the owner had, prior to July 1, 1872, given bond covering the tax due under the then existing law. If the act of June 6, 1872, had prescribed an increase of tax to take effect on the first day of July thereafter, no one would contend that such increase would have applied to tobacco stored in an export bonded warehouse between June 6, 1872, and July 1, 1872. That Congress reduced, rather than increased, the tax, to be assessed and collected on and after July 1, 1872, does not authorize the court to relieve Blackwell from the obligations of his bond, given prior to that date, to pay the tax as ascertained and fixed by the law in force when it was executed; especially, since the act of June 6, 1872, did not go into effect before July 1, 1872, as to the reduced tax, except as to tobacco stored in export bonded warehouses on 6th June, 1872.

It results from what has been said that the collector rightly

demanded a payment of thirty-two cents per pound on Blackwell's tobacco, when, on July 1, 1872, he applied to withdraw it for sale or consumption.

Nor was the collector responsible for any damage to the obacco resulting from the delay in obtaining the necessary stamps after Blackwell's demand in August, 1872. The collector was then, it is true, without the necessary stamps, but he made requisition for them upon the proper authorities at Washington. In view of the refusal of the appellee to pay the tax upon the first application for withdrawal on 1st July, 1872, the collector was justified in believing that appellee would not pay the required tax, and he was, therefore, under no obligation to keep stamps constantly in readiness for him.

We perceive in the evidence no just ground upon which to rest a verdict against the plaintiff in error. The jury should have been instructed to find in her favor.

The judgment will be reversed, with directions for further proceedings in conformity with this opinion; and it is

So ordered.

SHAW *v.* RAILROAD COMPANY.

SAME *v.* SAME.

1. The trustee to whom a railroad company executed a mortgage upon its property, to secure the payment of its bonds, represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them.
2. If bondholders not parties to the suit in which a decree was rendered in favor of the trustee can, under any circumstances, bring a bill of review, they can only have such relief as he would be entitled to in the same form of proceeding. To avoid what he has done in their behalf, they must proceed in some other way than by bill of review.
3. Except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by means of a receiver's certificates which create a paramount lien upon the property, in order to complete the work.
4. Upon a bill filed by the trustees to foreclose mortgages executed by a railroad company in Arkansas, one upon its road and the other upon its land grant

to secure its bonds the court found that they were valid and subsisting liens, that the whole amount of the bonds was due and unpaid, and decreed that in default of payment of principal and interest, at a specified date, the mortgaged property be sold and the proceeds thereof divided among the bondholders. A large majority in interest of the latter held, subsequently to the decree, and upon full notice, a meeting, at which a committee was appointed to purchase the property for the benefit of the bondholders. The committee accordingly purchased it at the sale. The sale was duly reported to the court, when the purchasers appeared therein and declared, and desired it to be so recorded, that it was their intention to organize a corporation under the laws of the State, to own, hold, and manage the property, and that any bondholder might, within sixty days from such organization, transfer to it his bonds and right to the proceeds of the sale, and become entitled to his proportional interest in the stock of the new corporation upon the same terms and stipulations as any other bondholder; but that said new corporation was not to be prevented thereby from requiring from any bondholder the payment of his proportion of the expenses attending the sale and purchase, and such other sums not exceeding five per cent of the principal of the bonds as it might deem for its interests to require as a condition on which stock should be delivered, provided that the same requirement should be made of all the other bondholders; and, further, that the stipulation should not limit the power of the purchasers to organize the corporation without notice, or of the corporation so organized to mortgage its property or reserve for its own use not exceeding ten per cent of its capital stock. At the same time, the trustees in the mortgages appeared in court and consented to an approval and confirmation of the sale, upon the agreement that the stipulation of the purchasers be embodied in the decree. Thereupon a decree was passed accordingly. The proper conveyance was made, and, as part of the consideration therefor, the decree also provided for the payment or compromise by the new corporation of certain claims against the old company. *Held*, 1. That the fact that some of the trustees were bondholders was not of itself sufficient to render them incompetent to consent to the decree. 2. That a bill filed by two bondholders not impugning the good faith of the trustees, but praying that the decree be reviewed and set aside, was properly dismissed.

APPEALS from the Circuit Court of the United States for the Eastern District of Arkansas.

These cases present the following facts: —

By an act approved Feb. 9, 1853 (10 Stat. 155), Congress granted lands to the State of Arkansas to aid in building a railroad. Power was given the State to sell them only as the road was completed in sections of twenty miles each. If the road was not finished in a specified time, all lands not sold were to revert to the United States. A part of the lands thus donated by Congress were granted by the State to the Little Rock and Fort Smith Railroad Company.

On the 22d of December, 1869, the railroad company executed a mortgage on its railroad, completed and to be completed, to Henry W. Paine and Samuel T. Dana, as trustees, to secure an issue of bonds amounting in the aggregate to $3,500,000, payable Jan. 1, 1890, with interest semi-annually at six per cent per annum, and on the 20th of June, 1870, it executed another mortgage on its land-grant, earned and to be earned, to Paine, Dana, and William B. Stevens, to secure another issue of bonds for $5,000,000, payable April 1, 1900, with interest semi-annually at seven per cent per annum. Each of the mortgages contained this clause: —

"In case default shall be made in the payment of any half-year's interest on any of the said bonds, at the time and in the manner in the coupon issued therewith provided, the said coupons having been presented and the payment of the interest therein specified having been demanded, and such default shall continue for the period of three months after said coupons shall have become due, and been demanded as aforesaid, then and thereupon the principal of all the said bonds shall, at the election of the trustees, become immediately due and payable."

On the 12th of May, 1874, all the bonds provided for in both these mortgages had been put out and one hundred miles of the road built. About sixty miles remained to be completed, and the company was without funds or credit. All interest on the bonds falling due Jan. 1, 1871, and thereafter, was in arrear and unpaid. Thereupon Paine, a citizen of Massachusetts, at that time the only trustee of the mortgage of the railroad, and Paine, Stevens, and Charles W. Huntington, all citizens of Massachusetts, then the trustees of the land-grant mortgage, commenced suits in the Circuit Court of the United States for the Eastern District of Arkansas to foreclose their respective mortgages. In each of the bills the necessary averments of fact were made to entitle the parties to a decree of sale, and the trustees elected to treat the principal of the bonds as due. All the necessary defendants, including certain judgment creditors, were made, and there was nothing at that time in the citizenship of the parties to interfere with the jurisdiction of the court. The first of these cases is the suit upon the railroad

mortgage, and the second that on the land grant. Afterwards changes in the trustees were made, so that Charles W. Huntington and Samuel H. Gookin represented the railroad mortgage, and Huntington, Gookin, and Samuel Atkins the land grant. The proper substitutions were made on the record, the new trustees all being citizens of Massachusetts.

Subsequently, on the 3d of October, 1874, an amendment was made to the bill for the foreclosure of the railroad mortgage, by which Atkins, one of the trustees of the land-grant mortgage, and other persons, citizens of Massachusetts, were brought in as defendants to that suit. The object of this amendment was to obtain the appointment of a receiver of the property with a view to raising money on receiver's certificates to complete the road and save the unearned land grant. No such appointment was made, however, and nothing was done under the amendment. On the 6th of November, a decree was entered in each of the cases, finding that the mortgage sued on was a valid and subsisting lien on the mortgaged property; that the whole amount of the bonds in each case had been issued, and, with the interest thereon, was due and unpaid; and ordering the mortgaged property to be sold unless the debt, principal and interest, was paid on or before the 10th of December then next. Provision was also made in each case for a distribution of the proceeds of the sales among the bondholders.

After this decree was rendered, a public meeting of the holders of both classes of bonds was called in Boston on full notice, and, as the result of that meeting, George O. Shattuck, Francis M. Weld, and George Ripley were appointed by parties representing in the aggregate $6,097,000 of the bonds, to purchase the mortgaged property for the benefit of the bondholders. They accordingly appeared at the sale, and became the purchasers of the railroad for $50,000, and the land grant for the same amount. The sale was duly reported to the court on the 19th of December, when the purchasers appeared and declared in open court, and desired to have it recorded, that it was their intention to organize a corporation under the laws of Arkansas, to own, hold, and manage the property bought at the sales, and that the holder of any of the bonds secured by

either mortgage might, within sixty days from the time of the organization of the corporation, transfer to it his bonds and his right to the proceeds of the sale, and become entitled to his proportional interest in the stock of the new corporation upon the same terms and stipulations as any other holder of the bonds; but this was not to prevent the new corporation from requiring from any and all bondholders the payment of his proportion of the expenses attending the sales and purchases, and such other sums not exceeding five per cent of the principal of the bonds as it might deem for its interests to require as a condition on which the stock should be delivered, provided that the same requirement should be made of all the other holders of bonds, and provided further, that this stipulation should not limit the power of the purchasers to organize the corporation without notice, or of the corporation so organized to mortgage its property, or to reserve for its own use an amount of its capital stock, not exceeding ten per cent thereof. At the same time, the several trustees appeared in court and consented to a confirmation of the sales upon the agreement that the stipulations of the purchasers thus given be embodied in the decrees approving and confirming the sales. Thereupon appropriate orders of confirmation containing the required stipulations were entered, and the proper conveyances made. In the order confirming the sale under the land-grant mortgage, it was provided that the new corporation should, as part of the consideration for the conveyance, compromise or pay such claims against the old company as Huntington, Ripley, and Henry A. Whitney might within one year approve, and upon such terms and in such manner as they should prescribe.

On the 22d of February, 1875, Charles H. Richardson, Frank Shaw, and David S. Greenough, of Boston, representing themselves to be holders of a large amount of the bonds, filed their petition in court, asking that the decree of confirmation might be modified by striking out the clause requiring payment of the claims against the railroad company, and that the provisions of the decrees relating to the exchange of bonds for stock in the new corporation might be extended until the question of modification should be decided. As one of the grounds of this application, it was alleged that Weld and Atkins were

creditors of the railroad company. This petition was answered by the several trustees explaining the facts. On the 13th of April, the time for exchanging bonds for stock in the new corporation was extended for sixty days, and the order for the payment of claims against the railroad company so modified as to make the approval of a claim by the court necessary before it could be paid, and providing for notice to Richardson, Greenough, and Shaw whenever a claim was presented for allowance.

On the 6th of July, 1875, Greenough, as owner of $58,000 of the bonds, and Shaw, as owner of $11,000, filed in the Circuit Court, in each of the cases, what is denominated a bill of review, in which they ask that the decrees be reviewed and reversed, and they placed in the same situation they would have been if the decrees had not been rendered. The errors complained of relate to the sufficiency of the allegations in the original bills; the confirmation of the sales, by the consent of the trustees, upon the terms stipulated for; a want of jurisdiction in the court, as the complainants and many of the defendants were citizens of the same State; and the rendition of a decree against the railroad company, without service of subpœna, after filing the amended bill. It was also alleged that Gookin and Atkins, trustees of the mortgages, were holders of bonds secured by the respective trusts. Demurrers to both bills were filed, which the court below sustained, and dismissed the suits. Shaw and Greenough thereupon appealed.

Mr. B. C. Brown, for the appellants, cited *Clearwater* v. *Meredith*, 1 Wall. 25; *Vose* v. *Bronson*, 6 id. 452; *Jackson* v. *Ludeling*, 21 id. 616; *Thomas* v. *Brockenborough*, 10 Wheat. 146.

Mr. C. W. Huntington, *contra*, cited *Whiting* v. *Bank of the United States*, 13 Pet. 6–15; *Crawshay* v. *Soutter et al.*, 6 Wall. 739; *Galveston Railroad* v. *Cowdrey*, 11 id. 459; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Kerrison*, *Assignee*, v. *Stewart et al.*, 93 id. 155; *Buffington* v. *Harvey*, 95 id. 99; *Sage* v. *Central Railroad Co.*, 99 id. 334; *West et als.* v. *Davis*, 4 McLean, 241; *Smith* v. *Chicago & Northwestern Railroad Co.*, 18 Wis. 17; *Carpenter* v. *Catlin*, 44 Barb. (N. Y.) 75; Hill, Trustees, 152, note and cases cited.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

We think it clear that the appellants are not entitled to the relief they ask. They were not parties to the original suits, except through their trustees, against whom they make no charges. Indeed, their counsel says in his brief, "It is probable that they [the trustees] believed that they were doing the best possible for their beneficiaries." The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by bill of review. All the errors complained of in these bills of review, as occurring before the confirmation of the sale, are such as affect only the railroad company injuriously. If, in fact, they are errors at all, they were in favor of the trustees and those they represent, and not against them. Of these the trustees could not complain. As no relief was granted under the amendment to the bill in the foreclosure of the railroad mortgage, the court clearly had jurisdiction of that case for the purposes of the decree as rendered.

But if the bills, as filed, are original in their character, to set aside the decrees complained of and not for review only, the appellants are in no better condition. The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing in the aggregate eight million out of the eight million five hundred thousand dollars of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretence even of fraud or unfairness, to defeat the wishes of such an overwhelm-

ing majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This company and these trustees were peculiarly situated. The road was unfinished, and the land grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact, and at first it seems to have been thought that the end might be accomplished through the instrumentality of a receiver and receiver's certificates. This necessarily contemplated the creation of a lien on the mortgaged property superior to that which then existed. Although the mortgages were separate, and on separate properties, the value of each depended, to a large extent, on the ability of the railroad company to finish its road.

For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what, to our minds, was a much more desirable plan adopted. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization

places the whole enterprise in the hands of those immediately interested in its successful prosecution.

The bare fact that some of the trustees were holders of bonds secured by their trust is not sufficient of itself to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that from the beginning their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees when personally interested should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done. But when every thing is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts.

Here the name of Gookin, one of the trustees, appears in the list of bondholders appointing the committee to make the purchase at the sale as the holder of two hundred thousand dollars of the bonds. Associated with him in the list were others representing near six millions of dollars. His name openly appeared on the paper when the court was asked to confirm the sale on the conditions agreed to. Certainly this is not sufficient to defeat the plan to which he and his associates gave their consent. Atkins, another trustee, was a creditor of the company, whose debt came within the provision made in the decree for payment by the new corporation. All this was fully explained to the court when the modification of the decree in this particular was asked for, and since no claim can now be paid except with the approval of the court after notice to the appellants, we see no reason why what has already been done is not sufficient for the protection of all concerned.

On the whole, we see no reason for interfering with the decrees below, and they are each, therefore,

Affirmed.

INSURANCE COMPANY *v.* GRIDLEY.

1. An application made by A. to an insurance company, upon which a policy on his life was issued for the benefit of his wife, contains a stipulation that his statements therein "shall form the basis of the contract," and that any untrue or fraudulent answers, any suppression of facts in regard to his health, habits, or circumstances material to the risk, "shall vitiate the policy and forfeit all payments thereon." In reply to a question as to whether certain of his relatives had any hereditary disease, he answered, "No hereditary taint of any kind in family on either side of house, to my knowledge." A. having died, his widow brought suit and made out her case. The company then proved that B., an uncle of A., had been insane for more than a year preceding his death, and had died in an insane asylum upwards of twenty years before the date of A.'s application. The jury were instructed to find for the plaintiff. *Held*, 1. That the instruction was proper. 2. That, to maintain its defence, the company was bound to prove, not only the insanity of B., but that it was hereditary, and that both facts were known to A. when he answered the question.
2. *National Bank* v. *Insurance Company* (95 U. S 673) cited and approved.

ERROR to the Circuit Court of the United States for the Eastern District of New York.

The facts are stated in the opinion of the court.

Mr. Edward Salomon for the plaintiff in error.

Mr. Robert Sewell, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action upon a policy of insurance insuring the life of Fayette R. Gridley in the sum of $10,000, for the benefit of his wife, the defendant in error.

The policy sets forth that it was issued "in consideration of the representations made in the application therefor and of the premium," &c. It sets forth, further, that "if any of the statements or declarations in the application for this policy, and upon the faith of which it is issued, shall be found in any material respect untrue, then . . . this policy shall be null and void."

The application was signed by the assured in behalf of himself and his wife. The first clause is as follows: "An answer to each of the following questions is required from persons proposing to effect insurance in this company, which answers form

the basis of this contract." It concluded with the declaration "that the above are the applicant's own fair and true answers to the foregoing questions. . . . And it is hereby agreed that these statements with this declaration shall form the basis of the contract for assurance, and that any untrue or fraudulent answers, — any suppression of facts in regard to the person's health, habits, or circumstances, — material to the risk, . . . shall vitiate the policy and forfeit all payments made thereon."

The application contained, among others, the following question: "Have the person's (whose life is to be assured) parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" The applicant answered: "No; except one brother temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family on either side of house, to my knowledge."

It was proved on behalf of the company that Abraham Gridley, an uncle of the assured, was insane for more than a year preceding his death, and that he died in the Bloomingdale Insane Asylum upwards of twenty years before the application for the insurance here in question was made.

The testimony being closed, the counsel for the company asked the court to instruct the jury to find a verdict for the defendant. This was refused. The court thereupon instructed the jury to return a verdict for the plaintiff. The jury found as directed. The defendant duly excepted to the instruction given and to that refused, and sued out this writ.

The only question argued before us is whether the court erred in instructing the jury to find for the plaintiff. The solution of that question depends upon the construction and effect to be given to the interrogatory and the answer to which our attention was called by the counsel for the plaintiff in error.

It is a recognized rule in the construction of statutes, that "a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the stat

ute unless it be within the intention of the makers." *People* v. *Utica Insurance Co.*, 15 Johns. (N. Y.) 358.

This proposition is equally applicable to other written instruments. The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained, it is conclusive. The intent of the law makers is the law, and here the intent of the parties is the contract.

It was material to the risk, and hence important to the insurers, to know whether either of the maladies named or any serious malady not named was hereditary in the family of the applicant. If the question were answered in the affirmative, it might be a reason for declining to issue the policy. On the other hand, if either of such maladies existed in a member of the family other than the applicant, but was not hereditary, and, on the contrary, existed, according to the family history, for the first time in the person affected, and in that case was the effect of known contemporaneous causes, then it was not material to the risk, was of no interest to insurers, and it is fairly to be presumed they did not care to be advised upon the subject.

This may be illustrated by the case of insanity mentioned in the answer of the applicant. He says his brother was afflicted in that way. "Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine." He adds: "Recovery followed reformed habits." This explanation took the subject wholly out of the scope and purpose of the inquiry by the company, and made it, as it were, *res inter alios acta.*

The last sentence of the answer is, "No hereditary taint on either side of the house, to my knowledge."

The affirmation was restricted and narrowed down to what the applicant himself personally knew touching the subject. It has this extent; no more.

The company might have refused to insure unless the qualification were withdrawn. Having failed to do this, such is the contract of the parties.

To make out the defence sought to be established by the insurers, three things were, therefore, necessary to be shown: that the alleged insanity of the uncle had existed; that it was

hereditary; and that both these things were known to the applicant when he answered the question.

The first point was clearly proved. In relation to the second and third, there was no proof whatever. What was proved, without what was not proved, was of no account. The defence, therefore, wholly failed. It follows that the instruction complained of was properly given.

The subject of questions and answers in cases like this was fully considered by this court in *National Bank* v. *Insurance Company*, 95 U. S. 673.

It is unnecessary to go over the same ground again, or to add any thing to what is there said.

Judgment affirmed.

KIDD *v.* JOHNSON.

The owner of a trade-mark which is affixed to articles manufactured at his establishment may, in selling the latter, lawfully transfer therewith to the purchaser the right to use the trade-mark.

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

The facts are stated in the opinion of the court.

Mr. M. F. Morris for the appellant.

Mr. E. M. Johnson, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

The question presented in this case relates to the ownership of a trade-mark used by the complainants on packages and barrels containing whiskey manufactured and sold by them in Cincinnati, and arises out of the following facts: —

In 1849, one S. N. Pike, doing business in that city as a wholesale dealer in whiskey, adopted as a trade-mark for his manufacture the words, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," enclosed in a circle, which he placed on packages and barrels containing the liquor. Between that date and 1863 he was in partnership with different persons doing

business there under the name of S. N. Pike & Co. In 1863, having dissolved his connection with others, he took as partners two of his former clerks, Tilney and Kidd, continuing the original firm name, and soon afterwards opened a branch house in New York City. The same trade-mark was used by the new firm as it had been by the preceding firm, without any change. At this time, and subsequently until its sale in 1868, the real property in Cincinnati, upon which the business was conducted, and the distillery, with its fixtures and appurtenances, belonged to Pike individually. In 1868, the firm removed its entire business to New York City, and Pike sold the real property in Cincinnati, and the stills, tubs, engines, boilers, tubing, and all apparatus in his distillery, for the consideration of $125,000, to the firm of Mills, Johnson, & Co., who were also engaged in the manufacture and sale of whiskey at that place. At the same time, Pike executed and delivered to the purchasers a separate instrument, stating that, having sold his premises to them, he extended to them and their successors the use of all his brands formerly used by him in his Cincinnati house.

Mills, Johnson, & Co. continued for some years the manufacture and sale of whiskey on the premises thus purchased, using, without objection from any one, the brands previously used by S. N. Pike & Co. They were succeeded in business by the complainants, who, it is admitted, are entitled to all the rights which they possessed in the trade-mark in question. S. N. Pike died in 1872, and his surviving partners formed a new partnership, under the name of George W. Kidd & Co., which was subsequently dissolved, and to its business Kidd, the appellant in this case, succeeded.

The complainants finding that whiskey bearing this trade-mark, manufactured by the firm of Tyra, Hill, & Co., of St. Louis, was sold in large quantities by dealers in New Orleans, filed the present bill to enjoin the dealers from selling or trafficking in whiskey contained in packages thus marked. By an amendment to the bill the defendant Kidd was made a party. He filed an answer and cross-bill, asserting title to the trade-mark as surviving partner of the firm of S. N. Pike & Co., and setting forth that Tyra, Hill, & Co. were acting under a license from him.

The principal question for determination is whether the complainants, claiming under the sale of Pike to their predecessors, or the defendant Kidd, claiming as survivor of S. N. Pike & Co., have the exclusive right to the trade-mark mentioned. The court below decided that the complainants possessed the exclusive right, and our judgment approves of the decision.

It is admitted that Pike was the owner of the trade-mark when he took two of his clerks into partnership and formed the firm of S. N. Pike & Co. He did not place his interest in the trade-mark in the concern as a part of its capital stock. He allowed the use of it on packages containing the whiskey manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned, and on which their business was conducted. He was engaged in the same business before the partnership as afterwards, and taking his clerks into partnership changed in no respect, beyond its terms, their relation to his individual property. Their subsequent conduct, moreover, plainly shows that they claimed no interest in the trade-mark. They knew of his conveyance of its use to Mills, Johnson, & Co. on the 1st of October, 1868, when they removed their own business to New York, and made no objection to the transfer. Their subsequent correspondence discloses beyond question their knowledge of the transfer and recognition of his power to make it. That transfer was plainly designed to confer whatever right Pike possessed. It, in terms, extends the use of the trade-mark to Mills, Johnson, & Co. and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trade-mark would be of no service in distinguishing the whiskey of the manufacture in Cincinnati; and thus the company would lose all the benefit arising from the reputation the whiskey there manufactured had acquired in the market. The right to use the trade-mark is not limited to any place, city, or State, and, therefore, must be deemed to extend everywhere. Such is the uniform construction of licenses to use patented inventions. If the owner imposes no limitation of place or time, the right to use is deemed coextensive with the whole country, and perpetual.

The claim of Kidd to the trade-mark as survivor of the partners in the firm of S. N. Pike & Co. is without any merit. Pike, in his lifetime, repudiated any ownership in the trade-mark after his sale, and Kidd knew that fact, and never even pretended that the firm had any such right until after Pike's death.

As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of Lord Cranworth in the case of *Leather Cloth Company* v. *American Leather Cloth Company*, reported in 11th Jur. N. S. See also *Ainsworth* v. *Walmesley*, 44 L. J. 355, and *Hall* v. *Barrows*, 10 Jur. N. S. 55.

The present case falls within this rule.

Decree affirmed.

WILLS *v.* RUSSELL.

1. Where it appears that no injury resulted to the plaintiff in error, a judgment will not be reversed merely because the court, at the trial, permitted a witness on his cross-examination to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief.
2. In September, 1872, A. imported from India a product known as "jute rejections," upon which the collector of the port of Boston imposed a duty of ten per cent *ad valorem* under sect. 24 of the Tariff Act of March 2, 1861 (12 Stat. 196), as a non-enumerated manufactured article, and of five dollars per ton under sect. 11 of the act of July 14, 1862 (id. 554), as a vegetable substance not enumerated. A. paid the duty under protest and brought suit against the collector to recover the specific duty, five dollars per ton. The jury were instructed that it was for them to find "whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in sect. 11 of the act of July 14, 1862. If they were, then the duty was properly assessed; if not, then their verdict must be for the plaintiff." *Held*, that the instruction was proper.

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

This was an action brought by Willis, Edmands, & Co., against Thomas Russell, a former collector of customs for the port of Boston, to recover certain duties paid under protest upon an importation from India of jute rejections, made in September, 1872. A duty of ten per cent *ad valorem*, assessed under sect. 24 of the Tariff Act of March 2, 1861 (12 Stat. 196), and five dollars per ton under sect. 11 of the Tariff Act of July 14, 1862 (id. 554), had been paid; and this action was for the five dollars per ton.

The plaintiffs, after proving their payment of the duties alleged to the defendant, put in evidence the following protest for the purpose of showing that they had complied with sect. 14 of the act of June 30, 1864, c. 171. 13 Stat. 214.

"BOSTON, Oct. 7, 1872.

"SIR, — We desire respectfully to protest against your action in assessing and exacting a duty of fifteen dollars per ton upon an importation made by us into this port of 125 bales of jute rejections, weighing 37,500 pounds, or about, per ship 'Melrose,' from Calcutta, and entered for consumption, on the 18th of September,

claiming that under existing laws this duty cannot be legally imposed upon this merchandise. Jute rejections are not enumerated in any tariff act in force, consequently can only be subjected to duty as a non-enumerated article. Jute rejections are unmanufactured. They are raw material, and have not passed through any process of manufacture before being imported into the United States. Being non-enumerated and unmanufactured, we claim that upon importation they should be classified and subjected to a duty of ten per cent *ad valorem*, under the twenty-fourth section of the act of March 2, 1861.

"Should it be determined that, because of the process which this merchandise passes through in being prepared for shipment, it is manufactured or partially manufactured, we then claim that it should be classified as a non-enumerated manufactured or partially manufactured article, under the section and act above referred to, and subjected to a duty of twenty per cent *ad valorem*.

"We pay this duty, amounting to two hundred and fifty-one dollars and six cents ($251.06) gold, in order to obtain possession of our property, and shall hold you and the government responsible for its exaction.

"Yours very respectfully,

"WILLS, EDMANDS, & Co.

"To Hon. THOMAS RUSSELL, *Collector*."

One of the plaintiffs having testified in chief to the payment of the duties and to the protest and appeal, but not as to what jute rejections were, or as to the contents of the protest, the defendant claimed upon cross-examination the right to examine him with a view of showing that jute rejections were a vegetable substance, within the eleventh section of the Tariff Act of July 14, 1862.

The plaintiffs objected, upon the ground that the witness had not testified in chief upon the subject inquired of; but the court overruled the objection, and permitted him to be examined as to whether jute rejections were a vegetable substance similar to the enumerated articles in the second clause of said sect. 11, what they were, and how jute was grown. To this ruling the plaintiffs excepted. The plaintiffs claiming that the vegetable substances not enumerated, named in said second clause, were limited to those used for cordage, offered to show that in 1862 jute, Sisal grass, sun hemp, and coir were so used, and that jute

rejections were not then, never have been, and cannot be, so used. This *profert* of evidence being objected to, was rejected by the court as immaterial, and the plaintiffs excepted. They asked the court to instruct the jury as follows: —

First, That sect. 15 of the act of March 2, 1861, and sect. 11 of the act of July 14, 1862, and the provision in schedule C, sect. 2504 of the Revised Statutes of the United States, must be construed together, and full effect be given to the words "used for cordage" as restrictive in the application of sect. 11 of the act of July 14, 1862, in the assessment of duties.

Second, That the words "used for cordage" by necessary implication of law are to be implied in sect. 11 of the act of July 14, 1862.

Third, That the provision in schedule C, sect. 2504 of the Revised Statutes of the United States, as follows, "vegetable substances used for cordage," was a legislative declaration, on the first day of December, 1873, that such was the state of the law, and it is necessarily a construction of sect. 11 of the act of July 14, 1862, in connection with sect. 15 of the act of March 2, 1861. It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions.

Fourth, If the jury shall find that commercially jute rejections were not used for cordage, then they were not liable to the duty imposed by the defendant under sect. 11 of the act of July 14, 1862, and their verdict must be for the plaintiffs.

The court declined so to instruct the jury; but instructed them that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in sect. 11 of the act of July 14, 1862. If they were, then the duty was properly assessed; if not, then their verdict must be for the plaintiffs. The jury returned a verdict for the defendant; and judgment having been rendered thereon, the plaintiffs sued out this writ of error.

Mr. Charles Levi Woodbury for the plaintiffs in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Five dollars per ton import duties were, by the act of the 14th of July, 1862, levied on jute, Sisal grass, sun hemp, coir, and other vegetable substances not enumerated, except flax, tow of flax, Russia and Manila hemp, and codilla or tow of hemp. 12 Stat. 554.

By the prior act, jute, Sisal grass, sun hemp, coir, and other vegetable substances, if not enumerated and used for cordage, were subject to a specific duty of ten dollars per ton. Jute butts paid five dollars per ton, and codilla or tow of hemp paid the same duty as non-enumerated vegetable substances used for cordage. Pages of the volume are filled with the enumerated list; but the twenty fourth section provides that all articles, raw and unmanufactured, not therein enumerated or otherwise taxed, shall pay a duty of ten per cent *ad valorem*. Id. 188, 196.

Products called jute rejections, to the amount of one hundred and twenty-five bales, were imported by the plaintiffs from Calcutta. Due entry of the importation for consumption was made by the importers, and the collector assessed an import duty on the goods of ten per cent *ad valorem* and a specific duty of five dollars per ton. Id. 196, 554.

Pursuant to the requirement of law in such cases, the plaintiffs filed a written protest, objecting to the levy of the specific duty, in which they claimed that the products imported should be classed as non-enumerated articles, raw and unmanufactured, and be subject to a duty of ten per cent *ad valorem* and no more; or, if regarded as partially manufactured, that the importation should be subjected to a duty of twenty per cent *ad valorem*, and no more.

Payment of the amount exacted was made by the plaintiffs to obtain possession of the goods, and redress being refused, the plaintiffs instituted the present suit to recover back the amount and lawful interest. Service was made; and, the defendant having appeared, the parties went to trial, and verdict and judgment were in favor of the defendant, and the plaintiffs excepted and sued out the present writ of error.

Six errors are assigned here, as follows: 1. That the court erred in permitting a witness for the plaintiffs to be cross-exam-

ined on a matter not within his testimony-in-chief. 2. That the court erred in refusing to permit the plaintiffs to introduce evidence to prove that jute rejections were not and could not be used for cordage, and that jute and the other vegetable substances mentioned in the act of Congress were used for that purpose. 3. That the court erred in permitting the defendant to introduce evidence to prove that jute rejections were one of the vegetable substances referred to in the act of Congress. 4. That the court erred in refusing each of the four prayers for instruction presented by the plaintiffs. 5. That the court erred in instructing the jury that it was for them to determine whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the articles enumerated in the eleventh section of the act, under which the importation was made. 6. That the court erred in not defining in what the required similarity would consist to bring the importation in question within the act of Congress.

Testimony was introduced by the plaintiffs to prove that they paid the duties, and they read the protest in evidence to show that they had complied with that condition precedent to a right to recover back the amount paid. Witnesses were called by them to prove payment and protest; and one of them having testified to the payment of the duties, and to the fact of protest and appeal, the defendant claimed the right to cross-examine him as to whether jute rejections were a vegetable substance similar to the articles enumerated in the second clause of the eleventh section of the Tariff Act, under which the duties were exacted. Objection was made by the plaintiffs; but the court overruled the objection and admitted the evidence. Exception was taken by the plaintiffs to the ruling of the court, and that exception constitutes the basis of the first assignment of error.

Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness,

or to lay the foundation to admit evidence of prior contradictory statements. Subject to those exceptions, the general rule is that if the party wishes to examine the witness as to other matters, he must in general do so by making him his own witness and calling him as such in the subsequent progress of the cause. *The Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 459; *Houghton* v. *Jones*, 1 Wall. 702, 706; 1 Greenl. Evid., sect. 445–447; 1 Whart. Evid., sect. 529.

It has been twice so ruled by this court, and is undoubtedly a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials; but it is equally well settled by the same authorities that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury. Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination-in-chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue.

Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance; and if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party. Nothing of the kind is shown or pretended in this case. Instead of that, it is conceded that the ruling of the court did not work any injury to the plaintiffs, and in that view the first assignment of error is overruled. *Jackson* v. *Litch*, 63 Pa. St. 451, 455.

Enough appears to show that the importation in this case was made under the tariff act temporarily increasing the duties on imports, which imposes a duty of five dollars per ton in addition to the duties theretofore imposed on the articles

therein enumerated, and other vegetable substances not enumerated, except flax, tow of flax, hemp of two descriptions, and codilla or tow of hemp. Products such as those imported, called jute rejections, it is admitted, are vegetable products, and that the article or product is not enumerated in that tariff act; but it is contended by the plaintiffs that the words "used for cordage," found in the fifteenth section of the former act, must be implied, to come in after the word "enumerated," as used in the said section of the antecedent act. Grant that, and it would follow that the plaintiffs must prevail, as the evidence shows that jute rejections are not used for cordage.

Hemp, under the prior act, unmanufactured, paid a duty of thirty-five dollars per ton, and Manila and other hemps of India paid a duty of fifteen dollars per ton. Jute, Sisal grass, sun hemp, and coir were enumerated articles in that tariff act, and they, with other vegetable substances not enumerated, if used for cordage, paid a duty of ten dollars per ton, and codilla or tow of hemp paid a duty of the same amount.

None of these suggestions are controverted, nor can it be controverted that jute, Sisal grass, sun hemp, coir, and other vegetable substances are required in terms by the new act increasing the duties on imports to pay five dollars per ton in addition to the duties previously imposed by law. All that is conceded; still the plaintiffs contend that the words "used for cordage," found in the prior act, should, by implication, be incorporated, as before explained, into the subsequent act increasing import duties; but the court is not able to adopt that construction of the new provision, for several reasons: 1. Because there is nothing in either act, or in the two when read together, to justify such a construction, or even to indicate that such was the intention of Congress. 2. Because nothing short of legislation would justify such a conclusion. 3. Because the exceptions contained in the new provision afford satisfactory proof that such was not the intention of Congress.

Attempt is made to support the theory of the plaintiffs by the fact that the words "used for cordage" are restored in the Revised Statutes; but the court is of the opinion that no aid can be drawn from that provision in favor of the views of the

plaintiffs, as it imposes a duty of fifteen dollars per ton on the articles named, including other vegetable substances not enumerated. Sect. 2504, sched. C, entitled Hemp, Jute, and Flax Goods.

Evidently the provision in the Revised Statutes referred to was borrowed from a later act, and cannot in any sense be regarded as a legislative construction of the clause in the tariff act under consideration. 16 Stat. 264.

Three of the prayers for instruction presented by the plaintiffs are covered by the preceding suggestions, and nothing need be added to show that they were properly rejected. Their fourth prayer was also rejected; but the court instructed the jury in its stead that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in sect. 11 of the act under which the same were imported, adding, that if they were, then the duty was properly assessed; that if they were not, then their verdict should be for the plaintiffs.

New products or articles of importation frequently appear, and hence it is that Congress finds it necessary to impose duties by some general designation, in order that non-enumerated articles may not escape from their just share of the public burden. Non-enumerated articles under the first act in question were subjected to a duty of ten per cent *ad valorem*, but the act increasing import duties included some of those articles in the enumerated list, and imposed on them a duty of five dollars per ton in addition to the duties previously imposed by the prior act. Appended to the class so enumerated in the clause of the second act under consideration was the phrase, "and other vegetable substances not enumerated," which were by the same clause made subject to the same additional specific duty.

Both the appraisers and the collector as well as the commissioner regarded the products imported as vegetable substances similar to the articles enumerated in the preceding part of the same clause; and if their theory is correct, then it was immaterial whether the jute rejections were or were not used for cordage, as those words, though incorporated into the corresponding clause in the prior act, were left out of the clause in the subsequent act increasing import duties.

It is the theory of the plaintiffs that the clause in the second act means the same thing as the clause in the antecedent act, but the Circuit Court held otherwise; and the court here fully concurs in the view of the Circuit Court, that the duties were properly assessed if the products imported were of a class of non-enumerated vegetable substances similar to the enumerated articles mentioned in the clause of sect. 11, which imposes the duty in question.

Plainly the question was one of fact; and the court is of the opinion that it was properly submitted to the jury in connection with the converse of the proposition, that if the products were not of that class, then their verdict should be for the plaintiffs.

Complaint is also made by the plaintiffs that when they offered evidence to show that jute rejections were never used for cordage, the court rejected the evidence as immaterial; but the court here is of the opinion that the ruling was correct, as it is clear that the words "used for cordage" is no part of the clause of sect. 11, under which the duties were assessed.

Dissatisfaction is expressed by the plaintiffs that the circuit judge did not give the jury some better standard to guide them in the performance of their duty; but it is not perceived that there is any just ground for that complaint, as he gave them the very criterion which the tariff act prescribes, — that if the importation was of an article non-enumerated and of a class of vegetable substances similar to the enumerated articles preceding that phrase in the same clause, then the duty was properly assessed, but, if not, then the plaintiffs were entitled to the verdict.

For these reasons the court is of the opinion that there is no error in the record.

Judgment affirmed.

SAVINGS BANK *v.* CRESWELL.

1. Where real estate bound by a judgment or a mortgage has been alienated in separate parcels to various persons at different times, such parcels should be subjected to the satisfaction of the lien in the inverse order of their alienation.
2. The English and the American authorities on the subject considered and reviewed.

APPEAL from the Supreme Court of the District of Columbia.

On June 20, 1870, the firm of S. P. Brown & Son made to Samuel P. Brown its promissory note for $10,000, payable to his order one year thereafter, which he duly indorsed to the Freedman's Saving and Trust Company. To secure its payment, he executed to Daniel L. Eaton, the actuary of the company, a deed of trust for certain lots of ground in Mount Pleasant, in the District of Columbia. Default having been made in the payment of the note, the trustee sold the property Oct. 12, 1872, and conveyed it to the company.

On March 3, 1870, John M. Jolly obtained in the court below a judgment against Samuel P. Brown. At various times in 1873 the company, for a valuable consideration, sold and conveyed a portion of said lots to different purchasers, giving to each its bond to save him harmless against said judgment. It still holds the remaining lots.

Some time about December, 1870, the National Savings Bank of the District of Columbia loaned to said Brown, or to said firm, moneys, to secure the payment of which he executed deeds of trust upon a number of other lots in Mount Pleasant. The moneys remaining unpaid, the bank, to protect its security against said judgment, purchased the same from Jolly, and, in July, 1874, issued an execution thereon, and caused it to be levied on the lots embraced by the trust-deed to Eaton.

This bill against the Savings Bank was filed by John A. J. Creswell, Robert Purvis, and Robert H. T. Leipold, the commissioners of the Freedman's Savings and Trust Company. It alleges that said promissory note remains unpaid, except so

far as it has been reduced by the application of the proceeds of the lots so sold by the company, and that the latter is willing to pay its *pro rata* share to relieve from the lien of said judgment them and the remaining lots conveyed by Eaton, if it is in law or in equity bound so to contribute. It prays for an injunction restraining the Savings Bank and the marshal for said district, who was made a defendant, from selling said lots under said execution, and for general relief. By an amended bill, the purchasers from the company were made defendants. The National Savings Bank set up among other things in its answer that Brown, at the time of the rendition of said judgment, owned a considerable amount of property subject to the lien of said judgment other than that described in the complainants' bill, which property having been conveyed by him subsequently to his conveyances in trust to secure his debt to the defendant, the purchasers thereof are necessary parties in order to charge them with a *pro rata* share of said judgment.

The remaining facts are stated in the opinion of the court.

The special term decreed that the complainants were entitled to have all the real estate belonging to said Samuel P. Brown on the twentieth day of June, 1870, bound by the judgment at law in favor of John M. Jolly, sold in the inverse order of its alienation by said Brown, including that conveyed by him for the security of the National Savings Bank, before the lands conveyed for the security of the Freedman's Savings and Trust Company can be called upon to contribute to the payment of any part of said judgment. The defendants were also enjoined from in any wise interfering with any of said property for the purpose of collecting or satisfying the said judgment, or any part of it, until all the other real estate belonging to said Brown on said twentieth day of June, bound by said judgment, shall have been sold, and the proceeds applied to the payment thereof.

That decree having been affirmed by the Supreme Court of the District of Columbia at its general term, the National Savings Bank appealed to this court.

Mr. James M. Johnston for the appellant.

The rule that where several parcels of land, bound by a com

mon charge, are conveyed by warranty deed to different purchasers and at different times, such parcels are charged with the paramount lien in the inverse order of their alienation, provided the junior purchasers have notice of the lien and of the prior conveyances of portions of the land bound by it, had never, previously to the decree in this case, been adopted by the Supreme Court of the District of Columbia.

On the contrary, this court, in *Hughes* v. *Edwards* (9 Wheat. 489), recognizes the opposing rule that, in marshalling real securities bound by a common charge, each piece of the incumbered property shall bear its share of the burden, in the proportion which the value of such parcel bears to the whole incumbrance, and irrespective of the order in which the several parcels may have been conveyed. That case constitutes a rule of property in the District of Columbia, and is conclusive in the case at bar.

The propriety of charging the paramount incumbrance on the parcels of land in the inverse order of their alienation was considered in *Orvis* v. *Powell* (98 U. S. 176), but there the court only followed the local rule in force in Illinois.

The authorities are not harmonious. In the following cases, what is known as the *pro rata* rule has been adopted and acted upon. *Barnes* v. *Rackster*, 1 Y. & Col. N. R. 401; 1 Hilliard, Mort. 310 (citing Bacon's Abr., title Execution, B. 4; *Carter* v. *Bernardiston*, 2 Eq. Cas. Abr. 224; *Sir W. Herbert's Case*, 3 Cox, 14; *Harris* v. *Ingleden*, 3 P. W. 98, 99); *Averall* v. *Wade*, 2 Llo. & Goo. 252; Story, Equity, sects. 477, 484, 1233 *b*; Adams, Equity, 270 (citing 2 Porter, 262; 2 Rand. 384; 4 id. 272; 3 J. J. Marsh. 44; 4 Monr. 76; 2 Ed. C. R. 297); *Green* v. *Ramage*, 18 Ohio, 429; *Burke* v. *Chrisman*, 3 B. Mon. (Ky.) 50; *Dickey* v. *Thompson*, 8 id. 313; *Beverly* v. *Brooke*, 2 Leigh (Va.), 425; 2 Humph. (Tenn.) 34; *Massie* v. *Wilson*, 16 Iowa, 391; *Barney* v. *Myers*, 28 id. 472.

If the *pro rata* distribution of the common charge is the proper mode, the decree below, directing the property to be sold in the inverse order of its alienation by Brown, is certainly erroneous.

If this was the only error in the decree, it might be modified by directing the judgment to be paid *pro rata* from the several

parcels of land mentioned in the bill. The appellant set up in its answer, however, that the owners of the other property, formerly owned by Brown, are necessary parties, inasmuch as their property must bear its share of the common burden. No amendment to that effect having been made, the bill should be now dismissed. *Shields* v. *Barrow*, 17 How. 130.

The bill is defective in that it fails to allege that the appellant, when the conveyance under which it claims was made by Brown, had actual knowledge or constructive notice of the prior conveyance to the company of some of the lots on which the judgment was a lien.

If a vendee should purchase one of several lots, known by him to be bound by a common charge, he, until otherwise informed from some source, has a right to presume that the remainder of the property is still vested in his vendor; and to infer that the lot so purchased is the last to be seized to satisfy the charge. *Brown* v. *Simmons*, 44 N. H. 475, 479; *Chase* v. *Woodbury*, 6 Cush. (Mass.) 143; 2 W. & T. Lead. Cas. in Eq., pt. 1, p. 298.

Hence, in order to call into existence the equity appealed to by the complainants, it must appear that the junior vendee had notice of the paramount lien and prior conveyance. *Startey* v. *Stocks*, 1 Dev. (N. C.) Eq. 314; *Lock* v. *Fulford*, 52 Ill. 166; *Iglehart* v. *Crane*, 42 id. 261, 266; *Insurance Company* v. *Bell*, 22 Barb. (N. Y.) 56, 57, 63; *Green* v. *Ramage*, 18 Ohio, 428; *Reilly* v. *Mayer*, 12 N. J. Eq. 56–60; *Mechanics' Association* v. *Conover*, 14 id. 225; *Orvis* v. *Newell*, 17 Conn. 100; *Brown* v. *Simmons*, *supra*; *Chase* v. *Woodbury*, *supra*.

Indeed, to hold that a purchaser of real estate is to be prejudiced by a mere equity, not known to him from the land records or from any other source, would be entirely opposed to the spirit of our registry laws.

The bill of complaint contains no allegation that the deed from Brown to secure the loan made by the Freedman's Savings and Trust Company was ever recorded.

However the truth may be, evidence to establish the fact of record would not be admissible, since the proofs must be confined to the allegations. *Simms* v. *Guthrie*, 9 Cranch, 25 *Boone* v. *Chiles*, 10 Pet. 209.

It is true that the original deed is filed as an exhibit with the bill of complaint, but it is not, for that reason, a part of the latter, nor can its contents be treated as a portion of the averments of the complainants. *Terry* v. *Jones*, 44 Miss. 542; *Strathan* v. *Insurance Company*, 45 id. 600; *Caton* v. *Willis*, 5 Ired. (N. C.) Eq. 335.

Even if it were competent to refer to that deed for the purpose of supplying allegations which are wanting in the bill itself, there is nothing on its face to indicate that it was ever recorded, much less that it was of record when the appellant loaned its money on the faith of Brown's title to the land taken as security. The title of a *bona fide* purchaser for valuable considerations is not to be affected by loose, vague, and uncertain evidence of the existence of the prior title. If a former owner neglects to record his title, every presumption is to be made in favor of a subsequent purchaser. *Boggs* v. *Varner*, 6 Watts & S. (Pa.) 469.

But it is maintained that, even if that deed had been recorded, the appellant would not thereby be charged with constructive notice. The record does not show that Brown's title to the lots which the company subsequently owned was acquired by the deed or conveyance which passed the title to those he conveyed to secure the appellant. So far as the record shows, the parcels of ground came to Brown by different chains of title. But the appellant is not charged with constructive notice of any conveyance by Brown, unless it be in the chain of its title. *Green* v. *Ramage*, 18 Ohio, 429; *Boggs* v. *Varner*, 6 Watts & S. (Pa.) 469; *Guion* v. *Knapp*, 6 Paige, Ch. 42; *Chase* v. *Woodbury*, 6 Cush. (Mass.) 143; *Hamilton* v. *Royse*, 2 Sch. & Lef. 326.

Those courts which favor the rule that charges the lien on the several parcels of land in the inverse order of their alienation, rest their argument on the fact that the purchaser paid full consideration for the title, and received a general warranty deed. *Bradley* v. *George*, 2 Allen (Mass.), 392; *Wallace* v. *Stevens*, 64 Me. 225.

But a beneficiary, under a deed of trust, does not occupy this position, for he does not pretend to pay a full price for the property, and the trustee only receives a conveyance of

the grantor's then interest in the land. Such a deed only operates by way of estoppel against the grantor, and does not profess to pass an absolutely perfect title, and for full value. In such cases the *pro rata* rule has been held to apply, even if, in the same jurisdiction, the opposite rule would hold in cases of warranty deeds. *Ely* v. *Perrine*, 2 N. J. Eq. 396; *Pancoast* v. *Duval*, 26 id. 445.

He who seeks to enforce an equitable right, especially if he appeals to the chancellor to grant him a mere benevolence, must allege in his bill all the facts necessary to make out his title to relief, and must show affirmatively that it would be equitable, in relation to all the parties, to afford him the relief asked. Cases *supra*; *Tomlinson* v. *McKaig*, 5 Gill (Md.), 276; *Orvis* v. *Newell*, 17 Conn. 100; *Ridgway* v. *Toram*, 2 Md. Ch. 308; *Dorr* v. *Shaw*, 4 Johns. Ch. 17; *Sterling* v. *Brightbill*, 5 Watts, 229, 231–233.

If the equities of the case are considered, complainants are not entitled to the relief which they seek, not having brought themselves fully within the rule on which they rely.

Both the complainants and the appellant are charged with constructive notice of the judgment lien, if either is. In this respect their claims are equally meritorious, for each purchased under a misapprehension of facts. The contracts were of the same character and for the same purpose, and the appellant had no notice of the conveyance now set up by the complainants.

But when the bill was filed in this cause the appellant had already seized, by an execution issued on the paramount judgment, a portion of the property now claimed by complainant.

Where the equities are balanced, the legal course of an execution is not to be disturbed. *Miller* v. *Jacobs*, 3 Watts (Pa.), 437. It is well settled that where parties have an equal claim to the consideration of the chancellor, the law will be allowed to take its course. *Zeigler* v. *Louk*, 2 id. 206; *Erbs's Appeal*, 2 Pearson & Watts, 296; *McGinnis's Appeal*, 16 Pa. St. 445; *Wallace's Estate*, 59 id. 401; *Withers* v. *Carter*, 4 Gratt. (Va.) 407.

Inasmuch, therefore, as the complainants have not alleged

nor established the necessary jurisdictional facts, nor brought themselves within the rule of which they claim the benefit, nor established any equity which is so far superior to appellant's as to justify the court in interfering with a legal execution, the bill should be dismissed.

It is submitted that, even if the court below had the power to grant the complainants any portion of the relief prayed, it erred in the extent of that relief; for the complainants show no title to the land conveyed to the appellant before filing the bill, and the appellant asks no relief whatever.

Mr. Enoch Totten, *contra.*

The question arising in the case is, whether or not the judgment now owned and held by the National Savings Bank can be collected out of the property conveyed to the Freedman's Savings and Trust Company, until all the other property bound by the judgment and owned by Brown at the date of the sale to the company shall have been first sold and the proceeds applied to the payment of the judgment.

The lots bound by this judgment, and subsequently mortgaged or sold by Brown at different times to different persons, are chargeable in the inverse order of their alienation; that is to say, the parcels last sold are to be charged to their full value, and then go backwards until the judgment shall have been fully paid.

This doctrine is now fully established in this country. It was firmly settled in *Clowes* v. *Dickinson*, 5 Johns. (N. Y.) Ch. 285; s. c. 9 Cow. (N. Y.) 403. See also *Gill* v. *Lyon*, 1 Johns. (N. Y.) Ch. 447; *Sturtevant* v. *Hall*, 2 Barb. (N. Y.) Ch. 151. It has been followed in nearly all the States in the Union where the question has arisen. *Shannon* v. *Marselis*, Sax. (N. J.) 413; *Shepherd* v. *Adams*, 32 Me. 63; *Holden* v. *Pike*, 24 id. 427; *Cushing* v. *Ayre*, 25 id. 383; *Com. Bank* v. *Western Res. Bank*, 11 Ohio, 444; *Cummings* v. *Cummings*, 3 Ga. 460; *Pallen* v. *Agricultural Bank*, 1 Freem. (Miss.) Ch. 419; s. c. 8 Smed. & M. 357; *Gist* v. *Pressley*, 2 Hill (S. C.), Ch. 318; *Stoney* v. *Shultz*, 1 id. 500; *Bank* v. *Howard*, 1 Strobh. (S. C.) 173; *Wright* v. *Atkinson*, 3 Sneed (Tenn.), 585; *Conrad* v. *Harrison*, 3 Leigh (Va.), 532; *Lyman* v. *Lyman*, 32 Vt. 79. See also 2 Lead. Cas. in Eq.

(Am. notes) 237; *Cary* v. *Folsom*, 14 Ohio, 365; *Gates* v. *Adams*, 24 Vt. 70; *Watson* v. *Barr*, 7 Md. 117; *Hamilton* v. *Schwehr*, 34 id. 107; *Titus* v. *State*, 17 Wis. 248; *Wynn* v. *Carter*, 20 id. 107; *Hurd* v. *Eaton*, 22 Ill. 122; *Orvis* v. *Powell*, 98 U. S. 176. For a list of cases and remarks on this doctrine see 2 Lead. Cas. in Eq. (1877), pt. 1, p. 291.

Mr. Justice Story, in his learned work on Equity Jurisprudence, inclines to doubt the justice of the doctrine as established in America, and seems to prefer the doctrine which charges the original incumbrance ratably upon the land of subsequent purchasers. He says the doctrine has been so "asserted in the ancient as well as the modern English cases on the subject." 2 Story, Eq., sect. 1233 *b*. He cites *Averall* v. *Wade* (11 Eng. Ch. 252), as an authority sustaining this view. Upon an examination of that case it will be found that it sanctions the American rule as above laid down. *Hamilton* v. *Royse* (2 Sch. & Lef. 315) is to the same effect. See *Cowden's Estate*, 1 Pa. St. 267.

Where an individual, owning two or more pieces of land bound by a personal judgment against him, sells a part of them, it is well settled as a rule of equity that the part retained shall be primarily chargeable with the debt. 2 Story, Eq., *supra*. It is clearly right and just, that on his alienation of a part the remainder should become immediately burdened with the entire debt. He cannot escape from the rule, and, in order to pay the judgment, enforce contribution against his vendee. This is conceded in all the cases. How, then, can he sell to a third person a privilege or right which he himself does not possess? The second purchaser "sits in the seat of his vendor," has precisely the same rights, and incurs the same obligations. *Clowes* v. *Dickinson*, *supra*. The judgment was notice to the world, and every purchaser or mortgagee was bound to ascertain what lands the debtor had alienated subsequently to its rendition. Every conveyance by Brown of land bound by the judgment directly and materially affected the lots whereof he retained the ownership, by releasing from the lien the parcels so conveyed, and transferring a corresponding additional burden to the remainder of them.

The deed of trust was in effect a mortgage, and every subsequent mortgagee was bound to take notice of its registration in the proper office. *Lyman* v. *Lyman*, 32 Vt. 81.

A judgment of the Supreme Court of the District of Columbia binds the defendant's lands. *Tayloe* v. *Thompson's Lessee*, 5 Pet. 358.

MR. JUSTICE MILLER delivered the opinion of the court.

Samuel P. Brown, being seised in fee of a large number of lots constituting the subdivision of a tract of land into the town of Mount Pleasant, had a judgment rendered against him, March 3, 1870, in favor of one Jolly, for the sum of $4,694.05, in the Supreme Court of the District of Columbia, and the lots being within the District, the judgment became from that day a lien on them. On the twentieth day of June of that year, Mr. Brown borrowed of the Freedman's Savings and Trust Company the sum of $10,000, and executed to Daniel L. Eaton a deed of trust conveying a part of the lots owned by him in Mount Pleasant as security for the repayment of the loan. Under this deed of trust the lots were sold and bought in for the Freedman's Bank, and they have resold several of them and guaranteed the title to the purchasers.

A few months after the execution of the deed of trust above mentioned by Brown, he began to borrow money from the National Savings Bank, the appellant in this case, and gave deeds of trust on other lots in the same subdivision to secure the payment of these loans. In July, 1874, the National Savings Bank, fearing the loss of their security by the judgment against Brown of March 3, 1870, purchased that judgment, and ordered an execution to be issued on it, which was levied on the lots conveyed to Eaton for the benefit of the Freedman's Bank. That bank having passed into the control of Creswell and others, as commissioners appointed to wind up its affairs, they brought the present bill in chancery to release those lots from sale under that execution.

The court granted such relief as is authorized by the principle that where real estate is subjected to a lien in the hands of its owner, and he sells or mortgages separate parcels of that property subsequently to different persons, and at different

times, these parcels shall be subjected to payment of the lien in the inverse order of their alienation.

The facts show that the conveyances to secure the savings bank were made subsequently to that made to secure the Freedman's Bank, and if the rule we have mentioned be a sound one, and there be no special reason to exempt this case from its operation, the Freedman's Bank was entitled to have the lots conveyed to the savings bank applied to the extent of their value in payment of the judgment, before their lots could be subjected to that payment.

There are one or two matters relied on by appellant to take this case out of the rule.

1. It is said that appellant had no actual notice of the deed of trust to Eaton when it took its mortgages, and a large part of the argument of counsel is devoted to this subject. But it does not appear that appellant in its answer set up the defence of a *bona fide* purchaser without notice, nor that any such question was raised in the court below. The main foundation of the suggestion, however, namely, that there is no evidence that the deed to Eaton was recorded, which appeared to be so by the transcript, is removed by the production of the original deed, having on it the certificate of the register of deeds, that it was properly recorded. This removes the foundation of the argument, and it must fail.

Another objection is that the appellant sets out in its answer that other persons had bought lots of Brown, after the rendition of the judgment, and were proper parties to this suit, and that as the complainants failed to bring them before the court, the decree in their favor is erroneous, and must be reversed for that reason.

But while the answer says that, as the appellant is informed and believes, there was a considerable amount of other property than that described in the bill, owned by said Brown, and subject to the lien of the judgment, which was sold and conveyed by him after his conveyance to secure the debt of the appellant, it does not describe the property or name the purchasers or fix the date of their purchases.

As the purchases are said to be subsequent to the creation of appellant's lien, it was the interest of appellant to set out the

facts necessary to enable the complainants to bring them before the court. Nothing in the decree as rendered prevents defendant from selling these lots under his execution. The complainants, therefore, were not bound to hunt up the parties and the transactions to which appellant merely alludes in such vague and indefinite terms.

Lastly, the appellant argues that the subjection of the property covered by the lien of the judgment to its satisfaction, in the inverse order of its alienation, is not the prevailing rule in courts of equity, nor the rule of property in the District of Columbia.

Though the attention of counsel was directed during the argument to the production of any authoritative decision of the courts of the District or of Maryland which would be conclusive of the question, none could be found, after several days' opportunity for examination. The decree before us must rest on the general equity doctrine, if it be sustained at all.

The question is also a new one in this court, for *Orvis* v. *Powell* (98 U. S. 176) was decided on the ground that the principle having become a rule of property in Illinois, would be followed by us in reference to lands in that State. And *Hughes* v. *Edwards* (9 Wheat. 490) does not raise the question before us now, much less decide it. That was merely a question whether improvements constructed on the land after the execution of the mortgage became subject to its operation.

The proposition we are called on to consider is one on which the authorities, though numerous, are by no means in harmony. Mr. Justice Story, in his work on Equity (vol. ii. sect. 1233 *b*), approves the rule, so far as any of the property subject to the lien remains in the hands of the party against whom the lien was first established, but he says there is great reason to doubt whether it can be applied as between subsequent purchasers from that party, when it has been alienated at different times and to several persons. "On the contrary," he says, in such case "there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates. And so the doc-

trine has been asserted in the ancient as well as the modern English cases on the subject."

The older cases cited for this proposition scarcely sustain it. In *Sir William Herbert's Case* (3 Coke, 11), it was resolved that "if A. be seised of three acres, and acknowledge a recognizance or statute, and enfeoff B. of one acre, and C. of another acre, and the third descends to his heir, and if execution be sued out against the heir he shall not have contribution against the purchasers, for the heir sits in the seat of his ancestor." Among them is also *Lanoy* v. *The Duke and Duchess of Athol* (2 Atk. 444), in which Lord Hardwicke says: "Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates *descended* to two different persons." This seems to be a pretty clear statement of the rule adopted in many of the States of the Union at the present day, though based rather upon the principle applicable to marshalling assets, that he who has a right to resort to two funds, in one of which alone another party has a subsidiary lien, shall be compelled to exhaust the one to which the other cannot resort before coming upon the one in which they both have an interest, than on the ground now relied on in the courts of this country.

That ground is that the first purchaser has a right to suppose that the part of the mortgaged property which he leaves with the mortgagor will in his hands be first subjected to the payment of the mortgage he has made. To this Judge Story assents. But the principle goes further, and holds that when a second purchaser from the mortgagor buys either all or a part of the incumbered property which remains, he cannot place himself in a better position than his grantor, and revive the burden on the first purchaser's land, from which it had been wholly or partially relieved by its primary pressure on the land left by him in the hands of the mortgagor.

No very clear decision of the question seems to have been

rendered in the English courts on the subject, though occasionally alluded to, until the case of *Averill* v. *Wade*, decided in the Irish Chancery by Lord Chancellor Sugden in 1835, whose great authority in all that concerned titles to real estate will not be disputed. Looking to the question as governed by the doctrine of marshalling assets, he appears to decide against its application in cases like the one now before us, and refers to an opinion of Lord Eldon in 8 Vesey, 382, in which, while this point was not directly in issue, the argument of that eminent chancellor leaned that way.

But while these latter are authorities of great weight, it is to be remembered that they were made long after the time to which this court has looked to the English chancery practice as governing ours, while the case of Sir William Herbert, and Lord Hardwicke's decision, were before; and that the English courts have not considered, as far as we know, the principle on which the rule is based in this country.

That principle was stated by Chancellor Kent, with his usual force and clearness, in 1821, in *Clowes* v. *Dickenson* (5 Johns. (N. Y.) Ch. 235), which has become the leading case on the subject in this country.

After referring to the case of Sir William Herbert, he says: "This case settles the question as between the vendor and purchaser, or the heirs of the vendor and the purchaser; and if there be several purchasers in succession, at different times, I apprehend in that case also there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable in the first instance with the debt as against B., as well as against A., and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency in preference to the acre sold to A.; because, when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him as it is

said of the heir, *he sits in the seat of his grantor*, and must take it with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land to throw the burden of the judgment or a ratable part of it back upon A." The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion.

We may, as an additional reason, suggest a principle often called into action in recent times in the courts; namely, that where one of two innocent persons must suffer a loss, it should fall on him who by reasonable diligence or care could have protected himself, rather than on him who could not. In the case supposed, the second purchaser, at the time of his purchase, knowing that the land which he buys is subject to the incumbrance before that already sold, can exact of the vendor security or protection against the incumbrance, which it is out of the power of the first vendor to do at the time his risk is increased by the very act of the second purchaser.

Since the decision in the case of *Clowes* v. *Dickenson*, the doctrine there announced has been followed by much the larger number of courts of the different States, though there are a few of very high authority which have held that as between vendees of land subject to a prior incumbrance, equality is justice, and the debt shall bear equally upon all the parcels originally subject to it, in proportion to their values.

The cases are collected in the briefs of counsel on both sides in this case, to which reference is here made as they will be given by the reporter, and in Leading Cases in Equity, vol. ii. part 1, p. 291, edition of 1877.

We are of opinion that the preponderance of authority as shown by judicial decisions, as well as the weight of sound argument, is in favor of the rule laid down by Chancellor Kent, and the decree in this case is accordingly

Affirmed.

RAILROAD COMPANY *v.* SCHUTTE.

1. A *supersedeas* will be vacated when the approval of the bond therefor was obtained by fraud and perjury.
2. If it appears that the appellant had knowledge of such fraud and perjury, a new bond will not be accepted.
3. The record in this case not being complete or properly certified, the court orders that unless appellant causes the omissions to be supplied on or before a specified day, the appeal be dismissed.

MOTION to vacate the *supersedeas*, and dismiss an appeal from the Circuit Court of the United States for the Northern District of Florida.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter and *Mr. Wayne MacVeagh* in support of the motion.

Mr. Philip Phillips and *Mr. William A. Maury*, *contra.*

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

In this case the appellees have moved, —

1. To vacate the *supersedeas*, because the approval of the *supersedeas* bond by the justice of this court, who allowed the appeal, was obtained by fraud and perjury; and,

2. To dismiss the appeal, because the transcript of the record which has been filed in this court is not complete, and is not properly certified.

The appellants also have moved for leave to file a new bond in case the old one shall be set aside.

1. As to the vacation of the *supersedeas.*

That the approval of the bond was brought about by gross fraud and perjury is so conclusively shown that no attempt has been made to deny it. The evidence also shows with equal certainty that the bond was obtained in the most irregular way. A lawyer who, to say the least, was an entire stranger to all the parties in interest, was employed to procure, within thirty-six or forty-eight hours, sureties for the appellants sufficient to secure the payment of $100,000. He was to be paid for his services six bonds of $1,000 each of the Florida Central Railroad Com-

pany, the appellant corporation, which were then of no marketable value. In due time he produced the requisite number of persons to sign as sureties. When they came, the "usual form of justification of about four lines in length" was "ignored," and a full affidavit was drawn for each surety, wherein was set forth "the name and residence of the surety, the amount of real estate, its location, its value, whether or not incumbered, if so, to what amount; next, the amount of his personal property, its character, whether or not incumbered, and if so, to what amount; next, whether or not the surety was upon any other bond; next, whether or not there were any judgments against the surety; and finally summing up that he owned so much over all his debts and liabilities, naming the sum. Each of these questions each surety answered favorably, and swore to. The justifications were extraordinary in their minuteness, as the affidavits will show."

This being done, a bond sufficient in form was signed by the "procured" sureties. One of the persons who signed, said to be a "very wealthy man," was paid $125 for what he did. Another, "the son of a former judge of the Supreme Court of the State of New York," received $12.50; another, a colored porter in a lawyer's office, $10; another was paid $10; and another was promised $50, but actually paid nothing. They were all irresponsible pecuniarily, and known to or suspected by the police of the city of New York as "purchasable sureties." The money to pay them for their fraudulent work was furnished by an agent of the appellant company under the form of buying back one of the worthless bonds promised as a reward for what was done.

After the bond was executed by the sureties thus obtained, the president of the appellant corporation was called in. He signed officially the name of the corporation, and affixed the corporate seal, but did not see, or ask to see, any of the persons who had become bound with his company. Neither he nor any other person actually interested in the litigation became in any manner personally bound.

With such a bond, procured in such a way, the president of the corporation presented himself at the last moment to the justice of this court, who heard the cause in the Circuit Court at

his summer residence in Vermont, and asked that the bond be approved. On its presentation, as we are informed by the testimony of the president himself, the justice read and seemed to be impressed "with the fulness and particularity of the justifications." He said, "This seems to be a good bond." The reply was, "Yes, Judge, I believe it to be a very good bond." The justice then asked as to one of the parties whose name appeared, and the reply was, "I am informed that he is the son of a former judge of the Supreme Court of the State of New York of that name," adding that another of the signers, "I am advised, is a very wealthy man."

Under these circumstances, the bond was approved. To allow it to stand and to operate as a stay of execution upon an important decree until the case can be reached in its order on our crowded docket, would be a reproach upon the administration of justice. We are aware that in *Jerome* v. *McCarter* (21 Wall. 17) we said, "That, upon facts existing at the time the security was accepted, the action of the justice, within the statute and within the rules of practice adopted for his guidance, is final," and that we would "presume that when he acted, every fact was presented to him that could have been." We are not inclined to depart from that rule, but, in a case of this kind, fraud is always open to inquiry. When discovered, justice requires that summary relief should be afforded, whenever and wherever it may be done consistently with the forms of orderly judicial procedure. This bond is as much false as if it had been forged. The persons who signed it are not in fact what they were represented to be. We have no hesitation in setting aside the approval of the bond.

2. As to the acceptance of a new bond in the place of the old one.

This application is addressed to our judicial discretion, and is based on the alleged ignorance of the officers and agents of the appellant corporation as to the character of the bond they got accepted. They insist in the most positive manner that they were deceived, and that they actually believed the security they offered was ample. The character of the president is vouched for under oath by many persons occupying high positions in public and private life, and they all say "they do not

believe he would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States, or any justice thereof, a fraudulent or worthless bond;" but the fact still remains that he did present such a bond, and if he was ignorant of the wrong that was being done, the other agents of the company were not. Taking the whole case together, we think it quite as incumbent on us to refuse to accept a new bond as it is to set aside the old one.

The motion to vacate the *supersedeas* is granted.

3. As to dismissing the appeal.

The evidence shows that after the bond was accepted the president of the railroad company went with his own copyists to the office of the clerk of the Circuit Court, and in the absence of the principal clerk selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript. This being done, he caused a certificate to be added, signed in the name of the clerk by a deputy, and sealed with the seal of the court, to the effect that the transcript annexed contained copies of such entries, papers, and proofs as were "necessary on the hearing of the appeal prayed and allowed in the said cause." It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed.

While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court. We therefore order, —

That the appellees file with the clerk of this court, and with the counsel for the appellant, on or before the first day of February next, a statement of the papers, documents, and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause, and that unless the appellant shall, on or before the fifteenth day of March, file in this court as part of

the record copies of such papers, duly certified by the clerk of the Circuit Court or his deputy, under the seal of the court, this appeal be dismissed.

If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper.

IMPROVEMENT COMPANY *v.* SLACK.

The "Argilite Mining and Manufacturing Company" was incorporated by an act of the General Assembly of Kentucky passed March 4, 1865. Its name, by an amendment to the charter, was changed to the "Kentucky Improvement Company," and it was authorized to "construct one or more rail tracks from any lands owned or improved by said corporation to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said track or tracks, and to draw cars over the same by suitable motive power." For the "construction and convenient and proper use and maintenance of such railroads" the company was authorized to condemn and appropriate the necessary lands and materials. Pursuant to said authority, the company built and equipped a railroad, and on Aug. 15, 1866, issued in payment therefor its six per cent coupon bonds to the amount of $500,000, secured by mortgage on its landed property and improvements. The road was finished in June, 1868, and thereafter the company transported over it its own freight, officers, and agents, and in addition thereto, though not in terms so authorized by the charter, from time to time other passengers and freight for hire. *Held*, that the company was, within the meaning of the ninth section of the act of July 13, 1866 (14 Stat. 138), a railroad company, and as such, for the year 1870, liable to the tax of five per cent on coupons thereby imposed.

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

This was an action brought by the Kentucky Improvement Company against Charles W. Slack, collector of internal revenue for the third collection district of Massachusetts, to recover the amount of certain internal-revenue taxes which, it was alleged, had been erroneously and illegally assessed and collected.

The case was submitted to the court below upon the following agreed statement of facts: —

"After an appeal duly made to the Commissioner of Internal Revenue (April 29, 1873), this suit was brought against

the collector to recover the sum of $750, paid to him May 24, 1870, being a tax of five per cent assessed upon coupons to the amount of $15,000, payable Feb. 15, 1870, on bonds of said company to the amount of $500,000, dated Aug. 15, 1866, and bearing interest at the rate of six per cent, payable semi-annually.

"The company was originally organized under an act of the General Assembly of the Commonwealth of Kentucky, approved March 4, 1865, by the name of the 'Argilite Mining and Manufacturing Company,' which act provided as follows: —

"'SECT. 2. The objects and purposes of the incorporation of said company shall be the mining for coal, iron ore, petroleum, carbon, or rock oil, and any and all other minerals or mineral substances, or the direct products of the earth, or any or all of them, and the manufacture and refining of any or all of them, and transportation to market of the same; the location and field of mining and manufacture of said company shall be in Greenup, or any of its adjoining counties.'

"'SECT. 7. Said company shall have the power, and may, if they choose so to do, lock and dam Little Sandy River up to their mines and property: *Provided*, for the condemnation of lands and property for said purpose the proceedings shall be had as is now provided by law for the condemnation of mill sites.

"'SECT. 8. Said company shall have the power to take, acquire, and hold such lands, mines, and mining rights as they may deem necessary for the uses of said company, and all such personal property, machinery, boats, flats, &c., as may be necessary, and to dispose of, for the use of the company and the stockholders, any or all of the same.'

"It was enacted by an act of the said General Assembly, approved December 14, as follows: —

"'SECT. 1. That the name of the "Argilite Mining and Manufacturing Company" is hereby changed, and said corporation shall hereafter be known and styled the "Kentucky Improvement Company."'

"'SECT. 4. The said corporation is hereby authorized to construct one or more rail tracks from any lands owned or improved by said corporation to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said track or tracks, and to draw cars over the same by

suitable motive power. The company is hereby authorized to condemn and appropriate such lands and materials as may be necessary for the construction and convenient and proper use and maintenance of such railroads: *Provided*, that for the condemnation of the lands and materials for such purpose the same proceedings shall be had as are now required by law for the condemnation of lands and materials for turnpikes and plank-roads: *Provided, further*, that the land condemned for any railroad track shall not exceed in width one hundred feet.

"'SECT. 5. That, in order to carry out to the fullest extent the purposes and objects of said act of incorporation, the said company is authorized to sell all minerals, mineral substances, products of the earth, and all other articles of commerce and manufacture lawfully possessed by them, and to buy and sell all such articles of merchandise as may be required to carry out the objects of their charter, and to establish agencies in any part of the United States, for the prosecution of the traffic hereby authorized.

"'SECT. 6. That, should said company lock and dam the Little Sandy River, they shall build two bridges over said river sufficient for the public travel, one of the bridges to be at the crossing of the Greenupsburg and Raccoon Furnace Road, and the other at the crossing of the Greenupsburg and Grayson Road, at or near the Argilite Mills.

"The Kentucky Improvement Company was duly organized under the acts aforesaid, and commenced and continued operations thereunder until it ceased to exist, about March 1, 1870.

"At an adjourned meeting of the shareholders of said company, held on the 24th of July, 1866, it was resolved, —

"'1st, To authorize the building of a railroad and to provide locomotives, cars, and other facilities for the transportation of coal and other productions to market for the canal openings near Hunnewell Furnace to Hockaday's Landing, on the Ohio River.

"'2d, That a sum not exceeding $500,000 be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the company's property.

"'3d, That the president and board of directors of this company be, and they hereby are, authorized and empowered to issue bonds to the amount of $500,000, . . . secured by an indenture of mortgage on all their present landed property and improvements . . . bearing six per cent interest, the interest payable semi-annually.'

"In pursuance of the above vote, an issue of bonds was made to the amount and bearing the interest named, and of date Aug. 15, 1866, and was secured by a mortgage to trustees of even date of the then landed property and improvements of said company, and the coupons taxed in this case were a part of the coupons attached thereto.

"The whole issue was duly subscribed for and delivered to the subscribers. The road was finished and opened for the business of the company about the 1st of June, 1868.

"In addition to its own freight and its own officers and servants, the company transported over its road from time to time for hire other passengers and freight, but there was no provision in its charter in terms authorizing it to convey freight or passengers other than its own.

"The receipts of the company were as follows: —

	OTHER THAN COMPANY.		Company's iron freight.
	Passenger receipts.	Freight receipts.	
1868.			
July	$68.50	$96.40	$815.95
August	133.75	63.13	1,183.22
September	220.20	20.00	1,075.22
October	165.00	44.35	1,461.30
November	170.50	5.25	1,586.93
December	322.50	107.77	1,356.60
January	218.75	112.43	1,666.60
February	222.50	132.30	1,680.08
March	403.25	119.55	1,958.73
April	224.00	104.35	1,842.57
May	249.50	78.80	2,339.88
June	219.10	47.45	2,347.00
July	272.50	87.57	1,378.51
August	328.90	510.60	1,605.14
September	413.20	116.82	1,017.27
October	214.90	473.11	991.05
November	262.20	503.52	1,380.21
December	351.05	797.66	1,648.70
1870.			
January	278.50	332.30	1,569.84
February 1–15	130.00	80.00	805.00
	$4,868.80	$3,833.36	$29,709.80

"The company's sales of coal were as follows: —

1866, April 1 to Dec. 31	. . . . .			$774.71
1867, Jan. 1 „ „	. . . . .			324.33
1868, „ „ „	. . . . .			25,576.82
1869, „ „ „	. . . . .			40,909.01
1870, „ „ Feb. 15	. . . . .			6,541.55
				$74,126.42

"And the company produced for its own use during same period as follows: —

1866	. . . . .	356.16 tons
1867	. . . . .	5,433.55 „
1868	. . . . .	2,286.78 „
1869	. . . . .	792 „
1870	. . . . .	60 „

"And the company's sales of iron were: —

1866, April 1 to Dec. 31	. . . . .	$49,071.16
1867, Jan. 1 „ „	. . . . .	95,846.46
1868, „ „ „	. . . . .	161,735.46
1869, „ „ „	. . . . .	145,812.15
1870, „ „ Feb. 15	. . . . .	18,204.13
		$470,669.36

"And the company's sales at its stores on the ground during same period amounted to $506,529.75."

The court below found for the defendant, whereupon the company sued out this writ of error.

Mr. Francis W. Palfrey for the plaintiff in error.

The company was a mining, not a railroad company. It constructed and operated the railroad for its own special uses.

The primary object of a railroad company is commerce and transportation. *Railroad Company* v. *Peniston*, 18 Wall. 49.

Railroad companies are carriers for hire. *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155.

A corporation created by statute can exercise no powers and has no rights except such as are expressly given or necessarily implied. *Huntington* v. *Savings Bank*, 96 id. 388.

"Express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to trans-

port goods and passengers thereon and charge transportation therefor. This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that, to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication." *Lake Superior & Mississippi Railroad Co.* v. *United States*, 93 id. 442.

In this case there is no indication that the convenience of the public was considered, — there is not a word said in the charter about general commerce, general transportation, rates of toll, rates of fare, common carriers, depots, or stations. On the contrary, the charter points to the construction and use of a track or tracks for the business of the company. The legislature of Kentucky contemplated the creation not of a railroad company, but of a mining and manufacturing company with permission to construct and use a set of tracks for its own special purposes; and the action of the company was in accordance with the grant.

But if the court shall be of opinion that the company was a railroad company within the meaning of the act, it was certainly not "a railroad company indebted for any money for which bonds had been issued."

The company, while it was a mining and manufacturing company and nothing else, voted "to authorize the building of a railroad . . . for the transportation of coal and other productions to market. . . .

"That a sum . . . be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the company's property; . . . to issue bonds . . . secured by an indenture of mortgage on all their present landed property and improvements."

Upon this showing, it is submitted that, even if the company shall be held to have afterwards become a railroad company, it could not, by such acts, become a railroad company indebted for money, &c., within the language of the act.

Suppose the company, instead of building the road it did build, had built a short track from one of its furnaces to another, and occasionally carried a passenger or a parcel over such

track for hire, could it be properly claimed that such action constituted it a railroad company, and subjected the coupons on its total bond issue to the internal-revenue tax?

Or suppose that, instead of issuing bonds to the amount of $500,000, it had issued bonds to the amount of $1,000,000, and used half the proceeds for opening mines and half for building a railroad, could it be properly claimed that it should pay the internal-revenue tax on the coupons on its whole issue?

Nor will it do to say that, even if it was not a railway company, it might receive and pay the internal-revenue tax as an agent of the government to collect the income tax from its bondholders. That such tax was an income tax is settled by *Haight* v. *Railroad Company*, 6 Wall. 15; *Railroad Company* v. *Jackson*, 7 id. 262; *United States* v. *Railroad Company*, 17 id. 322; *Stockdale* v. *Insurance Company*, 20 id. 323; *Railroad Company* v. *Rose*, 95 U. S. 78.

But if this court shall be of opinion that the plaintiff in error was not only a railroad company, but a railroad company indebted, &c., within the language of the act, then we submit that it was clearly protected against the tax by the proviso in the act of July 13, 1866. 14 Stat. 139.

The Solicitor-General, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Moneys involuntarily paid for internal-revenue taxes illegally exacted may be recovered back from the collector in an action of assumpsit.

Taxes of the kind, to the amount of $750, were paid to the collector by the plaintiffs, after an unsuccessful appeal to the Commissioner. Redress being refused, the plaintiffs instituted the present suit in the State court, where the defendant appeared and removed the cause into the Circuit Court for the same district. Subsequently both parties appeared in the Circuit Court and submitted the cause to the Circuit Court upon the agreed statement of facts exhibited in the transcript.

Bonds with coupons annexed, it appears, were issued by the plaintiff company in the sum of $500,000, bearing interest at the rate of six per cent, payable semi-annually. Sufficient appears also to show that the tax in question was a tax of five

per cent upon $15,000 of those coupons which fell due at the time specified in the agreed statement. Payment of the tax was resisted upon the ground that the plaintiffs were not a railroad company, and the claim to recover back the money paid for the tax, with interest, is made upon the same ground. Judgment was rendered in favor of the defendant in the Circuit Court, and the plaintiffs sued out the present writ of error.

Errors assigned in this court are as follows: 1. That the Circuit Court erred in rendering judgment for the defendant. 2. That the court erred in finding that the plaintiffs were a railroad company. 3. That the court erred in holding that the plaintiffs were not protected from paying the tax by the provision in the amendatory act. 14 Stat. 139.

When first organized under their original charter, it is doubtless true that the plaintiffs were a mining and manufacturing company, covering a very large field of operations, and with some quite extraordinary powers; as, for example, they might lock and dam Little Sandy River up to their mines and property, and for that purpose they might exercise the same power in condemning lands and property as was authorized by law for the condemnation of mill-sites.

Had the case stopped there, the question would be attended with difficulty, and perhaps would require a reversal of the judgment; but it does not stop there. Instead of that, the agreed statement shows that the name of the company was subsequently changed to that of the Kentucky Improvement Company, and the powers and privileges of the company were not only greatly enlarged, but were extended to objects and purposes other than those relating to mining and manufacturing. Authority is given to the company by the fourth section of the new act to construct one or more rail tracks from any lands owned or improved by the corporation to convenient points on the Ohio or Little Sandy River, or both, *or to connect with other railways*, and to maintain said track or tracks, and to draw cars over the same by any suitable motive power.

Under the enlarged power conferred by the new act the company may not only construct railway tracks and connect with other railways, but they may condemn and appropriate such lands and materials as may be necessary for the construc-

tion and convenient and proper use and maintenance of such railroad, without any limitation except that the same proceedings shall be had in effecting such condemnation as are required by law for the condemnation of lands and materials for turnpikes and plank-roads, and that the lands condemned for any railroad track shall not exceed in width one hundred feet.

Tested by the terms of the charter, it is clear that the powers granted were more comprehensive than are usually found in railroad charters, both in respect to the routes it may establish and the lands and materials the company may condemn and appropriate to such uses. For aught that appears to the contrary they might construct an indefinite number of tracks in any direction from their own lands, and might connect with every other railroad in the State; and in constructing such tracks or making such connections they might without limit condemn and appropriate all such lands and materials as might be necessary and convenient in constructing and maintaining the same, provided the width for the railroad track did not exceed one hundred feet.

Confirmation of the proposition that the plaintiffs are a railroad company is also derived from the evidence reported, which shows that the plaintiffs, after their road was constructed and equipped with rolling-stock, used it not only to transport their own products and manufactures, but as a public highway for the conveyance of freight and passengers.

Two suggestions are made by the plaintiffs in explanation of the evidence introduced to prove that the railroad was used for the public accommodation: 1. That the annual receipt from that source of employment was less than that derived from mining and manufacturing; but it is a sufficient answer to that suggestion to say that it does not appear that they did not accommodate all shippers and passengers who applied for any such services. 2. That the charter does not in terms authorize the company to convey freight or passengers for hire. Suppose that is so, still it remains that power is given to the plaintiffs to construct a railroad, and, if so, it must be inferred that the builders and owners of it have a right to use it, and to charge a reasonable price for its use.

Ample power to lock and dam Little Sandy River and flow the water to their property was given by the act of incorpo-

ration, nor is there any ground to suppose that that power was taken away or withdrawn by the amendatory charter, as the latter provides that if the company shall lock and dam that river they shall build two bridges over the river, sufficient for the accommodation of the public, at the points specified in the eighth section of the act, which warrants the conclusion that the power to construct railroads and to lock and dam the river named are both included in the charter as amended. Enough appears to show that the plaintiffs adopted the act changing their corporate name, and that the company was duly organized under the new charter, and that they continued operations under it until the company ceased to exist.

Meetings were held by the stockholders, and at an adjourned meeting they resolved to authorize the building of a railroad, and to provide locomotives, cars, and other facilities for the transportation of coal and other productions to market from the canal openings to a certain landing on the Ohio River. What that distance is the resolution does not state, but it is supposed to be about twenty miles.

They also resolved that a sum not exceeding $500,000 be raised for the purpose of building and equipping said railroad, and to afford facilities for transportation to market for the mineral and other productions of the company's property. Officers had previously been elected, and the shareholders also empowered the president and directors to issue bonds for the amount raised, to be secured by mortgage of all their landed property and improvements, the bonds bearing six per cent interest, payable semi-annually. Bonds to that amount were accordingly issued and were secured as indicated, and it appears that the coupons taxed in this case were a part of the coupons attached to those bonds.

Two years later, the railroad was finished and opened for business, and it appears that the company within one year and eight months transported passengers and freight over its railroad for hire to the amount of $8,700 in addition to their own freight and passengers not paying fare.

Viewed in the light of these suggestions, it is so clear that the plaintiffs are a railroad company, and that their road is a railroad, that it is not deemed necessary further to pursue the argument.

Grant that, and still it is insisted by the plaintiffs that the tax was illegally exacted, because the company of the plaintiffs was not a railroad company indebted for any money for which bonds had been issued.

Congress enacted to the effect that any railroad indebted for any money for which bonds or other evidences of indebtedness have been issued, subject to interest, or with coupons representing interest, shall pay a tax of five per cent on the amount of all such interest or coupons. 14 Stat. 138; *Barnes* v. *The Railroads*, 17 Wall. 294–299.

Express authority was given to the plaintiffs as an improvement company to construct one or more rail tracks, as before explained, or to connect with other railways, and to maintain said track or tracks and draw cars over the same, by any suitable motive power, before the plaintiffs as such improvement company resolved to build said railroad and to provide locomotives, cars, and other facilities for the purposes antecedently mentioned; and it was for the purpose of constructing and equipping that railroad that the shareholders of the company resolved to raise the said sum of $500,000, and to issue the coupon bonds for the amount. Coupon bonds were accordingly issued, and the record shows that the tax in question was assessed on $15,000 of such coupons.

Examined in the light of these suggestions, as the case should be, and it follows that the company of the plaintiffs was a railroad company indebted for money for which bonds had been issued.

Concede both of the preceding conclusions, and still the plaintiffs contend that they should recover, because they insist that the receipts of the company derived from the public use of their railroad were insufficient to pay the semi-annual interest of the bonds, and that they are protected from such a tax by the proviso added by the one hundred and twenty-second section of the amendatory act. 14 Stat. 139.

Nothing is shown in support of the theory of fact assumed in the proposition, except what is found in the table exhibited in the transcript. Even suppose that that is correct, it by no means follows that it will avail the plaintiffs in the present case, for several reasons: 1. Because, if the interest was in

fact paid by the plaintiffs, it is of no consequence where they obtained the money, it being clear that in order to raise the question there must be an actual failure to make the payment. 2. Where the interest is paid the presumption is conclusive that every other circumstance existed to justify the assessment of the tax. 3. Proof to show that the interest has never been paid is not exhibited, nor is the table referred to of a character to satisfy the court that it shows the whole amount of the pecuniary advantage which the plaintiffs derived from their railroad. Without more, these remarks are sufficient to show that each of the assignments of error must be overruled.

Judgment affirmed.

MR. JUSTICE FIELD, with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE HARLAN, dissenting.

I dissent from the judgment of the court in this case. The construction of the short railway by the company for its own use, to carry the products of its mine to the Ohio River, did not, in my opinion, convert the Improvement Company, which was organized to mine for coal, iron, and other minerals, into a railroad company, so as to bring it within the statute providing for a tax upon the coupons of bonds issued by such companies.

RAILWAY COMPANY *v.* SLACK.

Improvement Company v. *Slack* (*supra*, p. 648) reaffirmed.

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

The facts are stated in the opinion of the court.

Mr. Francis W. Palfrey for the plaintiff in error.

The Solicitor-General, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Statutory authority was given to the Eastern Kentucky Railway Company to purchase, acquire, and hold any line of railway,

finished or unfinished, lying on or near their line or crossing the same or between the termini of their railway, and to make payment for such purchase or acquisition on such terms as should be agreed between the parties. Pursuant to that authority, it purchased all the property of the Kentucky Improvement Company, real, personal, and mixed, including their franchise, subject, however, to the mortgage previously made by the grantors of their lands and improvements to secure a certain issue of bonds, amounting to $500,000, as therein more fully set forth. Due conveyance of the same was made to it by deed dated Feb. 28, 1870, as appears by the agreed statement of facts.

Coupons were attached to the bonds, and it appears that an internal-revenue tax of two and a half per cent was assessed thereon by the official assessor. Payment of the tax, after an unsuccessful appeal to the Commissioner, was made by the rail way company. The present suit was instituted to recover back the amount paid, with interest, as having been illegally exacted. Service was made; and the parties appeared, and, having consented to the agreed statement of facts exhibited in the record, submitted the cause to the court without a jury. Hearing was had; and the court rendered judgment in favor of the defendant, and the plaintiff removed the cause into this court.

Two errors are assigned: 1. That the court erred in finding that the grantors of the plaintiffs were a railroad company, and liable to the tax assessed upon the coupons attached to their bonds. 2. That the court erred in finding that the plaintiffs were liable for the tax assessed.

Railroad companies were by law made subject to an internal-revenue tax for the year 1871 of two and a half per cent on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date. 16 Stat. 260.

Such taxes for the year specified in the act cited were assessed against the plaintiffs, and the present suit was instituted to recover back the amount paid with lawful interest.

It appears by the act of incorporation that the plaintiffs were created a body politic and corporate for the purpose of constructing a railroad with a single or double track, with all the

privileges and rights usual to such corporations. Power to make the purchase of the line of railroad constructed by the Improvement Company, as described in the opinion just read, is admitted. Nor is it necessary to enter into any explanation as to the circumstances under which the bonds of the Improvement Company were issued, as it is admitted in the agreed statement of facts filed in this case that those circumstances are fully shown in the agreed statements of facts filed in that case.

Viewed in the light of these suggestions, it is quite clear that any discussion of the question presented in the first assignment of errors is unnecessary, except to refer to the decision in *Improvement Company* v. *Slack* (*supra*, p. 648), and the reasons there given for the conclusion that the company in that case was a railroad company.

Suppose that is so, then it is conceded by the plaintiffs in this case that they cannot sustain their second assignment of errors, which is all that need be said upon the subject.

Judgment affirmed.

RAILROAD COMPANY *v.* BLAIR.

1. A citation is not required when the appeal is taken and perfected in open court during the term at which the decree complained of is entered; *aliter*, where, at a subsequent term, the appeal is allowed, although the solicitors of the appellee be present.
2. The appeal will not, however, be dismissed in the latter case, but terms will be imposed upon the appellant.
3. *Dayton* v. *Lash* (94 U. S. 112) cited and approved.

MOTION to dismiss an 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.

Mr. W. C. Larned in support of the motion.

Mr. Lyman Trumbull, *contra.*

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

The decree appealed from in this case was rendered Feb

12, 1879, during the December Term, 1878, of the Circuit Court. The appeal was not allowed until April 14, 1879, which was during the March Term, 1879. The practice only dispenses with a citation when the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered; and, to be technically sufficient, so as to render a citation unnecessary, the taking of the appeal should in some form appear on the records of the court. The theory of the rule is, that as a party to a suit is constructively present in court during the entire term at which his cause is for hearing, and as the doings of the court are matter of record at the time, he is chargeable with notice of all that is done during the term affecting his suit; because, if actually absent when an order is made, he can on his return obtain full information by an examination of the minutes. Still, an appeal otherwise regular would not probably be dismissed absolutely for want of a citation, if it appeared by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done.

The records of the court in this case show an allowance of the appeal in court when the appellees were present by their solicitors. It was, however, at a term subsequent to the rendition of the decree, and under the practice a citation was necessary to bring the appellees to this court. The case was docketed promptly here at the term to which the appeal was returnable, and as the appellants might well have supposed that a citation would be waived, we will not dismiss the appeal absolutely, but apply the rule acted upon in *Dayton* v. *Lash* (94 U. S. 112), and "grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper."

An order may be entered that unless the appellants cause a citation, returnable on the first Monday of February next, to be issued and served upon the appellees before that date, the appeal be dismissed.

So ordered.

UNITED STATES v. LIPPITT.

1. The limitation prescribed by the act of March 3, 1863 (12 Stat. 765), amendatory of an act establishing the Court of Claims, does not bar in that court claims referred to it for determination by the head of an executive department, provided they were presented for settlement at the proper department within six years after they had first accrued.
2. Pursuant to orders, the colonel of a regiment reported, July 25, 1863, to the headquarters of a department, there to "await further orders." While awaiting them, he was not furnished fuel or quarters. *Held*, that he is entitled to recover their commuted value.

APPEAL from the Court of Claims.

This was a claim of Lippitt for $1,742, to which he alleged that he was entitled as commutation for fuel and quarters while he was in the military service of the United States. It was referred to the court below by the Department of War.

He thereupon filed his petition. The United States traversed all its averments, and also pleaded that the claim was not filed in or transmitted to the Court of Claims within six years after it had accrued.

The court below found the following facts: —

1. The claimant was colonel of the Second California Volunteers, a regiment in the military service of the United States, from some day preceding the 2d of July, 1863, to some day subsequent to the 1st of August, 1864.

2. On the 2d of July, 1863, the claimant, then being in command of the district of Humboldt, California, where his regiment was stationed, was ordered by the commanding general of the Department of the Pacific to report in person at the head-quarters of the department, there to await further orders. The head-quarters of the department were at San Francisco during the war. The order referred to is that annexed to and forming part of the petition.

3. In compliance with these orders, the claimant about the 25th of July, 1863, left his regiment, and from about that day to the 1st of August, 1864, was in San Francisco, absent from his regiment, awaiting orders.

4. There is no evidence that during the said period, the claimant received quarters and fuel in kind. There is no evidence

that they could have been furnished in kind. The records of the War Department show that most if not all the officers stationed in San Francisco received commutation of quarters and fuel.

5. The commuted value of quarters and fuel in San Francisco, during the said period, for a colonel of infantry, was $1,742.

6. On the 19th of July, 1864, the following order was issued, in pursuance of which the claimant returned to his regiment: —

"HEAD-QUARTERS DEPARTMENT OF THE PACIFIC,
"SAN FRANCISCO, CAL., July 19, 1864.

"I. Colonel Francis J. Lippitt, Second Infantry California Volunteers, will repair to Fort Miller and assume command of his regiment; head-quarters at Fort Miller.

"The Quartermaster's Department will furnish the necessary transportation.

. . . . . .

"By command of Major-General McDowell.

"RICHARD C. DUNN,
"*Assistant Adjutant-General.*"

7. It does not appear that the claimant was ordered to or performed any military duty during the time he was awaiting orders; nor that he reported himself at head-quarters, San Francisco, after his first report on his arrival there.

8. It does not appear that claimant made any demand on the proper officer at San Francisco that quarters and fuel be furnished him.

9. It does not appear that claimant received any military order after being placed on "awaiting orders," until the order of July 19, 1864, to repair to his regiment.

10. The claimant, in 1865, presented his claim to the proper department, and pressed its settlement from that day to the 9th of January, 1878, when it was referred by the War Department to this court, by virtue of the following order: —

"*To the Honorable the Judges of the Court of Claims:* —

"The undersigned, Secretary for the Department of War of the United States, hereby respectfully represents that a claim has been made against said department by Francis J. Lippitt, late colonel

Second California Infantry, brevet brigadier-general United States Volunteers, for commutation of fuel and quarters while awaiting further orders at San Francisco, in 1863–64.

"Said claim involving controverted questions of law, and the decision affecting a class of cases, the undersigned hereby, and in accordance with the provisions of sect. 1063 Revised Statutes of the United States, causes said claim, with all the papers pertaining thereto, to be transmitted to the Court of Claims for trial and adjudication.

"GEO. W. MCCRARY,
"*Secretary of War.*

"WAR DEPARMENT, Jan. 9, 1878."

Filed in the Court of Claims Jan. 10, 1878.

The Court of Claims held that the action was not barred by the Statute of Limitations, and rendered judgment on the merits for the claimant.

The United States then appealed to this court.

The Attorney-General for the United States.
Mr. James Lowndes, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The correctness of the judgment below depends, in part, upon the construction of the tenth section of the act of March 3, 1863, amendatory of the act of Feb. 24, 1855, establishing the Court of Claims. That section declares "that every claim against the United States, cognizable by the Court of Claims, shall be for ever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this [that] act, within six years after the claim first accrues," &c.

The claims against the government, of which the Court of Claims could, at that date, take cognizance, were those founded upon some law of Congress, or upon some regulation of an executive department, or upon some contract, express or implied, with the government of the United States, which might be suggested to that court by a petition filed therein; and also, all claims which might be referred to the court by either House of Congress. The limitation of six years applied, therefore, to every demand asserted against the government in the Court of

Claims, which it had, when the act of 1863 was passed, jurisdiction to hear and determine. Within the meaning of the act all such claims were cognizable by that court.

By a subsequent statute, approved June 25, 1868, authority was given to the head of any executive department, whenever any claim was made upon that department involving disputed facts or controverted questions of law, where the amount in controversy exceeded $3,000, or where the decision would affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case; or where any authority, right, privilege, or exemption was claimed or denied under the Constitution of the United States, to cause such claim, with all documents pertaining thereto, to be transmitted to the Court of Claims, to be there *proceeded in* as if originally commenced by the voluntary action of the claimant.

The court was also empowered to try and adjudicate any claim of like character, amount, or class transmitted to it by the Secretary of the Treasury, upon the certificate of an auditor or comptroller of the treasury.

But the act accompanied this enlargement of the jurisdiction of the Court of Claims with the restriction that no case should be referred to it by the head of a department, unless it belonged to one of the several classes of cases to which, by reason of the subject-matter and character, the court could, under the then existing laws, take jurisdiction on the voluntary action of the claimant.

The claim of appellee first accrued in 1864. It was presented to the War Department in the year 1865, and its settlement pressed — so the finding declares — until Jan. 9, 1878. On that day, it was transmitted by the Secretary of War to the Court of Claims for its determination. It was transmitted, not, so far as the record shows, at the instance or with the consent of the appellant, but because it involved controverted questions of law, the decision whereof would affect a class of cases.

It is conceded by the government that the claim was presented at the proper department, and, when presented, was not barred by the limitation of six years. But the contention of

the Attorney-General is that the Court of Claims is prohibited by the express words of the statute from giving judgment against the government upon *any* claim which is not asserted by petition filed therein within six years after the claim first accrued, or which is not within that period transmitted to the court from one of the Houses of Congress or by the head of an executive department.

We are unable to concur in this construction of the statute of March 3, 1863. Such a construction would work an injustice which we cannot suppose Congress intended should be done to the citizen having a demand against the government. The claim in question, although cognizable in the first instance by the Court of Claims, was yet properly presented at the department which had authority to pass finally upon it. It should have been there allowed or disallowed long before the expiration of six years from the time it first accrued. The claimant steadily pressed its settlement without, so far as the finding shows, any intimation that it was defectively prepared, or that it would be ultimately rejected. The department held it undisposed of until 1878, and then sent the claimant to the Court of Claims, where he was met at the very threshold of his case by a plea of limitation upon the part of the government. That plea, if sustained, would defeat the only object of the reference. It would prevent the department from obtaining for its future guidance the judgment of the court upon controverted questions of law affecting a large class of cases. It should not be sustained, unless we are required to do so by some absolute, unbending rule of construction.

When this claim was presented at the War Department for settlement, there was no statute allowing the heads of executive departments to refer claims to the Court of Claims for adjudication. But when the act of June 25, 1868, was passed, its provisions necessarily applied to all claims then before the executive departments which belonged to one of the several classes, of which, by reason of their subject-matter and character, the Court of Claims could take cognizance upon the voluntary petition of the claimant. The claim of appellee certainly belonged to one of those classes. It was not, as we have seen, barred by limitation, when that act was passed. It could, then,

in 1868, have been referred by the War Department to the Court of Claims for its determination. But, instead of adopting that course, at a time when no question of limitation could be raised, its reference was postponed or delayed for nearly ten years after the passage of the act of 1868. We are satisfied that the delay was accidental, certainly not with any intention to defraud or injure the claimant. If the plea had, upon its face, admitted, or if the fact was established by competent evidence, that the delay in deciding, or in referring the claim to the Court of Claims, was intentional, or with a purpose to defeat the claimant, by limitation, the court would certainly not permit the government to profit by such a course. Why should a different conclusion be reached when the delay is unexplained, and is inconsistent with proper diligence in the transaction of the public business? It seems to the court that, looking at the purpose which Congress had in the establishment of the Court of Claims, and in enlarging its powers, as indicated in the acts of 1863 and 1868, the just and reasonable construction of the tenth section of the first-named act requires us to hold that limitation is not pleadable, in the Court of Claims, against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the government. Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department, for allowance and settlement. In such cases, the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the proper department for settlement. These views find support in the fact that the act of 1868 describes claims presented at an executive department for settlement, and which belong to the classes specified in its seventh section, as *cases* which may be trans-

mitted to the Court of Claims. "And all the *cases* mentioned in this section, which shall be transmitted by the head of an executive department, or upon the certificate of any auditor or comptroller, shall be *proceeded in* as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations," with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims they are to be "proceeded in as other cases pending in said court."

Whether if a claim be presented at the proper department when six years has elapsed after it first accrued, the government is at liberty, upon its transfer therefrom to the Court of Claims, to plead the limitation of six years, or whether the court, in such cases, must itself interpose the statute for the protection of the government, are questions not necessary to be decided in this case.

Touching the merits of the case, it appears that the appellee was required, by competent military authority, to leave his regiment, then on duty in the district of Humboldt, California, to the command of which he had been previously assigned, and report in person at the head-quarters of the department of the Pacific, in San Francisco, *there to await further orders.* He remained in that city, absent from his regiment, from about July 25, 1863, until Aug. 1, 1864, awaiting orders. It is immaterial that he performed no active duty while thus awaiting orders. He was subject to assignment for such duty, while in San Francisco, and, as said by the court below, the responsibility for his non-employment rested with his superior officer. What was said in *United States* v. *Williamson* (23 Wall. 411) has some application here. That case arose under the act of March 3, 1863, relating to the government of the army, by which it was enacted that any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half the pay and allowances prescribed by law, and no more. Williamson claimed full pay while absent, upon his own request, from his command. He was, however, required to remain at a particular place, and to await orders. Among

other things we there said: "The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place, and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience, than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time."

Nor is there any thing in *United States* v. *Phisterer* (94 U. S. 219) in conflict with the conclusion we have reached. We there held that an army officer at his own home awaiting orders, and having no public duty to perform, was not entitled to commutation for quarters or fuel. No such case is presented by the special finding.

Some stress is laid upon the fact that appellee has failed to show affirmatively that he made a demand on the proper officer at San Francisco for quarters and fuel in kind. There is some force in this suggestion, but, under the circumstances of this case, we do not think it should control our judgment. There is no evidence that quarters and fuel could have been furnished in kind. On the contrary, the records of the War Department show that most, if not all, the officers stationed in San Francisco during this period received commutation of quarters and fuel. In the light of all the facts found by the court below, and since it does not appear that the claim was objected to in the War Department upon any such ground, during the thirteen years it lay there, undisposed of, despite the fact that its settlement was steadily pressed by the claimant, we are disinclined to reverse the judgment because it does not appear affirmatively that appellee, upon his arrival in San Francisco, made a formal requisition for quarters and fuel.

Our conclusion is that, under the law as it stood when appellee's claim accrued, he was entitled to the commuted value of quarters and fuel while in San Francisco awaiting orders.

Judgment affirmed.

BURNS *v.* MEYER.

1. A. held letters-patent for making side-saddle trees. The tree, composed of side-bars, cantle behind, and crook before, is first made, and the seat constructed separately on a rim and fastened to the tree by screws, resting on the crook, and on supports attached to the side-bars in the middle and at the rear. This construction, it was claimed, simplifies and cheapens the manufacture, and leaves a space for air under the seat. The claim is as follows: "As a new article of manufacture, a side-saddle tree, having the side-bars and seat made separate and then united, substantially as and for the purpose shown and specified." The side-saddle tree constructed according to the letters-patent subsequently granted to B. does not have the side-bars and seat made separate and then united. Tough strips of wood, steamed and bent to a proper shape, are attached to the tree, as a part thereof, forming side-rails for the seat; that on the right or off side extending from the cantle to the crook, and that on the left or near side, from the cantle to a point on the near side-bar some distance back of the crook. The seat is stretched over these strips or side-rails. *Held*, that the advantage of separate construction claimed by A. was not attained by B.'s letters-patent, and that the invention of the latter is not an infringement of A.'s letters-patent.
2. Courts should not by construction enlarge the claim which the Patent Office has admitted, and the patentee acquiesced in, beyond the fair interpretation of its terms.

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

The facts are stated in the opinion of the court.

Mr. Samuel S. Boyd for the appellants.

No counsel appeared for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The only question in this case is, whether the defendants infringe certain letters-patent (No. 97,236) granted 23d of November, 1869, to John J. Grimsley and John Shelly, for an improved side-saddle tree alleged to have been invented by Shelly; which letters were afterwards assigned to the complainants.

The infringement alleged consists in making and using side-saddle trees according to a plan described in another patent granted to Orlando V. Flora, on the 9th of May, 1876, numbered 177,233. According to the complainants' patent, this tree, composed of side-bars, cantle behind, and crook before, is first made, and the seat is constructed separately on a properly

shaped rim, and is then fastened to the tree by screws, resting on the crook in front, and on supports attached to the side-bars in the middle and at the rear. This construction is claimed to simplify and cheapen the manufacture, and leave a space for air under the seat. The claim of the patent is as follows: —

"What I claim as my invention, and desire to secure by letters-patent is —

"As a new article of manufacture, a side-saddle tree, having the side-bars and seat made separate and then united, substantially as and for the purpose shown and specified."

The defendants' side-saddle tree, constructed according to Flora's patent, which is alleged to be an infringement, does not have "the side-bars and seat made separate and then united." On the contrary, tough strips of wood, steamed and bent to a proper shape, are attached to the tree, as a part thereof, forming side-rails for the seat; that on the right or off side extending from the cantle to the crook, and that on the left or near side extending from the cantle to a point on the near side-bar some distance back of the crook. The seat is stretched over these strips or side-rails. It is obvious that the seat, in this case, cannot possibly be constructed separately from the side-bars. They must be united in one construction, forming a complete tree. The advantage of separate construction which the plaintiffs claim for their patented tree is not attained by that of Flora. It is true that room is left for the admission of air under the seat; but that by itself is not claimed as the invention of Shelly.

It is well known that the terms of the claim in letters-patent are carefully scrutinized in the Patent Office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous inventions and the state of the art, determines the applicant is entitled to. The courts, therefore, should be careful not to enlarge, by construction, the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms.

We think there was no infringement.

Decree affirmed.

BRANCH v. UNITED STATES.

The proceeds of certain cotton seized under the Confiscation Act as the property of A. were, in July, 1866, by order of the proper District Court, turned over to its clerk, who thereupon deposited them to his credit as such in a national bank which had been duly designated as a depositary of public money. The bank failed, and judgment in the confiscation proceedings having been rendered in favor of A., he brought suit against the United States to recover said proceeds. *Held*, 1. That the deposit by the clerk was not a payment into the treasury of the United States. 2. That said proceeds belonged for the time being to the court, and were, pending the proceedings, held as a trust fund 3. That A. was not entitled to recover.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Theodore H. N. McPherson for the appellants.

The Attorney-General, contra.

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

This case presents the following state of facts: —

In June, 1865, the marshal of the United States for the middle district of Alabama seized certain cotton belonging to the appellants, by order of the District Court of that district, upon the information of the district attorney, under the Confiscation Act. Pursuant to an order of the court made in the progress of the suit for condemnation, the property was sold, and the proceeds paid over, under the direction of the court, to the clerk. The clerk, having been notified by the Interior Department that the First National Bank of Selma, Alabama, had been designated by the Secretary of the Treasury as a depositary of public money, deposited in July, 1866, to his own credit as clerk in that bank the money received by him from the marshal. This deposit was made pending the condemnation suit and to await the further orders of the court. In January, 1871, the suit was dismissed and judgment entered in favor of the defendants for costs. In the mean time the Bank of Selma had failed, and in the proceedings for winding up its affairs under the National Banking Act a dividend amounting to $641.32 upon this deposit was paid to the court,

and then by order of the court paid over to the claimants, less a small amount allowed by the judge to an auditor appointed by him to ascertain the facts. This suit was brought against the United States to recover the balance of the original deposit, upon the ground that, as the bank was at the time when the deposit was made a designated depositary of public money, it was part of the treasury of the United States, and that consequently the deposit made by the clerk was equivalent to a payment of the money into the treasury, binding the United States to the claimants for its return in case the court should determine, in the condemnation suit, that the cotton when seized was not liable to confiscation.

The position assumed by the appellants is to our minds wholly untenable. The designated depositaries are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depositary. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the treasury could not control the fund. Although deposited with a bank that was a designated depositary, it was not paid into the treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong.

The whole subject is elaborately considered in the opinion of the Court of Claims, and we deem it unnecessary to attempt to add to what has there been said.

Judgment affirmed.

NAGLE v. RUTLEDGE.

This court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Wyoming, unless the record shows that the matter actually in dispute exceeds $1,000.

MOTION to dismiss a writ of error to the Supreme Court of the Territory of Wyoming.

The facts are stated in the opinion of the court.

Mr. Edward P. Johnson for the defendant in error, in support of the motion.

Mr. W. R. Steele, contra.

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

To give us jurisdiction in cases coming from the Supreme Court of the Territory of Wyoming, the value of the matter in dispute must exceed $1,000. This writ of error was sued out by the defendant below on a judgment against him for only $969.63. It is claimed we have jurisdiction, however, because the defendant in his answer set up a counter claim for $1,340. The only question presented here on that branch of the case is whether the plaintiff below was liable for interest on a note of $210, at the rate of three per cent a month from the twenty-fourth day of June, 1872, until the date of the judgment, July 26, 1876, or for some shorter period. In no event could the amount thus put in controversy reach $1,000; and since if error should be found in the charge of the court on this claim, it would only result in a reduction of the judgment as it now stands, and not in an actual money recovery in favor of the defendant below, it follows that our jurisdiction is not shown by the record, and that the suit must be dismissed.

So ordered.

MACHINE COMPANY v. GAGE.

The Supreme Court of Tennessee decided that the law of that State imposing an annual tax upon "all pedlers of sewing-machines and selling by sample," levies such "tax upon all pedlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture." *Held*, that the law, so construed, is not in violation of the Constitution of the United States.

ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

Mr. R. McPhail Smith for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The Howe Machine Company is a corporation of the State of Connecticut. It manufactured sewing-machines at Bridgeport, in that State, and had an agency at Nashville, in the State of Tennessee. From the latter place, an agent was sent into Sumner County to sell machines there. A tax was demanded from him for a pedler's license to make such sales. He denied the validity of the law under which the tax was claimed, but, according to a law of the State, paid the amount demanded by the defendant, as clerk of the county court. The company, who brought this suit to recover it back, was defeated in the lower court, and the judgment was affirmed by the Supreme Court of the State.

The Constitution of Tennessee (art. 11, sect. 30) declares that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

"Sales by pedlers of articles manufactured or made up in this State, and scientific or religious books, are exempt from taxation." Code of Tennessee, sect. 546.

"All articles manufactured of the produce of the State" are exempt from assessment or taxation. Acts of 1875, c. 98, sect. 10.

"All pedlers of sewing-machines and selling by sample" shall pay a tax of ten dollars. Code, sect. 553 *a*, subsect. 43.

By a subsequent act of the legislature, this tax was increased to fifteen dollars.

The sewing-machines here in question were made in Connecticut. The Supreme Court of the State held, in this case, "that the law taxing the pedlers of such machines, levied the tax upon all pedlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture."

We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute. *Leffingwell* v. *Warren*, 2 Black, 599.

The question presented for our consideration is not difficult of solution. A brief reference, however, to some of the adjudications of this court, bearing with more or less directness upon the subject, may not be without interest.

A State cannot require a license to be taken out to sell foreign goods while remaining in the packages in which they were imported. Such a law is contrary to the provision of the Constitution of the United States touching the laying of imposts by a State, and to the commerce clause of that instrument. *Brown* v. *The State of Maryland*, 12 Wheat. 419.

A State cannot give to the master and wardens of a port, in addition to other fees, the sum of five dollars, whether they are called on to perform any service or not, for every vessel arriving in the port. This would be a regulation of commerce and a tonnage duty, both involving the exercise of a power which is withheld from the States. *Steamship Company* v. *The Portwardens*, 6 Wall. 31.

A purchaser of goods coming from abroad, the goods to be at his risk until delivered to him, is not an importer, and the goods may be taxed while in the original packages. *Waring* v. *The Mayor*, 8 id. 110.

The provision in the Constitution of the United States that "no State shall levy imposts or duties on imports or exports," does not refer to articles brought from one State into another, but exclusively to articles imported from foreign countries. Hence, a tax imposed by a State upon all auction sales, whether by citizens of such State or of another State, and whether the articles are the products of such State or of another State, without any discrimination, is valid. *Woodruff* v. *Parham*, id. 123.

Where a State imposes the same rate of taxation upon like

articles, whether brought from another State or the products of the State imposing the tax, the tax may be enforced. *Hinson* v. *Lott*, id. 148.

A State cannot impose a higher tax upon pedlers from another State than is imposed upon her own citizens under like circumstances. Any discrimination in favor of the latter is fatal to the statute. *Ward* v. *State of Maryland*, 12 id. 163, 418.

A State cannot impose a tonnage tax upon vessels belonging to her own citizens, and engaged exclusively in commerce between places within her own limits. Id. 204.

A State law imposing a tax upon freight brought into, taken from, or carried through the State is a regulation of commerce, and contrary to the provision of the Constitution which declares that "Congress shall have power to regulate commerce with foreign nations, between the several States, and with the Indian tribes." *Case of the State Freight Tax*, 15 id. 232.

A State cannot impose a tonnage tax upon vessels owned in foreign ports, to defray the expenses of administering her quarantine regulations. *Peete* v. *Morgan*, 19 id. 581.

A tax for a license to sell goods is in effect a tax on the goods authorized to be sold.

A law which requires a license to be taken out by pedlers who sell articles not produced in the State, and requires no such license with respect to those who sell in the same way articles which are produced in the State, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several States. This power applies to articles taken from one State into another, until they become mingled with and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin.

The non-exercise by Congress of the power to regulate interstate commerce is equivalent to a declaration that it shall be free from any restrictions. *Welton* v. *State of Missouri*, 91 U. S. 275.

A State may demand from a vessel a list of passengers, with their ages, places of birth, occupations, last place of legal settlement, &c. Such a requirement is a police regulation. *City of New York* v. *Miln*, 11 Pet. 102.

But it cannot require a sum to be paid for each passenger landed. *Passenger Cases*, 7 How. 283.

A statute which imposes a heavily burdensome condition upon a shipmaster as a prerequisite to landing his passengers, and allows him the alternative of paying a small sum for each one landed, is a regulation of commerce, and therefore void.

What may be done by a State to protect itself from the influx of paupers and convicted criminals, in the absence of legislation on the subject by Congress, is left undecided. *Henderson* v. *The Mayor of New York et al.*, 92 U. S. 260.

A tax by a State on the amount of goods sold at auction is a tax upon the goods so sold. A law which requires every auctioneer to pay into the State treasury a tax on his sales is, when applied to goods imported and sold in the original packages, in conflict with sects. 8 and 10, art. 1, of the Constitution of the United States, and therefore invalid. *Cook* v. *Pennsylvania*, 97 id. 566.

A State cannot by law authorize a municipal corporation to exact such wharfage as it may deem reasonable from vessels using certain designated wharves, and laden with articles not the products of the State, while vessels laden with such products of the State are exempted from any charge whatever. Such a statute, and an ordinance enacted by the corporation to carry it out, are void. They are a regulation of commerce. *Guy* v. *Baltimore*, *supra*, p. 434.

In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result.

In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing-machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff* v. *Parham*, *Hinson* v. *Lott*, *Ward* v. *State of Maryland*, *Welton* v. *State of Missouri*, *supra*.

Judgment affirmed.

EMBRY *v.* UNITED STATES.

April 20, 1867, the President duly commissioned A. as deputy postmaster at Nashville, Tenn., for the term of four years, "subject to the conditions prescribed by law," and May 5, 1869, under the act of April 5, 1869 (16 Stat. 6), signed an order suspending him from office until the end of the next session of the Senate, and designating B. to perform the duties of that office. A. delivered the office to B. May 27, 1869. The nomination of B. was sent to the Senate at its next session, which terminated July 15, 1870, and on that date it was rejected. Pursuant to instructions from the Post-office Department, A. took possession of said office July 25, 1870. B., when holding the office, received the salary. A. brought suit therefor against the United States. *Held*, that he was not entitled to recover.

APPEAL from the Court of Claims.

This was a suit in the court below by Bowling Embry to recover $4,644.75 as the amount of salary claimed to be due him as deputy postmaster at Nashville, Tenn., from May 27, 1869, to July 25, 1870.

The court found the following facts: —

1. On the 20th of April, 1867, the claimant was appointed by the President of the United States, by and with the advice and consent of the Senate, deputy postmaster at Nashville, in the State of Tennessee, for the term of four years from that day, and the commission issued to him was in the following words: —

"ANDREW JOHNSON, President of the United States of America, to all who shall see these presents, greeting:

"Know ye, that, reposing special trust and confidence in the integrity, ability, and punctuality of Bowling Embry, I have nominated, and, by and with the advice and consent of the Senate, do appoint him deputy postmaster at Nashville, in the State of Tennessee, and do authorize and empower him to execute and fulfil the duties of that office according to law; and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Bowling Embry, for the term of four years from the day of the date hereof, subject to the conditions prescribed by law.

"In testimony whereof, I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

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

and sixty-seven, and of the independence of the United States of America the ninety-first.

[L. S.] "ANDREW JOHNSON.

"By the President:

"WILLIAM H. SEWARD, *Secretary of State.*"

2. Under this appointment the claimant entered upon the discharge of the duties of said office, and continued therein until the 27th of May, 1869, when, in consequence of an order made by the President of the United States, under the act of April 5, 1869, suspending him from said office, he delivered over said office to one Enos Hopkins, who had been designated by the President to perform the duties of deputy postmaster at Nashville, and the commission authorizing him to perform said duties was in the following words: —

"ULYSSES S. GRANT, President of the United States of America, to all who shall see these presents, greeting:

"Know ye, that by virtue of the authority conferred upon the President by the second section of the act of Congress, approved April 5, 1867, entitled 'An Act to amend an act regulating the tenure of certain civil offices,' I do hereby suspend Bowling Embry from the office of deputy postmaster at Nashville, in the State of Tennessee, until the end of the next session of the Senate; and I hereby designate Enos Hopkins to perform the duties of such suspended officer in the mean time, he being a suitable person therefor, subject to all provisions of law applicable thereto.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

"Given under my hand, at the city of Washington, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States of America the ninety-third.

[L. S.] "U. S. GRANT.

"By the President:

"HAMILTON FISH, *Secretary of State.*"

3. On the 6th of December, 1869, the President nominated the said Hopkins to the Senate for appointment as deputy postmaster at Nashville, and on the 15th of July, 1870, the Senate resolved that it did not advise and consent to that appointment.

4. On the 21st of July, 1870, the following communication was addressed and sent by the First Assistant Postmaster General to the claimant: —

"POST-OFFICE DEPARTMENT, APPOINTMENT OFFICE,
"WASHINGTON, D. C., July 21, 1870.

"SIR, — In the case of Enos Hopkins, rejected by the Senate of the United States, under date of July 15, 1876, he is, under the provisions of the act of March 2, 1867, and April 5, 1869, regulating the tenure of certain civil offices, inhibited from holding, exercising, or discharging any of the duties pertaining to the office of postmaster at Nashville, Tenn. You should take charge of said office at once under your unexpired commission, for the time being and until the case can be submitted to the Attorney-General. Upon taking charge of the office you will receipt to Mr. Hopkins (in duplicate) for all the public property in his possession, and report the date of your doing so to this office.

"Very respectfully, &c.,
"J. W. MARSHALL,
"*First Assistant Postmaster-General.*

"BOWLING EMBRY, Esq., Nashville, Tenn."

In pursuance of the authority of said communication, the claimant again took possession of said office on the 25th of July, 1870.

5. While the claimant was in possession of said office, prior and up to the 27th of May, 1869, he gave his personal attention to the business thereof to the entire satisfaction of the Post-office Department and of the people of Nashville, and punctually and promptly rendered to the Sixth Auditor of the Treasury his accounts of all moneys collected and disbursed by him during that period, and promptly paid over to the United States all balances due from him to them, and his account was satisfactorily settled and adjusted on the books of the said auditor's office.

6. During the whole period from May 27, 1866, to July 25, 1870, and afterward, the salary of said office was fixed by the Postmaster-General at the rate of $4,000 per annum; and the same amounted for that period to $4,645.47, which was paid to said Hopkins, and refused to the claimant, who applied to the Postmaster-General for payment of the same to him.

Upon the foregoing facts the court found as a conclusion of law that the claimant was not entitled to recover.

Judgment having been rendered for the United States, Embry appealed, and here assigns the following errors: —

The Court of Claims erred in holding as matter of law upon the facts found that the claimant was not entitled to the salary of the office during the time he was suspended.

The court erred in holding that the claimant was not entitled to the said salary from the end of the next session of the Senate, after his suspension, even if not entitled to it during the time he was suspended,

Mr. Matt. H. Carpenter and *Mr. J. H. Embry* for the appellant.

1. An act of Congress which provides that a suspended officer shall not receive the salary and emoluments of the office is unconstitutional.

The appointment gives the officer a legal right to the salary by law attached to the office, until he is removed, resigns, dies, or his term expires. *Marbury* v. *Madison*, 1 Cranch, 137.

The Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate appoint, all officers of the United States. The power of removal is an incident to the power to appoint, and must be exercised by the President and Senate together. An act of Congress cannot vest the power of removal elsewhere. From this it follows that the claimant never was removed from the office, and, consequently, that he is entitled to the salary for the whole term.

2. Conceding the act of Congress in question to be constitutional, and that the claimant was not entitled to the salary during the period of his suspension, still, that period being fixed by the statute to expire on the termination of the next session of the Senate, it follows that from that day he was entitled to the salary. The judgment of the Court of Claims is erroneous to this extent, even should the act be held constitutional.

The Attorney-General, contra.

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

By the tenure-of-office act, passed March 2, 1867 (14 Stat. 430), it was enacted that every person appointed to a civil office by and with the advice and consent of the Senate should hold his office until his successor should be in like manner appointed and duly qualified, except as therein otherwise provided; but the President was authorized during the recess

of the Senate to suspend an officer for misconduct, crime, or incapacity. In case of suspension, the President could designate some suitable person to perform temporarily the duties of the office until the matter should be acted on by the Senate when in session. If the Senate concurred in the suspension, and advised and consented to the removal, the President might remove and by and with the advice and consent of the Senate appoint another person to the office. If, however, the Senate refused to concur, the officer suspended might resume the functions of his office, but his salary and emoluments during the suspension went to the person who performed his duties, and not to him.

On the 20th of April, 1867, while this law was in force, Embry, the appellant, was, by and with the advice and consent of the Senate, appointed and commissioned postmaster at Nashville, Tenn., the salary being at the rate of $4,000 a year. By his commission he was to hold his office for four years, "subject to the conditions prescribed by law."

On the 5th of April, 1869, the original tenure-of-office act was amended, so as to authorize the President in the recess of the Senate to suspend an officer at his discretion until the end of the then next session of the Senate, and to designate some person to perform the duties of the office in the mean time, who should be entitled to the salary and emoluments while he served, instead of the officer suspended. 16 Stat. 6.

Under the authority of this act, Embry was suspended from office on the 5th of May, 1869, during a recess of the Senate, and Enos Hopkins designated to perform his duties. Embry, however, remained in the office until May 27. The Senate did not advise or consent to the appointment of any one to fill the place of Embry during its next session, which terminated July 15, 1870, and he was, on the 21st of July, notified to resume the charge of his office, which he did on the 25th of that month. The salary from May 27, 1869, to July 25, 1870, was paid to Hopkins. This suit was brought by Embry to recover for the same time. The Court of Claims decided against him, and he appealed.

We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitu-

tional question which has at times occupied the attention of the political department of the government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the judges of the courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign.

When Embry was appointed, the President had power to suspend him for cause. The law also provided that if suspended he should draw no salary so long as another person was performing his duties. While he was in office, further power of suspension was given the President, with a like provision as to pay. He was suspended. The Senate did not see fit to advise or consent to the appointment of another person in his place, and consequently, on the 15th of July, 1870, when the next session of the Senate ended, he became entitled to enter again on the performance of the duties which pertained to his office. This he did on the 27th of July, but not before. His present claim rests not on any contract with the government, either express or implied, but upon the acts of Congress which provide for his salary. We so held in *United States* v. *McLean*, 95 U. S. 750. To adjudge in his favor would be to make a new law, not to enforce an old one. Although he was lawfully in office, he was not entitled to pay or emolument while not performing its duties because of his suspension.

It is true his lawful suspension ended on the 15th of July, but he did not resume possession until ten days afterwards. In the mean time, the person designated for that purpose performed his duties. Under these circumstances, the law gave the salary to the actual incumbent and not to him. The delay was an incident to the suspension, and does not seem to have been unreasonable. No more time elapsed than was necessary to give the proper notices and transfer the possession.

Judgment affirmed.

NATIONAL BANK *v.* BURKHARDT.

1. When the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, the rule that for most purposes the law regards the entire day as an indivisible unit is necessarily departed from.
2. On the afternoon of Feb. 23, 1875, A. executed to a national bank in Cincinnati, Ohio, an instrument whereby he stipulated to guarantee and make good to said bank any sum or sums which might thereafter be held against B. to an amount not exceeding $50,000, and waived notice from time to time of the amount and extent of such indebtedness. On the morning of that day C. had presented for deposit therein a check to his order drawn on said bank by B. The bank, claiming that said check was within the terms of the guaranty, brought suit against A. to recover the amount thereof. The evidence of the plaintiff tending to show that pursuant to a general and notorious usage among the banks in Cincinnati, by which checks left in the morning by depositors were held until after business hours for the purpose of examining the accounts of the drawers, B.'s check was placed aside by the teller for such examination, and C. informed that it would not be placed to his credit unless found good, and that, on the part of the defendant, no such usage existed, and that C. had no knowledge or understanding in regard to said check except that it was received as a deposit by the bank when left there by him, — the court charged the jury that it was for them to determine whether at the time said check was left at the bank by C. it was offered as a deposit and so received. The jury so found *Held*, 1. That the charge was not erroneous. 2. That the jury having found that said check was so offered and received, it was not a debt due by B. within the meaning of A.'s undertaking. 3. That in view of such finding the question of usage was immaterial.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Timothy D. Lincoln for the plaintiff in error.
Mr. George A. Sage and *Mr. E. W. Kittredge*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

On the 23d of February, 1875, Burkhardt, the defendant in error, executed, for the benefit of John Cinnamon, an instrument to the bank whereby he stipulated "to guarantee and make good to said bank any sum or sums which may hereafter be held against the said John Cinnamon, to an amount not exceeding $50,000," and notice "from time to time of the amount and extent of such indebtedness" was waived.

As originally drawn, the guaranty included Cinnamon's existing as well as his future liabilities. Burkhardt refused to sign it, unless what related to the former was stricken out.

This was done by the vice-president of the bank, and Burkhardt thereupon signed and delivered the instrument. This was in the afternoon of the day above named.

The only controversy between the parties, as the case is presented here, relates to a check for $10,997, drawn by Cinnamon upon the bank, in favor of Evans, Lippincott, & Co.

It appears by the bill of exceptions that the check was presented to the bank by the payees on the day of its date, the 23d of February, 1875, and that the bank "gave evidence tending to show that when the check was so handed in it was without the pass-book, and was placed aside by the receiving teller for examination after the close of banking hours before it should be credited; that the receiving teller had been instructed by the cashier not to credit Cinnamon's account with checks left until after the close of bank hours, when the account was examined and found good; that when the checks of Cinnamon were left on that day, the depositors were informed that they would not be passed to their credit unless found good after the close of bank hours; that there was at the time, and for a long time had been, a notorious usage in Cincinnati in receiving checks from depositors on them, and that this usage peculiarly applied to large banks, like the First National, by which checks left in the bank in the morning by depositors were held until after close of the bank, subject to be returned in the afternoon if found, upon balancing the accounts, not to be good; that such had been the usage in the First National Bank since its organization in 1861, and that it was a bank of $1,500,000 capital; and that such usage was general and notorious among the customers of the bank." And that the "defendant thereupon gave evidence tending to show that no such usage existed, and to contradict all the evidence of plaintiff in relation thereto, and in reference to any notice to the depositors in regard to Cinnamon's check as testified to by the plaintiff, and tending to show that Evans, Lippincott, & Co. had no knowledge or understanding in regard to said check, except that it was received on deposit and as a deposit when it was left with the bank."

If the check were to be considered as received on deposit when it was left with the teller, and Cinnamon was the debtor of the bank and the bank his creditor from that time, then the transaction was not within the guaranty, and Burkhardt was not liable. If, on the other hand, the bank had the right to hold the check until after bank hours, and then to make its election, and to credit the depositor and charge Cinnamon with the amount, as was done, the check was covered by the guaranty, and the bank was entitled to recover.

These alternatives were the hinges of the controversy upon the trial.

The question presented was decisive of the case. Its solution was for the jury under instructions from the court. It is insisted by the plaintiff in error that the court erred in the instructions given.

The general charge embraced topics not brought before us, doubtless for the reason that, with respect to them, both parties acquiesced in the findings of the jury. The charge was full and able. In our judgment, it was correct in every thing it touched upon, and it covered the entire case.

Having given such a charge, the court was not bound to give any further instructions, and it would have been as well if the judge had declined to give those submitted by the plaintiff in error.

It appears that they were seven in number. Only the last four are in the record. They affirm or deny, with only a change of phraseology, what had been said in the charge already given.

The jury was properly cautioned not to be misled or confused by them. There is danger of both in such cases.

The first of these special charges, as we find them in the record, was given as asked for without qualification. Nothing need, therefore, be said in relation to it.

The second one, with the addition made to it by the court, is as follows: "That if checks of John Cinnamon on the bank were left at the bank on the 23d of February, 1875, but were not passed upon by the receiving teller, or received as a deposit, nor entered in any pass-book or other book of the bank to the credit of the parties leaving them, but were laid aside

for examination until after bank hours, when an examination could be made to see whether Cinnamon's account was good, then they did not become a debt of Cinnamon to the bank until they were so passed upon and entered."

This charge the court gave, adding, "If it was handed in as a deposit, it became a deposit at the time it was received. Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit. That I give you, for it has these words in it, 'or received as a deposit.'"

For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from. Thus, where a mortgage took effect from the time it was deposited for record on a particular day, and a judgment became a lien upon the premises on the same day, proof was received to show that the mortgage was deposited before the court sat, and it was held that the mortgage must be first satisfied. *Follett* v. *Hall*, 16 Ohio, 111. A like inquiry is involved in this case.

In Morse's well-considered work on Banking, p. 321, it is said: "But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable."

We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text.

When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the

former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent Chief Justice: "If there has ever been a doubt on this point, there should be none hereafter." *Oddie* v. *The National City Bank of New York*, 45 N. Y. 735.

We see no objection to the amendment made by the court to the instruction under consideration. It was correct in point of law, and it was proper to prevent any misunderstanding by the jury. It told them tersely and clearly, as the principal charge had done, that if the check was offered and received as a deposit it was a deposit, and it followed as matter of law that the bank was bound accordingly. Whether there had or had not been a consummated deposit was the ultimate fact to be found by the jury. The evidence is not, and should not have been, set forth in the bill of exceptions. All on the subject to be found there is that the parties gave evidence tending to prove what they respectively claimed. What that evidence was we do not know, and it is in no wise necessary that we should be advised upon the subject. The facts and circumstances, whatever they were, and the probative force and weight of each one, were exclusively for the consideration of the jury. The evidence may have been more or less cogent on either side, and more or less characterized in parts or in its entirety by internal conflicts and contradictions, or by other neutralizing qualifications. With all this we have nothing to do. The subject is beyond the sphere of our power and duties. We sit here to correct the errors committed by the court, if there were any, as disclosed in the record. The verdict, as the case is before us, is as if it were not. If it was wrong, the remedy was with the court below by a new trial. It cannot be administered here.

The third instruction involves substantially the same point as the second. It was given with a like addition, and an exception was taken. What we have said with respect to the second exception applies here.

The fourth and last instruction was, that if, at the bank, there had been for a long time a usage "that the receiving

teller entered checks in the pass-book, as they came in, subject to a return of the checks to the depositors if in the afternoon of the day, when the accounts were examined, the checks were found not to be good, and to return the same to the party depositing them, and such were then made good by the depositor, . . . such usage would be a valid and legal usage as between the depositors and the bank."

The court refused to give this charge as asked, but gave it as thus qualified: —

"Nothing in this case shows that Mr. Evans knew any thing about this usage. As to the question of general usage, I have said that it was not competent to change the law in the case, when the deposit was made without any thing said about the deposit by the persons receiving the deposit, — the law made that a debt against the bank in favor of the depositor; but if the depositor knows the usage in cases of that kind, why, as a matter of course, it will change it."

The plaintiff in error excepted.

The proposition submitted was fatally defective in not including as one of its terms that the depositors knew of the special and particular usage mentioned. Without such knowledge it was entirely ineffectual. The objection of the judge was conclusive. *Moore* v. *Voughton*, 1 Stark. 396; 1 Chitty, Contr. 84.

The principal charge was full and clear in regard to the general usage or custom insisted upon by the plaintiff in error. Upon that subject the judge, among other things to the like effect, remarked: "It is said by the plaintiff, by way of proof, that although there was no express agreement between Evans, Lippincott, & Co., the depositors of this check, and the bank, that it should be returned in case it should not be found good at three o'clock, or shortly thereafter, yet that there was a general usage among bankers of the city of Cincinnati of that character, which extended to all their customers, and, therefore, it had become a law. The question of usage, as presented here, is undoubtedly a very important question, and as a general proposition of law every commercial contract is entered into with the understanding that the usage in regard to the particular matter of the contract becomes a part and parcel of the contract itself."

A large part of the able and elaborate argument of the counsel for the plaintiff in error was addressed to this point. In our view, conceding the usage to have been established, it was in no wise material as a factor in the case.

The verdict of the jury, by rejecting the claim of the bank touching the check, established the fact that the deposit became complete by the agreement of the parties when the check was handed in. As a necessary consequence, it was not within the undertaking of Burkhardt. Usage, therefore, could have had no effect upon the rights of the parties, and was immaterial. The result of the case must have been the same as if that subject had not been drawn in question.

A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict, or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing.

Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law. *Barnard* v. *Kellogg*, 10 Wall. 390; *Bliven* v. *New England Screw Co.*, 23 How. 433; *Collender* v. *Dinsmore*, 55 N. Y. 200; *Adams* v. *Goddard*, 48 Me. 212; *Thompson* v. *Riggs*, 5 Wall. 674; *Dykers* v. *Allen*, 7 Hill (N. Y.), 497.

These considerations apply to the posture of the case as it was found to be by the verdict of the jury, under instructions, properly given, by the court. According to those tests, the contract was clear, complete, and irrevocable when the check was delivered by one party and received by the other. After that there was nothing left for usage to do. Its aid, when the controversy arose, was invoked too late. If the bank proposed to hold the check on conditions, it was but fair and just to the other party to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payees might have depended on the promptitude and energy of their conduct. Delay until after bank hours might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a

bank, under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor.

It does not appear by the record that any evidence offered by the bank, touching the general usage, was excluded, and we think what was said by the court in that connection, as well as with respect to the special usage of the institution, was unexceptionable, and was quite as favorable to the bank as it had a right to claim.

If either side had ground for complaint, it was not the plaintiff in error.

Judgment affirmed.

MANNING v. INSURANCE COMPANY.

1. A contract between A. and an insurance company stipulated that for his services as its agent the company would pay him twenty per cent on the ordinary premiums upon all policies for the first year, and "seven and one-half per cent for the second and subsequent years of assurance," said allowance to continue for twenty-five years, should the policies remain so long in force. It was also stipulated that he should appoint sub-agents, that all moneys should be promptly remitted to the company on or before the fifteenth day of each month, and that his "commissions should accrue only as the premiums were paid to the company." The company having discharged him from its service, June 2, 1871, brought this suit to recover its moneys in his hands, and introduced evidence that he was indebted to it in a certain amount, and had been properly removed. Among other defences, he offered to show that a set-off existed in his favor for commissions collected and received by the company from May 1, 1871, to Dec. 23, 1871, and interest thereon. After having made proof of notice to the company to produce the books and papers necessary to show the amount of renewal premiums received by it from policies obtained through his agency during the period mentioned, and the books and papers not being produced, he testified that on June 2, 1871, there were policies in force upon which the annual premiums would be $87,000, as it appeared in his accounts with his sub-agencies, that his annual commissions upon the premiums would amount to $8,391.14, and that computing the amount which would be due to him, accruing between that date and Dec. 23, 1871, they amounted to about $4,754.97. No direct proof was given that any of the policies in force on May 1, 1871, or on June 2, 1871, had been renewed or extended, or that any of the annual premiums becoming payable after those dates had been paid to the company or received by it. The court instructed the jury, in effect, that if A. had been removed from his agency without just cause, they might find from this evidence what amount the company should have

received of renewal premiums, but if they found that he had been justifiably removed, there was no proof for their consideration of the amount of renewal premiums received or collected, in the hands of the company, upon which he was entitled to commissions. *Held*, 1. That A. had no just ground of exception to the charge. 2. That the burden was on him to prove that the premiums had been *actually paid* to the company.

2. It is error to submit to the jury to find a fact of which there is no competent evidence.

3. The only presumptions of fact which the law recognizes are immediate inferences from the facts proved.

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

The facts are stated in the opinion of the court.

Mr. William Henry Arnoux for the plaintiff in error.

Mr. James C. Carter, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The John Hancock Mutual Life Insurance Company, on the second day of December, 1868, employed Manning and one Hall as its general agents for New York and other States, to secure applications for life insurance, and to collect and pay over premiums on insurances effected. It was stipulated that the agreement should continue in force three years from Sept. 1, 1867, and that it might thereafter be terminated by either party on giving six months' notice. By the contract, the compensation allowed to Hall and Manning was twenty per cent on the ordinary premiums upon all policies (excepting those paid for by single payments) for the first year, and seven and one half per cent for the second and subsequent years of assurance. An additional allowance was also made for travelling and incidental expenses. It was further stipulated that these allowances should continue to be paid for twenty-five years from the date of each policy, should any continue so long in force; and, further, that the agents should remit monthly all moneys collected by them, and return all uncollected policies and receipts sent to them for collection by the company. The contract declared that commissions should accrue only as the premiums were paid to the company.

On the 13th of May, 1870, Hall assigned his interest in the contract to Manning, with the approval of the company.

On the seventeenth day of September, 1870, a new arrangement in lieu of the former was made between the parties, by which it was agreed that Manning should thenceforward receive for his compensation $5,000 per annum, the commission to sub-agents to be twenty-five and seven and one-half per cent; that Manning should collect the renewals of the old business of Hall, and Hall and Manning, and receive the renewal commissions which said renewals were entitled to under the former contract. This contract was terminable at the option of the company at any time within three years.

About the 1st of June, 1871, the company discharged Manning from its service, for reasons which the verdict in the case establishes to have been lawful and sufficient, and brought this suit to recover its money in his hands.

Among other defences set up against the claim of the plaintiff, the defendant offered to show that a set-off existed in his favor for commissions collected and received by the plaintiff from May 1, 1871, to Dec. 23, 1871, and interest thereon to the time of the trial. To sustain this (after having made proof of notice to the plaintiff to produce the books and papers necessary to show the amount of renewal premiums received by it from policies obtained through his agency during the period mentioned, and the books and papers not being produced), he gave evidence to prove that on the 2d of June, 1871, there were policies in force upon which the annual premiums would be $87,000, as it appeared in his accounts with his sub-agencies; that his annual commissions upon the premiums would amount to $8,391.14; and that, computing the amount which would be due to him, accruing between June 2, 1871, when he was discharged, and Dec. 23, 1871, when the suit was commenced, they amounted to about $4,754.97.

But no direct proof whatever was given that any of the policies in force on the 1st of May, 1871, or on the 2d of June, 1871, had been renewed or extended, or that any of the annual premiums becoming payable after those dates had been paid to or received by the plaintiff.

Upon this evidence the Circuit Court instructed the jury, in effect, that if the defendant had been removed from his agency without justifiable cause, they might find from it what amount

the plaintiff should have received of renewal premiums; but if they found he was justifiably removed, there was no proof for their consideration of the amount of renewal premiums received or collected in the hands of the company upon which he was entitled to commissions.

In another part of the charge the same instruction was given, though in different order. It was, that if by his own conduct the defendant rendered his removal necessary, before he could recover from the plaintiff his portion of the renewals, it would be incumbent upon him to show, not only how many policies had been taken by his agency, and the premiums due upon them, but also that the premiums had been paid to the plaintiff. On the other hand, if by its wrongful act of removing him the plaintiff deprived him of the means of collecting the premiums, then when he had shown that renewal premiums to a certain amount were due and payable upon life policies at the time when he was removed, which because of its own act the plaintiff was bound to collect, if collectible, he was entitled to the presumption that they were collected as they became due, and, therefore, the burden would rest upon the company to show that policies had lapsed, or that without its fault it had been unable to collect the renewal premiums. To so much of these instructions as ruled in effect that if the defendant was rightfully dismissed from the employment of the plaintiff there was no evidence for the consideration of the jury as to the amount of the renewals, and, of course, of the amount of commissions thereon, exception was taken, and it is now assigned for error.

We think, however, the defendant has no reason to complain. The charge was, at least, quite as favorable to him as he had any right to ask. By his contract with the plaintiff it was expressly stipulated that the "commissions should accrue only as the premiums are paid to the company." It was incumbent upon him, therefore, to prove, not merely that they were due, which might possibly have been paid, but that they had been actually paid, and paid not merely to his sub-agents, but paid to the plaintiff. If they had been thus paid, the plaintiff held the money, to the extent of the commissions, for his use. If they had not been paid to the plaintiff, it had nothing in hand which belonged to him. His set-off was in the nature of an

action for money had and received to his use. The plaintiff owed him nothing until it received the money. Now, it is very plain that proof of the existence of outstanding premiums which became payable before his set-off was pleaded fell short of any proof that those premiums had been actually paid, or that they were in the hands of the plaintiff.

It is argued, however, that because the plaintiff failed to produce its books and papers necessary to prove the amount of renewal premiums received by it, the defendant was at liberty to prove the amount by what he calls "secondary evidence;" or, in other words, "by the best evidence the case afforded." This may be admitted; but the receipt of the renewal premiums by the plaintiff was still a fact to be proved, either by direct or circumstantial evidence.

No direct proof of such receipt was offered, as we have said. None was attempted. The defendant might have resorted to a *subpœna duces tecum*, or to an order of the court to produce papers and books, or, perhaps, to a bill of discovery. He did neither. He simply proved, as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon which fell due before the suit was brought. His evidence stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff, and to presume it against a party who was not in the wrong, a party who had rightfully dismissed him from his agency, and who was under no obligation to collect the premiums at all. But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. From the fact that a debt existed, it does not follow as a necessary or even reasonable sequence that it has been paid. Nor is there any presumption of its payment upon which a jury can act. Certainly none until after the lapse of twenty years. Much less can such a presumption arise in regard to the payment of renewal premiums upon policies of insurance such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the exist-

ence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *United States* v. *Ross* (92 U. S. 281, 284), we said: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed." Referring to the rule laid down in Starkie on Evidence, page 80, we added: "It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass* v. *Mitchell*, 35 Pa. St. 440."

If these principles be applied to the present case, the inadmissibility of the presumption which the defendant contends the court should have permitted the jury to draw becomes apparent. That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were $87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Every thing more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid

to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidences of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury.

What we have said renders it unnecessary to notice at length the several assignments of error. If there was no evidence of the receipt of renewal premiums by the company, what would have been the interest upon them had they been received was quite immaterial. So, also, was it immaterial to show what would have been the probable duration of the policies.

Judgment affirmed.

NATIONAL BANK *v.* GRAHAM.

1. A national bank is liable for damages occasioned by the loss, through gross negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors.
2. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing.
3. The doctrine of *ultra vires* has no application in favor of corporations for wrongs committed by them.
4. Sect. 5228 of the Revised Statutes, which provides that it shall be lawful for a national bank after its failure to "deliver special deposits," is as effectual a recognition of its power to receive them as an express declaration to that effect would have been.
5. The phrase "special deposits," so employed, embraces the public securities of the United States.

ERROR to the Supreme Court of the State of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. George H. Williams for the plaintiff in error.

Mr. John Hays, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The capital stock of the First National Bank of Carlisle, Pennsylvania, was $500,000, divided into five hundred shares

of $1,000 each. From Nov. 9, 1869, Samuel Hepburn, the president, owned four hundred and sixty shares. His son, C. H. Hepburn, was the cashier, and he and Hopewell Hepburn, another son and a director, owned ten shares each. From Oct. 19, 1871, H. M. Hepburn, also a son and director, owned ten shares. John G. Orr, the teller and a director, owned the remaining ten shares. With one exception, these persons were directors from the year 1870. In 1867, Fannie L. Graham, the defendant in error, had $4,000 of 7.30 bonds of the United States deposited in the bank for safe-keeping. They were called in by the government, and at her request the cashier had them converted into the same amount of 5.20 bonds. These also were left in the bank for safe-keeping. The cashier gave her a receipt, dated Oct. 22, 1868, setting forth this fact and that the bonds were to be returned on the return of the receipt. The cashier cut off the coupons and collected them and placed the proceeds to her credit on the books of the bank, and paid her the amount as it was demanded. She kept an account with the bank. Before and after the times mentioned, the officers of the bank were accustomed to receive such deposits from others in the same way and for the same purpose. They were entered in a book kept by the bank. The fact of there being such deposits was frequently spoken of by the directors at meetings of the board. Some of the directors and quite a number of other persons had such deposits in the bank. No compensation was expected or received by the institution. It was a bailee without reward. The bank alleged that on the 5th of August, 1871, the bonds of the defendant in error were stolen from its vault. She did not learn the fact until some two or three weeks afterwards. She heard that some other securities belonging to her and so deposited had been stolen, and upon inquiry at the bank was told that those securities had been found upon a neighboring highway and had been returned, but that her government bonds had been stolen also and had not been recovered. She was requested to say nothing about their loss, and was assured that the interest should be regularly paid to her, and that the value of the bonds should also be made good, so that she should not be a loser. The interest was accordingly paid up to the 1st of July, 1873,

inclusive. This suit was brought to recover the value of the bonds.

The defendant in the court below asked the court to instruct the jury that the bank, being a corporation chartered under the national banking laws, "was not authorized to receive bonds and valuables for safe-keeping;" that "the act of the cashier in taking the bonds of the plaintiff was not within the scope of his powers and duties as cashier, and, therefore, did not bind the bank; and that the plaintiff could not recover." This instruction the court refused to give, and the defendant excepted.

The jury was instructed that, "to justify a recovery against the defendant in this case, they must be satisfied from the evidence that the plaintiff's bonds were received for safe-keeping with the knowledge and acquiescence of the officers and directors of the bank, and that if the bonds were lost by the gross negligence of the bank or its officers, the bank was liable." The defendant again excepted. A verdict was rendered for the plaintiff. The jury thus found and affirmed the facts of knowledge and gross negligence by the bank. These points are, therefore, conclusively established, and are not open to inquiry.

Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side, — certainly none on the part of the depositor. She was entitled at any time to reclaim the securities. The bank was bound in good faith and in law to return them, or to keep them, without gross negligence until they were called for. If, when applied for, they were refused, it cannot be doubted that they, or their value, according to the form of action adopted, might have been recovered. *White* v. *The Franklin Bank*, 22 Pick. (Mass.) 181. If the bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the liability of the bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depositary. The only way of escape from liability open to the latter

would have been to return the property to the owner, or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *Foster* v. *Essex Bank*, 17 Mass. 479. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract it may be regarded only as inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto*, at the option of the injured party. 1 Chitty, Pl. 151.

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants' Bank* v. *State Bank*. 10 Wall. 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence. *Philadelphia, Wilmington, & Baltimore Railroad Co.* v. *Quigley*, 21 How. 209; 2 Wait, Actions and Defences, pp. 337–339; Angell & Ames, Corporations, sects. 186, 385; Cooley, Torts, pp. 119, 120.

Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *Foster* v. *Essex Bank*, *supra*; *Lancaster County National Bank* v. *Smith*, 62 Pa. St. 47; *Scott* v. *The National Bank of Chester Valley*, 72 id. 471; *The First National Bank of Carlisle* v. *Graham*, 79 Pa. 106; *Turner* v. *The First National Bank of Keokuk*, 26 Iowa, 562; *Smith* v. *The First National Bank in Westfield*, 69

Mass. 605; *Chattahooche National Bank* v. *Schley*, 58 Ga. 369. The only authorities in direct conflict with these adjudications, to which our attention has been called, are *Willey* v. *The First National Bank of Brattleboro'*, 47 Vt. 546, and *Whitney* v. *The First National Bank of Brattleboro'*, 50 id. 389.

The case first cited (*Foster* v. *Essex Bank*) was argued exhaustively by the most eminent counsel of the time, and decided by a court of great judicial learning and ability. Their opinion is marked by careful elaboration.

The special deposit there was a cask containing gold coin. While it was maintained that the bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown.

Here, gross negligence is conclusively established. The depositor kept an account in the bank. The cashier cut off and collected the coupons, and placed the proceeds to her credit. The bonds, therefore, entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this view of the subject further, because we think there is another ground free from doubt upon which our judgment may be rested.

The forty-sixth section of the Banking Act of 1864, reenacted in the Revised Statutes of the United States, sect. 5228, declares that, after the failure of a national bank to pay its circulating notes, &c., "it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, and to deliver special deposits." This implies clearly that a national bank, as a part of its legitimate business, may receive such "special deposits;" and this implication is as effectual as an express declaration of the same thing would have been. *United States* v. *Babbit*, 1 Black, 55.

The phrase "special deposits," thus used, embraces deposits such as that here in question. *Patterson* v. *The Syracuse National Bank*, Court of Appeals of New York (recently decided and not yet reported). In that case it was said "a reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were

special deposits of money, bullion, plate, &c., for safe-keeping, and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

It would, undoubtedly, be competent for a national bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly.

We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider.

Judgment affirmed.

COX *v.* NATIONAL BANK.

CLARDY *v.* NATIONAL BANK.

A bill of exchange drawn by A. to the order of B. on "Messrs. C. & D., New York, N. Y.," was accepted by them without qualification or condition. All the parties then and at its maturity resided in Kentucky. The notary public, after making on the day it matured diligent but unsuccessful inquiry in New York City for C. & D., and for their place of residence or business, presented it and demanded payment, during business hours, at the places frequented by them when in that city. Payment not having been made, he protested the bill, and on the next day, learning from those whom he believed to be informed on the subject the residence of A. and B., transmitted to them there by mail, post paid, notices of such protest. *Held*, 1. That the bill was in law payable at that city. 2. That the presentment and demand were sufficient. 3. That the requisite steps to bind A. and B. were taken.

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

The first of these cases is an action by the National Bank of the State of New York against Merritt Cox, the drawer, J. C. Whitlock, the payee, and W. F. Cox and William Cowan,

the two last doing business as partners under the firm name of Cox & Cowan, the acceptors of the following bill: —

"$5,000. HOPKINSVILLE, KY., Aug. 3, 1875.

"Eighty days after date pay to the order of J. C. Whitlock five thousand dollars, value received, and charge to account, renewing a bill for same amount and names, due Aug. 3, 1875.

"MERRITT COX.

"To Messrs. COX & COWAN, New York, N. Y."

Written across the face of the bill were the words, "Accepted: Cox & Cowan."

Whitlock indorsed said bill to E. M. Wright & Co., of New York, who in turn indorsed it to the bank.

The petition of the plaintiff alleges the presentation of the bill in the city of New York for payment, the refusal thereof, and protest and notice to the drawer and indorser.

Cox & Cowan made no defence.

Merritt Cox and Whitlock, however, answered, denying notice of protest, the due and proper presentation of the bill, or the demand of payment.

At the trial, the plaintiff, having read the bill and the protest thereof to the jury, offered evidence tending to show that the notary intrusted with said bill made reasonable and diligent inquiry for the acceptors and their place of business in New York City at the place or places frequented by them when there, and could not, after such inquiry, find them or any place of business of them or either of them; that he then demanded payment on the day of maturity in business hours at the place so frequented by them when in said city, and that payment of said bill was then and there refused; that they caused inquiry to be made by the said notary in New York on the twenty-fifth or twenty-sixth day of October, 1875, of E. M. Wright, a resident of New York City, and one of the firm of E. M. Wright & Co., who indorsed said bill to the bank, as to the post-office address respectively of said Merritt Cox and J. C. Whitlock; that said notary was then informed by said Wright that the post-office address of each of said defendants was Hopkinsville, Ky.; that said notary, on the twenty-sixth day of October, 1875, mailed notices of said protest to each of said

defendants at Hopkinsville, Ky. There was no evidence to show that the bank, or any one for it, at any time made any other inquiries for the post-office address of either or both of said defendants.

Cox and Whitlock introduced evidence tending to show that the bill was drawn by Merritt Cox, accepted by Cox & Cowan, and indorsed by Whitlock, all in Hopkinsville, Ky.; and it was there delivered to G. V. Thompson, to whom the bill, of which the one in suit was a renewal, had been sent by E. M. Wright & Co., who had indorsed the same to the bank as collateral security, and had received it after maturity from the bank (the holder) for the purpose of having it renewed; that Thompson sent the bill in suit to said Wright & Co., who immediately delivered it to the bank, and informed it that the bill had been executed and accepted in Kentucky; that at the time of the execution and acceptance of said bill, and at the time of its maturity, the acceptors thereof, W. F. Cox and William Cowan, composing the firm of Cox & Cowan, each resided in Hopkinsville, Christian County, Ky., and had their place of business there, and not elsewhere; that the bank, when it took said bill, and when it was executed and when it matured, was informed and had knowledge that the residence and place of business of Cox & Cowan were at Hopkinsville, Ky., at all the times aforesaid; that there was no presentment for payment of said bill or demand of payment of the same to or upon said acceptors, or either of them, in person or at their residence or place of business in Kentucky on the day of its maturity, or at any time; that there was no agreement to pay said bill in New York except as shown upon its face; that the post-office address of both Merritt Cox and J. C. Whitlock was then, and at all previous times for fifteen years had been, Newstead, Ky., and never at Hopkinsville, and that at all times when the bill in suit or the previous one existed G. V. Thompson, to whom the bill had been sent, resided in Hopkinsville, Ky., and well knew the post-office address of both Cox & Whitlock to be Newstead, Ky., and not Hopkinsville, that mail facilities between Hopkinsville and New York were ample and daily, and that a letter reached one place from the other in three days; that there was telegraphic communication

between the two places; that E. M. Wright & Co. were factors and commission merchants in New York, and in that capacity did business for Cox & Cowan, and in the course thereof the bill was received; that each of the firm of Cox & Cowan during the course of said business, and up to June, 1875, on different occasions visited New York on business, and while there wrote and received letters at the office of said Wright & Co., and looked after business intrusted with said factors, and did the like with other factors in their employment in said city.

The plaintiff then introduced evidence tending to show that the original bill was sent to G. V. Thompson by said E. M. Wright & Co., who corresponded with said Thompson in their own names, disclosing no sort of agency for the bank; that he procured the renewal of said bill at their instance and by their instruction, and sent it to them when obtained; that he had no communication with the bank, and was never at any time in any respect its agent, and did not inform it or Wright & Co. of the post-office address of Merritt Cox or Whitlock, and was not inquired of as to either, and afterward had no further connection with the bill.

The court instructed the jury that the bills of exchange were in law payable in the city of New York, notwithstanding the plaintiffs may have known, before making acceptance and indorsement thereof, that the acceptors, Cox & Cowan, actually resided at Hopkinsville; that if the jury believed that the notary made reasonable and diligent inquiry for the acceptors at their place of business in New York, at the place or places frequented by them in that city, and could not after such inquiry find them or their place of business, then the demand of payment during business hours on the day of the maturity of the bill at the place so frequented by them in the city of New York was sufficient; that if the bank did not know the post-office address of the drawer, Merritt Cox, and the indorser, J. C. Whitlock, and if the notary made inquiry as to their several post-office addresses of Wright & Co., who had assigned the bills to the plaintiff, and who were the correspondents of the acceptors, and in the judgment of the notary were likely to be informed as to such post-office addresses, and

who professed to know them, and was informed that their post-office address was Hopkinsville, Ky.; and if the notary transmitted notices on the day after the protest by mail, postpaid, to the drawer and indorsers at the post-office address so ascertained by the notary, such notice of protest was good to bind the drawer and indorsers respectively.

The defendants excepted to these several instructions, and also made several requests for instructions, each of which was refused.

There was a verdict and judgment for the plaintiff. The defendants, Merritt Cox and Whitlock, then sued out this writ of error.

In the second case the facts are in substance identical with those in the first case, except that J. D. Clardy was the payee and indorser of the bill.

Mr. Walter Evans for the plaintiffs in error.

The fact that the bill of exchange was addressed to Cox & Cowan, New York, N. Y., does not render it at all events payable there, and it was error for the court to so instruct the jury. *Rowe* v. *Young*, 2 B. & B. 276; *Fenton* v. *Goundry*, 13 East, 468; Chitty, Bills, 151; *Lighter* v. *Will*, 2 Watts & S. (Pa.) 140; *Fisher* v. *Evans*, 5 Binn. (Pa.) 541.

The acceptors never had a residence or place of business in New York. On the contrary, they lived and did business in Hopkinsville, Ky., where the bill was executed and delivered. Their residence or place of business was not subsequently changed. These facts were known to the bank when it took the bill, and before its date, and when it matured. Hence, in the exercise of the diligence necessary to bind the drawer and indorser, it was absolutely essential that presentment for payment should have been made in Kentucky at the maturity of the bills. *Taylor* v. *Snyder*, 3 Denio (N. Y.), 145; *Spies* v. *Gilmore*, 1 N. Y. 321; *Bank of Orleans* v. *Whittemore*, 12 Gray (Mass.), 469; 1 Parsons, Bills and Notes, 421–425, 441, 453, *In re Glyn*, 15 Nat. Bank. Reg. 502, 503; *Fisher* v. *Evans*, *supra*; *Musson* v. *Lake*, 4 How. 274; *Whitesides* v. *Northern Bank*, 10 Bush (Ky.), 502; *Barnes* v. *Vaughan*, 6 R. I. 259; Story, Bills, last clause, sect. 325.

While a protest was unnecessary, demand of payment and

notice were quite as essential as in case of a foreign bill. *Hager* v. *Boswell*, 4 J. J. Marsh. (Ky.) 62.

The address of the drawee on a bill of exchange is nothing more than an intimation of where he is, or of where he resides or does business. It is perhaps *prima facie* his residence. *Rowe* v. *Young*, *supra*; *Fenton* v. *Goundry*, 13 East, 468; Chitty, Bills, 151; *Lowry* v. *Scott*, 24 Wend. (N. Y.) 358.

Mr. William D. Shipman and *Mr. W. W. Macfarland*, *contra*.

The bills were addressed to the drawees at the city of New York, and were accepted generally. They were therefore payable at that city.

No matter in what part of the world the acceptors may, in fact, have dwelt, they, by accepting a bill addressed to them at New York, elected to reside there for the purpose of its presentation and payment. *Smith* v. *Little*, 10 N. H. 526; 1 Am. Lead. Cas. (5th ed.), p. 454; Story, Bills, sect. 353; Chitty, Bills, 172–175, 322, 323, 397.

The duty of the holder is performed when he has made diligent effort to find the acceptor at the place where he has undertaken to pay the bill.

It follows that the charge on this point was right. Story, Bills, sect. 351 and note; 3 Kent, Com. (12th ed.), p. 96 and notes; 1 Parsons, Notes and Bills, p. 440 and note.

The charge of the court below upon the question of notice to the drawer and the indorsers of the bills was clearly within the rule laid down in *Lambert* v. *Ghiselin*, 9 How. 256. See also *Hunt* v. *Maybee*, 7 N. Y. 266; Story, Bills of Exchange, sects. 299, 308, 351, 387; *Carter* v. *Smith*, 9 Cush. (Mass.) 321.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Bills of exchange are written orders or requests from one party to another for the payment of money to a third person or his order, on account of the drawer, and, if payable at sight or at a date subsequent to the acceptance by the drawee, the instrument must be duly presented for payment, else the parties to the same conditionally liable for the payment of the amount will be discharged. Different rules prevail as to the place where the presentment for payment must be made,

dependent upon the form of the instrument and the place where and the terms in which it was accepted.

Such an instrument must first be accepted; and if when presented for that purpose the drawee refuses to accept the same, it must, if it is a foreign bill, be protested for non-acceptance, the rule being that the place of protest is the place where the same is required to be presented for acceptance, unless it is in terms payable at some other place. Due presentment for payment must also be made, the general rule being that the place of payment is the place where the acceptor resides, or where on the face of the bill it is addressed to him, unless some other place is specifically designated in the instrument. Story, Bills, sects. 48, 282.

Sufficient appears to show that the subject-matter of the present controversy is a bill of exchange drawn by the defendant first named, the address to the drawees being "Messrs. Cox & Cowan, New York, N. Y.," for the sum of $5,000, payable eighty days from date, value received, and the indorsement on the face of the bill is as follows: "Accepted. Cox & Cowan."

That the bill was duly presented for acceptance, and that it was accepted by the drawees in the manner described, is admitted; nor is it denied that it was duly indorsed by the payee, nor that the plaintiff bank became the *bona fide* holder of the bill by virtue of the second indorsement exhibited in the record.

Payment of the bill at maturity being refused, the plaintiff bank, as the lawful holder of the same, caused it to be protested, and instituted the present action against the drawer, the acceptors, and the payee as the first indorser, to recover the amount. Process was served, and the drawer and indorser appeared and filed separate answers.

Though the answers are separate, yet the material defences in each are the same, and may be considered together. They are as follows: 1. That the bill was not duly presented to the acceptors for payment. 2. That it was not duly protested for non-payment. 3. That due notice was never given to the drawer of the dishonor of the bill or of the failure of the acceptors to pay the same at maturity.

Amended answers having subsequently been filed by the same parties, they went to trial, and the verdict and judgment were in favor of the plaintiff bank against the drawer, acceptors, and indorser for the amount specified in the transcript. Exceptions were filed by the defendants, and they sued out the present writ of error.

Since the cause was entered here, the defendants have assigned for error the following causes: 1. That the Circuit Court erred in instructing the jury that the bill, being addressed to the drawees, "New York, N. Y.," is in law payable in New York City. 2. That the Circuit Court erred in refusing to instruct the jury that the acceptance of the bill, as shown in the transcript, was a general acceptance, which made the bill payable at no particular place. 3. That the Circuit Court erred in refusing to instruct the jury that, in order to charge the defendants, the officers of the plaintiff bank, if they knew at the maturity of the bill where the residence and place of business of the acceptors were, as stated in the answers, must show that the bill was presented and that payment was demanded at their residence or place of business. 4. That the Circuit Court erred in instructing the jury that if the notary made reasonable and diligent inquiry for the acceptors and their place of business in the city of New York, and could not find either their residence or place of business, and that he then demanded payment during business hours at the place or places frequented by them when in said city, that such a demand was a sufficient presentment to maintain the action.

Evidence was introduced by the defendants tending to show that throughout the transaction they were all residents of the State of Kentucky, and that the bill in question was drawn and indorsed in the State; that it was sent by one Thompson to the firm of Wright & Co., who delivered the same to the plaintiff bank or their officers, who were informed where the bill was executed by the drawer and indorser. They also introduced testimony showing that the officers of the bank, when they took the bill, knew where the drawer resided when it was forwarded, and afterwards when it was accepted by the drawees. Explanatory evidence was also given by the plaintiff bank showing that no sort of agency existed between the per-

son by whom the bill was forwarded and the firm by whom it was delivered and the plaintiff bank, and that the former never had any communication with the bank, and never informed either the bank or the said firm of the post-office address of any one of the defendants.

Commercial rules everywhere require that to fix the liability of the drawer of a bill of exchange or the indorser of a bill or note there must be a legal presentment of the instrument to the acceptor or maker, or payment must be demanded of such a party on the day the instrument becomes payable. That payment must be demanded from the maker of a note and notice of its non-payment forwarded to the indorser in due time, in order to render him liable, is so firmly settled, says Marshall, C. J., that no authority need be cited to support the proposition. *Magruder* v. *Bank*, 3 Pet. 87, 90; *The Juniata Bank* v. *Hale*, 16 Serg. & R. (Pa.) 157.

Nobody doubts the correctness of that rule, and it is equally well settled that when a note or bill is expressed to be payable at a particular place, a demand there is always sufficient to charge the indorser. Story, Bills (4th ed.), sect. 357; Chitty, Bills (13th Am. ed.), 407; *Rowe* v. *Young*, 2 Brod. & B. 165; *Picquet* v. *Curtis*, 1 Sumn. 478.

Text-writers of undoubted authority state that an acceptance is an engagement to pay the bill according to the tenor of the acceptance, and that a general acceptance is an engagement to pay according to the tenor of the bill. Bayley, Bills (5th ed.), 154; Chitty, Bills (13th Am. ed.), 342.

Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are that in such a case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but the same decisions hold otherwise as to the maker of a note and the acceptor of a bill, the rule being that, unless the restrictive words "only and not elsewhere" are added, no presentment there at maturity or afterwards is necessary to charge such a party. *Foden & Slater* v. *Sharp*, 4 Johns. (N. Y.) 183; *Wolcott* v. *Van Santvoord*, 17 id. 248.

Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circum-

stances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business. Circumstances, however, may control the usual inference arising from the want of any such expression in the instrument which may warrant a very different conclusion. Thus, if a bill were drawn upon a merchant when abroad, and should be addressed to him at Paris or at London, the place of payment would be the place where the drawer accepted the instrument, whether Paris or London, and not the place of his residence when the bill was drawn or at its maturity. 1 Daniel, Negotiable Securities (2d ed.), sect. 90.

Provided no place is designated or agreed or indicated in the form of the address or the terms of the acceptance, the rule then is that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at their usual place of business during business hours. Id., sect. 635.

Parol testimony to show such an agreement is admissible, it being settled law that the introduction of such testimony is not inconsistent with the rule that a written instrument cannot be varied by parol evidence. *Brent's Exrs.* v. *The Bank of the Metropolis*, 1 Pet. 89, 92.

Unlike the indorser, the maker of a promissory note is liable without any demand of payment. His undertaking is unconditional, but the indorser only undertakes to pay if the maker does not, which makes it necessary for the holder to take proper steps to obtain payment from the maker, from which it follows that his contract is that due diligence shall be used to that end; and when the parties agree what shall constitute due diligence in the particular case, says Marshall, C. J., they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes as such when they are silent.

Acceptors of a bill of exchange stand in the same relation to the drawee of the bill as the maker of a note does to the payee, the acceptor being the principal debtor in a bill precisely as the maker is of a promissory note, the rule being that the liability of the acceptor is governed by the terms of his acceptance, just as the liability of the maker of a note is defined and governed

by the terms of a note; nor can the place of payment be of any more importance in the one case than in the other.

When a note or bill is made payable at a particular bank, as is frequently the case, it is well known that, according to the usual course of business, the note or bill is usually lodged in the bank for collection; and if the maker or acceptor calls to take it up when it falls due, and it is delivered to him, and he pays the amount, the business is closed; but if he does not find the note or bill at the bank, he can deposit the money to meet the same when it shall be presented, and the proof of such tender and deposit, in case of a subsequent suit, will exonerate him from all costs and damages. Or should the note or bill be made payable at some other place than a bank, and no deposit should be made, or he should choose to retain the money in his own possession, an offer to pay at the time and place would protect him against interest and costs on bringing the money into court.

Rules of a different character have sometimes prevailed in other jurisdictions, but the principles to be applied in such a case are settled in this court, nor is it necessary, where the note or bill is payable at a specified time and place, to aver in the declaration or prove at the trial that a demand was made at that place in order to maintain the action, the established rule being that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it is matter of defence to be pleaded and proved. *Wallace* v. *McConnell*, 13 Pet. 136, 150; 1 Daniel, Negotiable Securities (2d ed.), sect. 643; Edwards, Bills (2d ed.), 150; *Rowe* v. *Young*, 2 Bli. 391, 395.

Beyond doubt, these principles are applicable, as determined by this court, where the suit is against the maker of the note or the acceptor of the bill; but when recourse is had to the indorser of the note or the drawer of the bill, very different considerations arise, as they are not the principal debtors to the holder of the instrument. Their undertaking is not absolute, like that of the maker of the note or the acceptor of the bill, but conditional, that if the maker in the one case or the acceptor in the other refuses to make good the undertaking they will pay the amount. Hence, the holder is bound to use due

diligence to obtain payment from the maker or acceptor, as a condition precedent to his right to recover of the parties only conditionally liable. Consequently, when a place of payment is designated in the body of the note or bill, the drawer or indorser has a right to presume that the maker or acceptor has provided funds at such place to pay the note or bill, and to require the holder to apply for payment at such place, unless when the place designated is a bank, and the bank is the holder of the instrument, when the rule does not apply. In all other cases the obligation is absolute, that the holder must aver and prove a presentment at the designated place, unless the necessity is obviated by agreement, or something appearing in the instrument to indicate a different intention. *Bank of the United States* v. *Smith*, 11 Wheat. 171, 175.

Suppose that is so, then there never need be any difficulty in determining the rights of the parties in such a case, where the place of payment is specifically designated in the bill, or where the terms of the instrument contain no such designation whatever, as the rule of procedure in each case, though different, is equally plain and unmistakable. Nor do the parties here differ in respect to those rules, but the plaintiff bank contends that the bill in question brings the case within the category of the first case, but the defendants insist that it falls within the second, where no place of payment is designated.

Looking at the terms of the bill, independent of the address to the drawees and the acceptance written across the face of the bill, it would seem that the theory of the defendants is correct; but the bill is addressed to "Messrs. Cox & Cowan, New York, N. Y.," as drawees, and is by them accepted without explanation or condition, from which it follows as a reasonable inference that they accepted the bill as if they were at the time in the city of New York, and having so accepted it without explanation or condition, the legal construction of the instrument is that it became payable when it fell due at the place designated by the address as the place where the acceptance took place. *Halstead* v. *Skelton*, 5 Q. B. 86; 1 & 2 Geo. IV. c. 78; 38 British Stats. 291.

Bills of exchange, like other written instruments, are subject to legal construction in order to ascertain the intent and mean

ing of the parties, unless the language employed to express such intent and meaning is clear and unambiguous.

Enough has already been remarked to show that when a bill or note is expressed to be payable at a particular place on demand, it is always sufficient to prove that it was presented there to charge the acceptor or the indorser. *Evans* v. *St. John*, 9 Port. (Ala.) 186, 193; *McClane* v. *Fitch*, 4 B. Mon. (Ky.) 599. Where a bill is drawn on a firm, as W. M. & Co., at a particular number and street, as at 263 Washington Street, New York, the presentment should be made at their place of business, as presumable from such address, or at the residence of either of the firm. *Otsego County Bank* v. *Warren*, 18 Barb. (N. Y.) 291, 293.

If the instrument is payable in a particular town, and the residence of the maker or acceptor is elsewhere, the holder is not bound to make demand anywhere except in that town. *Smith* v. *Little*, 10 N. H. 526, 530; 1 Am. Lead. Cas. (5th ed.) 454.

Views equally explicit are expressed by Judge Story, who says that if the bill is drawn upon the drawee domiciled in one place and is payable in another place, and is accepted by him, *meaning without qualification*, the presentment should be made at the latter place. Thus, if a bill is drawn on the drawees at Liverpool, payable in London, and is accepted, without explanation, the presentment for payment must be in London, if any particular place is there pointed out where demand may be made, and if none, and no one can be found to pay the bill, it may be protested there for non-payment for that very cause. Story, Bills (4th ed.), sect. 353; *Boot* v. *Franklin*, 3 Johns. (N. Y.) 208; 2 & 3 Wm. IV., 50 British Stats., c. 98, p. 587; Chitty, Bills (13th Am. ed.), 390.

So where a bill is directed to the drawee at a particular house, and is by him accepted without condition, the going to that house with the bill on the day of payment and finding it closed is a sufficient presentment. Bayley, Bills (5th ed.), 200; *Hine* v. *Allely*, 1 Nev. & M. 433; Chitty, Bills (13th Am. ed.), 330.

American authorities almost universally hold that in such a case no presentment is necessary to charge the acceptor of

the bill or the maker of the note, — the only effect of the neglect as to such a party being that it relieves him from cost and damages if he was ready at the time and place named to pay the amount and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact and payment of the money into court will be a bar to the recovery of interest and cost. *Hills* v. *Place*, 48 N. Y. 520; *Caldwell* v. *Cassidy*, 8 Cow. (N. Y.) 271.

Want of due diligence cannot be successfully set up in this case, as the protest was given in evidence, and shows to a demonstration that every thing the law requires was done to find the acceptors or their place of business without success, and that the protest was finally made at the only place in the city of New York where they were accustomed to transact any business.

Diligence is doubtless required of the holder to ascertain the proper place to present the bill for payment; but it is not necessary to give that issue much consideration in this case, as it is not controverted that every needful effort in that regard was made, if the true theory of the bill is that it was payable in the city of New York, which is asserted by the plaintiff bank and denied by the defendants.

Nothing need be added to what has already been remarked to explain the views of the court upon that subject, which are, that the bill having been addressed to the drawees at the city of New York, and they having accepted the same without qualification, explanation, or condition, the bill became payable in that city, even though no mention was made of any dwelling, store, or place of business where the bill should be presented. *Freese* v. *Brownell*, 35 N. J. L. 285; 1 Bell, Com. (5th ed.) 412.

Nor is it necessary to repeat the views heretofore expressed, that the acceptor of the bill, like the maker of a note, is the promissory debtor in such a case, and that in respect to such a party to a bill no presentment or demand of payment need be made at the specified place in order to render him liable to an action on the instrument. Story, Notes (7th ed.), sect. 228; 1 Parsons, Bills and Notes, 425–429; Thompson, Bills (2d ed.), 294.

Our decisions are decisive to that effect, and it is equally clear in this case that every step necessary to bind the drawer and the indorser was also taken by the holder of the bill described in the declaration. Story, Notes (7th ed.), 236; *Carter* v. *Smith*, 9 Cush. (Mass.) 321.

Presentment at the specified place as against the acceptor of a bill is not necessary, the rule being that, if he was ready at the time and place to pay, he may prove that as a defence; but the rule is otherwise as against the drawer and indorsers. 3 Kent, Com. (12th ed.) 100, 104.

Five other assignments of error are set forth in the brief of the defendants; but it is unnecessary to pursue the discussion, as the remarks already made are sufficient to show that there is no error in the record, and that the judgment should be affirmed.

Exactly the same questions are also involved in the second of the above-entitled cases. Both were argued and submitted at the same time, and must be decided in the same way. In each case

Judgment affirmed.

INDEX.

ABANDONED PROPERTY. See *Captured and Abandoned Property.*

AGENT. See *Contributory Negligence*, 4; *Collateral Security*, 1.

ALABAMA. See *Bills of Exchange and Promissory Notes*, 2; *National Bank*, 1, 2.

ALIEN.

1. A sale of lands in Texas, made before her separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen. *Phillips* v. *Moore*, 208.
2. In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue. *Hauenstein* v. *Lynham*, 483.
3. A., a citizen of Switzerland, died in 1861 in Virginia intestate and without issue. For want of an heir capable under the statutes of the State to inherit the lands there situate whereof he died seised in fee, they were sold by the escheator of the proper district. A.'s next of kin, B., a citizen of Switzerland, filed a petition to recover the proceeds of that sale. Upon consideration of the treaty between the United States and the Swiss Confederation of Nov. 25, 1850 (10 Stat. 587), — *Held*, 1. That the treaty is the supreme law of the land, and by its terms the incapacity of B. as an alien was so far removed as to entitle him to recover and sell the lands and "withdraw and export the proceeds thereof." 2. That his rights thus secured are not barred by the lapse of time, inasmuch as no statute of Virginia prescribes the term within which they must be asserted. 3. That where a treaty admits of two constructions, — one restrictive as to the rights that may be claimed under it, and the other liberal, — the latter is to be preferred. 4. That the treaty-making clause of the Constitution is retroactive as well as prospective. 5. That, in view of B.'s rights in the premises, the escheator is entitled only

ALIEN (*continued*).
to the amount allowed by law for making sales of real estate in ordinary cases. 6. That counsel cannot be paid out of the fund in dispute. *Id.*

ALIENATION OF LANDS. See *Lien.*

AMENDMENT. See *Practice.*

AMENDMENTS OF CONSTITUTION U. S. See *Constitutional Law.*

APPEAL. See *Practice.*

ASSISTANT SURGEON-GENERAL, ACTS OF.

1. The acts of the Assistant Surgeon-General, appointed under the act of Congress and located at St. Louis, are the acts of the Surgeon-General, and have the same validity until countermanded or revoked. *Parish* v. *United States*, 500.
2. Where parties in the effort to fulfil an order for a large amount of ice for the use of the government, which by their contract they were bound to furnish, purchased ice which was lost by the *suspension* of the order of the Assistant Surgeon-General by his superior officer, they are entitled to recover the cost of the ice so lost and the expense of the care and attempt to preserve it. *Id.*

ATTORNEY-AT-LAW.

A., an attorney-at-law, employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate, "B.'s title to the lot" (describing it) "is good, and the property is unincumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing by way of security therefor a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. is insolvent. *Held*, 1. That there being neither fraud, collusion, or falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate. 2. That usage cannot make a contract where none was made by the parties. *Savings Bank* v. *Ward*, 195.

BAGGAGE. See *Passengers, General Carriers of.*

BAILEE. See *National Bank*, 6-10.

BILL OF EXCEPTIONS. See *Exceptions, Bill of.*

BILL OF REVIEW. See *Review, Bill of.*

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Interest*, 2.

1. A creditor who before its maturity accepts a negotiable note, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, in consideration of an extension of time granted

BILLS OF EXCHANGE AND PROMISSORY NOTES (*continued*).
to the debtor, is, according to the law merchant, a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice. *Oates* v. *National Bank*, 239.

2. "Bills of exchange and promissory notes, payable in money at a certain place of payment therein designated," are, by an act of the legislature of Alabama, put upon the same basis as to immunity from set-off, discount, or equities as bills and notes payable at a bank or private banking-house. Such declared to be the intention and effect of the act of April 8, 1873, amending sect. 1833 of the Revised Code of that State. *Id.*

3. A bill of exchange drawn by A. to the order of B. on "Messrs. C. & D., New York, N. Y.," was accepted by them without qualification or condition. All the parties then and at its maturity resided in Kentucky. The notary public, after making on the day it matured diligent but unsuccessful inquiry in New York City for C. & D., and for their place of residence or business, presented it and demanded payment, during business hours, at the places frequented by them when in that city. Payment not having been made, he protested the bill, and on the next day, learning from those whom he believed to be informed on the subject the residence of A. and B., transmitted to them there by mail, post paid, notices of such protest. *Held*, 1. That the bill was in law payable at that city. 2. That the presentment and demand were sufficient. 3. That the requisite steps to bind A. and B. were taken. *Cox* v. *National Bank*, 704.

BOND. See *Internal Revenue*, 2; *Internal Revenue, Collector of; Municipal Bonds.*

BONDHOLDERS. See *Trust and Trustee.*

BURDEN OF PROOF. See *Contributory Negligence*, 5; *Court and Jury*, 3; *Life Insurance*, 1.

BURNT CHICORY. See *Customs Duties*, 1,

CALIFORNIA. See *Limitations, Statute of*, 3, 4; *Pre-emption.*

CAPTURED AND ABANDONED PROPERTY.
The proceeds of certain cotton seized under the Confiscation Act as the property of A. were, in July, 1866, by order of the proper District Court, turned over to its clerk, who thereupon deposited them to his credit as such in a national bank which had been duly designated as a depositary of public money. The bank failed, and judgment in the confiscation proceedings having been rendered in favor of A., he brought suit against the United States to recover said proceeds. *Held*, 1. That the deposit by the clerk was not a payment into the treasury of the United States. 2. That said proceeds belonged for the time being to the court, and were, pending the proceedings, held as a trust fund. 3. That A. was not entitled to recover. *Branch* v. *United States*, 673.

CAUSES, JOINDER OF. See *Practice*, 5.

CAUSES, REMOVAL OF. See *Jurisdiction*, 13; *Jury, Waiver of; Practice*, 6.

1. Sect. 643 of the Revised Statutes of the United States, which declares that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, . . . the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court," &c., is not in conflict with the Constitution of the United States. *Tennessee* v. *Davis*, 257.
2. A. was, in a State court of Tennessee, indicted for murder. In his petition, duly verified, for removal of the prosecution to the Circuit Court of the United States, he stated that, although indicted for murder, no murder was committed; that the killing was done in necessary self-defence, to save his own life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue; that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal-revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries and the apparatus used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce said laws, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire, which is the killing mentioned in the indictment. *Held*, that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States for that district. *Id.*
3. The provision of the Constitution declaring that the judicial power of the United States extends "to *all* cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," embraces alike civil and criminal cases. Both are equally within that power. *Id.*
4. A case arises under that Constitution not merely where a party comes into court to demand something conferred upon him by the Constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defence of a party, in whole or in part, depends upon the construction

CAUSES, REMOVAL OF (*continued*).

of either. It is in the power of Congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law. *Id.*

5. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the Federal court does not invade State jurisdiction. On the contrary, a denial of the right of the general government to remove, take charge of and try any case arising under the Constitution and laws of the United States, is a denial of its conceded sovereignty over a subject expressly committed to it. It is a denial of a doctrine necessary for the preservation of the acknowledged powers of the government. The exercise of the power to remove criminal prosecutions is seen in the act of Feb. 4, 1815 (3 Stat. 198), again in the third section of the act of March 2, 1833 (4 id. 633), and more recently in the act of July 13, 1866. 14 id. 171. *Id.*

6. Sect. 641 of the Revised Statutes, which declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending," considered and *held* not to be in conflict with the Constitution of the United States. *Strauder* v. *West Virginia*, 303.

7. Sect. 641 of the Revised Statutes, which provides for the removal into the Federal court of any civil suit or prosecution "commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," &c., examined in connection with sects. 1977 and 1978. *Held*, that the object of these statutes, as of the Constitution which authorized them, was to place, in respect to civil rights, the colored race upon a level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same. *Virginia* v. *Rives*, 313.

8. The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and, consequently, the statutes founded upon the amendment, and partially enumerating what civil rights the colored man shall enjoy equally with the white, are intended for protection against State infringement of those rights. Sect. 641 was also intended to protect them against State action, and against that alone. *Id.*

CAUSES, REMOVAL OF (*continued*).

9. A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged. *Id.*

10. But the Fourteenth Amendment is broader than sect. 641, as the latter does not apply to *all* cases in which the equal protection of the laws may be denied to a defendant. The removal thereby authorized is before trial or final hearing. But the violation of the constitutional prohibitions, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know until then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied. To such a case — that is, to judicial infractions of the constitutional amendment after the trial has commenced — sect. 641 has no applicability. It was not intended to reach such cases. They were left to the revisory power of this court. *Id.*

11. Therefore, the denial or inability to enforce in the judicial tribunals of a State rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But, in the absence of constitutional or legislative impediment, he cannot swear before his case comes to trial that his enjoyment of his civil rights is denied to him. *Id.*

12. The Constitution and laws of Virginia do not exclude colored citizens from service on juries. The petition for removal did not present a case under sect. 641. *Id.*

13. The provision in the first clause of the second section of the act entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875 (18 Stat., part 3, 470), "that any suit of a civil nature, at law or in equity, now pending . . . in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, . . . in which

CAUSES, REMOVAL OF (*continued*).

there shall be a controversy between citizens of different States, . . . either party may remove said suit into the Circuit Court of the United States for the proper district," construed, and *held* to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side, being all citizens of different States from those on the other, desire a removal, the suit may be removed. *Removal Cases*, 457.

14. Until a case requiring it arises, the court refrains from expressing an opinion upon the second clause of said section. *Id.*
15. The petition for removal (*supra*, p. 463), held to be sufficient in form. *Id.*
16. An application made before trial for the removal to the Circuit Court of a cause pending in a State court at the passage of said act of March 3, 1875, was in time if made at the first term of the court thereafter. *Id.*
17. In order to bar the right of removal, it must appear that the trial in the State court was actually in progress in the orderly course of proceeding when the application was made. *Id.*
18. The ruling in *Insurance Company* v. *Dunn* (19 Wall. 214), that a party who, failing in his efforts to obtain a removal of a suit, is forced to trial loses none of his rights by defending against the action, reaffirmed. *Id.*

CERTIORARI, WRIT OF. See *Habeas Corpus, Writ of*, 1.

CHATTELS, CONTRACT FOR SALE OF.

A. & B. agreed, by a contract in writing, to manufacture for C., at a stipulated price, a quantity of staves, and to pile them on lands adjoining their mill, which were leased to him. The contract provided that, on the staves being counted from week to week, A. & B. were to be entitled to a certain percentage of the price of the number ascertained; that upon such piling and counting the delivery should be deemed complete, and the staves were thenceforth to be absolutely and unconditionally the property of C. Before the day when all were to be furnished, and full payments made, a creditor of A. & B. caused his execution to be levied upon the staves which had been counted and piled, most of them being then upon the leased lands and the remainder upon a contiguous tract. The stipulated percentage had also been paid. The lease and contract were not recorded nor filed, but the contract was made in good faith. *Held*, that the title to the staves was in C., and they were not subject to the execution. *Hatch* v. *Oil Company*, 124.

CHICORY. See *Customs Duties*, 1.

CITATION. See *Practice*, 19–21.

CITIZENSHIP. See *Constitutional Law*, 6–10.

CIVIL OFFICE. See *Office, Suspension from.*

CIVIL RIGHTS. See *Constitutional Law*, 6–10.

CLAIMS, COURT OF. See *Court of Claims.*

COLLATERAL SECURITY. See *Bills of Exchange and Promissory Notes*, 1 ; *National Bank*, 1, 2.

1. A., in order to secure the payment of his note to B., pledged to the latter certain shares of the capital stock of a national bank in Louisiana, with authority to sell them in default of such payment. Default having been made, B. sold them, and in March, 1873, applied to the cashier of the bank to have them transferred on its books. That officer refused to allow the transfer, on the ground that A. was indebted to the bank. Before the transfer could be enforced, the bank failed, and C. was appointed a receiver, against whom B., Feb. 24, 1876, brought this action to recover damages for the loss sustained by him. It does not appear that the bank ever adopted any by-law providing for a lien on the shares of a stockholder indebted to it, or that A.'s debt to it had been contracted before his stock was pledged to B. *Held*, 1. That the action is not prescribed by the limitation of one year. 2. That the cashier having been intrusted by the directors of the bank with the transfers of stock, his refusal to permit the transfer was the refusal of the bank. 3. That judgment having been rendered, the court below had power to order C. to pay the claim, or certify it to the comptroller. *Case* v. *Bank*, 446.
2. A statement in a contract between a railroad company and a construction company, that the former would pay the latter out of a certain fund, — the subscription of a particular county along the road — is not, within the meaning of the laws of Iowa, such a taking by the latter company of a collateral security as to vitiate its lien. *Removal Cases*, 457.

COMITY. See *Corporations*, 1.

1. Where no Federal question is involved, this court will follow the construction which has been uniformly given to the Constitution or the laws of a State by its highest court. *Fairfield* v. *County of Gallatin*, 47.
2. Cases affirming this principle cited and examined. *Id.*
3. This court accepts as binding the decision of the Supreme Court of Illinois in *Chicago & Iowa Railroad Co.* v. *Pinckney* (74 Ill. 277) and subsequent cases, construing the section of the Constitution of that State in force July 2, 1870, which provides that "no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be con-

COMITY (*continued*).
strued as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption;" and holding that such previous donations, if sanctioned by a popular vote, under pre-existing laws, were not forbidden, but were in like manner, as subscriptions, excepted by the proviso from the general prohibitory terms of the section. *Id.*

4. Where, therefore, pursuant to the authority conferred by a legislative enactment, such a donation was voted by a county in Illinois before the adoption of that Constitution, the donation may be thereafter completed by the issue of the requisite bonds. *Id.*
5. *Chicago & Iowa Railroad Co.* v. *Pinckney* (*supra*) was decided before, but not reported until after, the ruling in *Town of Concord* v. *Portsmouth Savings Bank* (92 U. S. 625), involving the construction of that section, and the attention of this court was not called to it; but as it established in Illinois a rule of property which has been since maintained, the latter case, so far as it conflicts therewith, is overruled. *Id.*
6. The courts of the United States are not bound by the decisions of State courts upon questions of general commercial law. *Oates* v. *National Bank*, 239.

COMMERCE. See *Constitutional Law*, 35, 36, 39–42, 46; *Trade-marks*, 3–5.

COMMERCIAL LAW. See *Comity*, 6.

COMPTROLLER OF THE CURRENCY. See *National Bank*, 2.

CONDITION, BREACH OF. See *Deed*, 2, 3, 4; *Swamp and Overflowed Lands*, 4.

CONDITION PRECEDENT. See *Passengers, General Carriers of*, 2.

CONFISCATION ACT. See *Captured and Abandoned Property.*

CONSTITUTIONAL LAW. See *Alien*, 3; *Comity*, 1–3; *Federal Question*; *Municipal Bonds*, 1; *Trade-marks*, 1–5.

1. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No State can exclude it from exercising them, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which the Constitution has committed to it. *Tennessee* v. *Davis*, 257.
2. The general government must cease to exist whenever it cannot enforce the exercise of its constitutional powers within the States by the instrumentality of its officers and agents. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at

CONSTITUTIONAL LAW (*continued*).

once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of the States. No such element of weakness is to be found in the Constitution. *Id.*

3. The provision of the Constitution declaring that the judicial power of the United States extends "to *all* cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," embraces alike civil and criminal cases. Both are equally within that power. *Id.*

4. A case arises under that Constitution not merely where a party comes into court to demand something conferred upon him by the Constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defence of a party, in whole or in part, depends upon the construction of either. It is in the power of Congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law. *Id.*

5. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the Federal court does not invade State jurisdiction. On the contrary, a denial of the right of the general government to remove, take charge of and try any case arising under the Constitution and laws of the United States, is a denial of its conceded sovereignty over a subject expressly committed to it. It is a denial of a doctrine necessary for the preservation of the acknowledged powers of the government. The exercise of the power to remove criminal prosecutions is seen in the act of Feb. 4, 1815, (3 Stat. 198), again in the third section of the act of March 2, 1833 (4 id. 633), and more recently in the act of July 13, 1866. 14 id. 171. *Id.*

6. The Fourteenth Amendment of the Constitution of the United States considered, and *held* to be one of a series of constitutional provisions having a common purpose; namely, to secure to a recently emancipated race, which had been held in slavery through many generations, all the civil rights that the superior race enjoy, and to give to it the protection of the general government, in the enjoyment of such rights, whenever they should be denied by the States. Whether the amendment had other, and if so what, purposes, not decided. *Strauder* v. *West Virginia*, 303.

7. The amendment not only gave citizenship and the privileges of citizenship to persons of color, but denied to any State the power to withhold from them the equal protection of the laws, and invested Congress with power, by appropriate legislation, to enforce its provisions. *Id.*

8. The amendment, although prohibitory in terms, confers by necessary implication a positive immunity, or right, most valuable to persons of the colored race, — the right to exemption from unfriendly legislation against them distinctly as colored, — exemption from discriminations, imposed by public authority, which imply legal

CONSTITUTIONAL LAW (*continued*).
inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the condition of a subject race. *Id.*

9. The statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is, practically, a brand upon them, and a discrimination against them which is forbidden by the amendment. It denies to such citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is that it is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds. *Id.*

10. Where, as here, the State statute secures to every white man the right of trial by jury selected from, and without discrimination against, his race, and at the same time permits or requires such discrimination against the colored man because of his race, the latter is not equally protected by law with the former. *Id.*

11. Sect. 641 of the Revised Statutes, which declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending," considered, and *held* not to be in conflict with the Constitution of the United States. *Id.*

12. Sect. 641 of the Revised Statutes, which provides for the removal into the Federal court of any civil suit or prosecution "commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," &c., examined in connection with sects. 1977 and 1978. *Held*, that the object of these statutes, as of the Constitution which authorized them, was to place, in respect to civil rights, the colored race upon a level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same. *Virginia* v. *Rives*, 313.

13. The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of

CONSTITUTIONAL LAW (*continued*).
the laws, and, consequently, the statutes founded upon the amendment, and partially enumerating what civil rights the colored man shall enjoy equally with the white are intended for protection against State infringement of those rights. Sect. 641 was also intended to protect them against State action, and against that alone. *Id.*

14. A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged. *Id.*

15. But the Fourteenth Amendment is broader than sect. 641, as the latter does not apply to *all* cases in which the equal protection of the laws may be denied to a defendant. The removal thereby authorized is before trial or final hearing. But the violation of the constitutional prohibitions, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know until then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied. To such a case — that is, to judicial infractions of the constitutional amendment after the trial has commenced — sect. 641 has no applicability. It was not intended to reach such cases. They were left to the revisory power of this court. *Id.*

16. Therefore, the denial or inability to enforce in the judicial tribunals of a State rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But, in the absence of constitutional or legislative impediment, he cannot swear before his case comes to trial that his enjoyment of his civil rights is denied to him. *Id.*

17. The Constitution and laws of Virginia do not exclude colored citizens from service on juries. *Id.*

18. The defendant moved in the State court that the *venire* be so modified that one-third or some portion of the jury should be composed of his own race. The denial of that motion was not a denial of a right

CONSTITUTIONAL LAW (*continued*).

secured to him by any law providing for the equal civil rights of citizens of the United States, or by any statute, or by the Fourteenth Amendment. A mixed jury in a particular case is not essential to the equal protection of the laws. It *is* a right to which any colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of his color. But that is a different thing from that which was claimed, as of right, and denied in the State court; viz., a right to have the jury composed in part of colored men. *Id.*

19. A., a judge of a county court in Virginia, charged by the law of that State with the selection of jurors to serve for the year 1878 in the circuit and county courts of his county, was, in the District Court of the United States for the Western District of Virginia, indicted for excluding and failing to select as grand jurors and petit jurors certain citizens of his county, of African race and black color, who, possessing all other qualifications prescribed by law, were excluded from the jury lists made out by him as such officer, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace, &c., of the United States, and against the form of the statute in such case made and provided. Being in custody under that indictment, he presented to this court his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the inferior court, that he might be discharged, averring that the finding of the indictment, and his arrest and imprisonment thereunder, were unwarranted by the Constitution of the United States, in violation of his rights and the rights of the State of Virginia, whose judicial officer he is, and that the inferior court had no jurisdiction to proceed against him. A similar petition was presented by Virginia. *Held*, that while a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order which an inferior court of the United States had no jurisdiction to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all. *Ex parte Virginia*, 339.

20. The section of the act entitled "An Act to protect all citizens in their civil and legal rights," approved March 1, 1875 (18 Stat., part 3, 336), which enacts that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000," examined, and *held* to be authorized by the Thirteenth and Fourteenth Amendments of the Constitution. ***Id.***

CONSTITUTIONAL LAW (*continued*).

21. The inhibition contained in the Fourteenth Amendment means that no agency of the State, or of the officers or agents by whom her powers are exerted, shall deny to any person within her jurisdiction the equal protection of the laws. Whoever by virtue of his public position under a State government deprives another of life, liberty, or property, without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition; and as he acts in the name of and for the State, and is clothed with her power, his act is her act. Otherwise, the inhibition has no meaning, and the State has clothed one of her agents with power to annul or evade it. *Id.*

22. That amendment was ordained to secure equal rights to all persons. To render its purpose effectual, Congress is vested with power to enforce its provisions by appropriate legislation. Such legislation must act, not upon the abstract thing denominated a State, but upon the persons who are its agents in the denial of the rights which were intended to be secured. Such is said act of March 1, 1875, and it is fully authorized by the Constitution. *Id.*

23. The act of A. in selecting jurors was ministerial, not judicial, and, although he derived his authority from the State, he was bound, in the discharge of that duty, to obey the Federal Constitution and the laws passed in pursuance thereof. *Id.*

24. Certain judges of election in the city of Baltimore, appointed under State laws, were convicted in the Circuit Court of the United States, under sects. 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under sects. 2016, 2017, 2021, 2022, title xxvi., of the Revised Statutes. *Held*, that the question of the constitutionality of said laws is good ground for the issue by this court of a writ of *habeas corpus* to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged. *Ex parte Siebold*, 371.

25. Congress had power by the Constitution to enact sect. 5515 of the Revised Statutes, which makes it a penal offence against the United States for any officer of election, at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, &c.; and sect. 5522, which makes it a penal offence for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, &c.; also, sects. 2011, 2012, 2016, 2017, 2021, 2022, title

CONSTITUTIONAL LAW (*continued*).
xxvi., which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals, — these being the laws provided in the Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 28, 1871, for supervising the elections of representatives, and for preventing frauds therein. *Id.*

26. In making regulations for the election of representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter, or modify the regulations made by the State. *Id.*

27. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds, and see that the elections are legally and fairly conducted. *Id.*

28. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter." *Id.*

29. There is nothing in the relation of the State and the national sovereignties to preclude the co-operation of both in the matter of elections of representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the national government being paramount, collisions can only occur from unfounded jealousy of such authority. *Id.*

30. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The national government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution. *Id.*

31. The concurrent jurisdiction of the national government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, &c. *Id.*

32. The provisions adopted for compelling the State officers of election to observe the State laws regulating elections of representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are

CONSTITUTIONAL LAW (*continued*).
owed to the United States as well as to the State; and their violation is an offence against the United States which Congress may rightfully inhibit and punish. This necessarily follows from the direct interest which the national government has in the due election of its representatives, and from the power which the Constitution gives to Congress over this particular subject. *Id.*

33. Congress had power by the Constitution to vest in the circuit courts the appointment of supervisors of election. It is expressly declared that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is nevertheless left to the discretion of Congress. *Id.*

34. An officer of election, at an election for a representative to Congress in the city of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under sect. 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open. *Held*, according to the decision in *Ex parte Siebold* (*supra*, p. 371), that Congress had power to pass the law under which the conviction was had, and that the Circuit Court had jurisdiction of the offence. *Ex parte Clarke*, 399.

35. A municipal corporation, owning improved wharves and other artificial means which it maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the Constitution of the United States from charging and collecting from parties using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of the property. *Packet Company* v. *St. Louis*, 423.

36. *Packet Company* v. *Keokuk* (95 U. S. 80) affirmed. *Id.*

37. The ordinance of the city of Vicksburg passed July 12, 1865, entitled "An ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft landing and lying at the City of Vicksburg," is not in conflict with the Constitution of the United States. *Vicksburg* v. *Tobin*, 430.

38. *Packet Company* v. *St. Louis* (*supra*, p. 423), affirmed. *Id.*

39 A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden or tax than upon like products of her own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them. *Guy* v. *Baltimore*, 434.

40. An ordinance of Baltimore, whereunder vessels laden with the products of other States, are required to pay for the use of the public wharves of that city, fees which are not exacted from vessels

CONSTITUTIONAL LAW (*continued*).
landing thereat with the products of Maryland, is in conflict with the Constitution of the United States. *Id.*

41. Such fees, so exacted, must be regarded not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States. *Id.*

42. So far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin, the power of the national government over commerce with foreign nations and among the several States reaches the interior of every State of the Union. *Id.*

43. This court can afford the citizen of a State no relief from the enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon Federal authority nor violate any right recognized or secured by the Constitution of the United States. *Kirtland* v. *Hotchkiss*, 491.

44. The Constitution does not prohibit a State from taxing her resident citizens for debts held by them against a non-resident evidenced by his bonds, payment whereof is secured by his deeds of trust or mortgages upon real estate situate in another State. *Id.*

45. By an act of the legislature of Ohio, passed Feb. 16, 1846, it was provided that, upon the fulfilment of certain terms and conditions by the proprietors or citizens of the town of Canfield, in Mahoning County, the county seat should be "permanently established" at that town. Those terms and conditions having been complied with, the county seat was established accordingly. On April 9, 1874, the legislature passed an act providing for the removal of the county seat to Youngstown. Certain citizens of Canfield thereupon filed their bill setting forth that the act of 1846, and the proceedings thereunder, constituted, within the meaning of the Constitution, an executed contract the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. *Held*, 1. That no such contract existed. 2. That the act of 1846 was a public law relating to a public subject with respect to which the legislature which enacted it had no power to bind a subsequent one. 3. That if that act and the proceedings under it constituted a contract, it was satisfied on the part of the State by establishing the county seat at Canfield, with the intent that it should remain there. 4. That there was no stipulation that the county seat should remain there in perpetuity. 5. That the practical interpretation of the phrase "permanently established," which has been in long and frequent use in the statutes of Ohio with respect to county seats established otherwise than temporarily, is, though by no means conclusive, entitled to consideration. *Newton* v. *Commissioners*, 548.

46. The Supreme Court of Tennessee having decided that the law of that State imposing an annual tax upon "all pedlers of sewing-

CONSTITUTIONAL LAW (*continued*).
machines and selling by sample," levies such "tax upon all pedlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture," that law, so construed, is not in violation of the Constitution of the United States. *Machine Company* v. *Gage*, 676.

CONSTRUCTIVE NOTICE. See *Lis Pendens*.

CONTRACTS. See *Assistant Surgeon-General, Acts of; Court of Claims*, 1; *Court and Jury*, 2; *Swamp and Overflowed Lands*.

1. Usage cannot make a contract where none was made by the parties. *Savings Bank* v. *Ward*, 195.
2. By an act of the legislature of Ohio, passed Feb. 16, 1846, it was provided that, upon the fulfilment of certain terms and conditions by the proprietors or citizens of the town of Canfield, in Mahoning County, the county seat should be "permanently established" at that town. Those terms and conditions having been complied with, the county seat was established accordingly. On April 9, 1874, the legislature passed an act providing for the removal of the county seat to Youngstown. Certain citizens of Canfield thereupon filed their bill setting forth that the act of 1846, and the proceedings thereunder, constituted, within the meaning of the Constitution, an executed contract the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. *Held*, 1. That no such contract existed. 2. That the act of 1846 was a public law relating to a public subject with respect to which the legislature which enacted it had no power to bind a subsequent one. 3. That if that act and the proceedings under it constituted a contract, it was satisfied on the part of the State by establishing the county seat at Canfield, with the intent that it should remain there. 4. That there was no stipulation that the county seat should remain there in perpetuity. 5. That the practical interpretation of the phrase "permanently established," which has been in long and frequent use in the statutes of Ohio with respect to county seats established otherwise than temporarily, is, though by no means conclusive, entitled to consideration. *Newton* v. *Commissioners*, 548.

CONTRIBUTORY NEGLIGENCE.

1. The general rule exempting the common master, whether a natural person or a corporation, from liability to a servant for injuries caused by the negligence of a fellow-servant recognized and considered. *Hough* v. *Railway Company*, 213.
2. To that rule there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servants, when conducting his business, to perils or hazards against which they may be guarded by proper diligence upon his part. *Id.*
3. Therefore, although his liability to them is not that of a guarantor of the absolute safety or perfection of the machinery or other apparatus provided for their use, he is bound to exercise the care which

CONTRIBUTORY NEGLIGENCE (*continued*).
the exigency reasonably requires, in furnishing such as is adequate and suitable. *Id.*

4. A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in that regard are, in discharging it, guilty of negligence, from which injury to an innocent party results. *Id.*
5. If the servant of such a company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company to show contributory negligence. *Id.*

CONVEYANCE. See *Mining Claim*, 4; *Deed*.

CORPORATIONS. See *Excise Tax; Nevada, Statute of Limitations of.*

1. By the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on any lawful business in another, and to acquire, hold, and transfer property there equally as individuals. *Cowell* v. *Springs Company*, 55.
2. When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation, which does not concern third parties. *Id.*
3. The doctrine of *ultra vires* has no application in favor of corporations for wrongs committed by them. *National Bank* v. *Graham*, 699.

COSTS. See *Practice*, 6, 7.

COUNSEL.
This court will not allow counsel to be paid out of the fund in dispute. *Hanuenstein* v. *Lynham*, 483.

COUNTY SEATS, REMOVAL OF. See *Constitutional Law*, 45.

COUPONS. See *Internal Revenue*, 2.

COURT AND JURY. See *Customs Duties.*

1. In an action against a collector of customs, to recover duties alleged to have been wrongfully exacted upon chicory imported in 1873, it was not error for the court to charge the jury that ground chicory was the same thing as burnt chicory, and to submit to them to determine from the evidence, as a matter of fact, whether the imported article in question was a new preparation, something other than ground chicory. *Arthur* v. *Herold*, 75.
2. A contract between A. and an insurance company stipulated that for

COURT AND JURY (*continued*).

his services as its agent the company would pay him twenty per cent on the ordinary premiums upon all policies for the first year, and "seven and one-half per cent for the second and subsequent years of assurance," said allowance to continue for twenty-five years, should the policies remain so long in force. It was also stipulated that he should apoint sub-agents, that all moneys should be promptly remitted to the company on or before the fifteenth day of each month, and that his "commissions should accrue only as the premiums were paid to the company." The company having discharged him from its service June 2, 1871, brought this suit to recover its moneys in his hands, and introduced evidence that he was indebted to it in a certain amount, and had been properly removed. Among other defences, he offered to show that a set-off existed in his favor for commissions collected and received by the company from May 1, 1871, to Dec. 23, 1871, and interest thereon. After having made proof of notice to the company to produce the books and papers necessary to show the amount of renewal premiums received by it from policies obtained through his agency during the period mentioned, and the books and papers not being produced, he testified that on June 2, 1871, there were policies in force upon which the annual premiums would be $87,000, as it appeared in his accounts with his sub-agencies, that his annual commissions upon the premiums would amount to $8,391.14, and that computing the amount which would be due to him, accruing between that date and Dec. 23, 1871, they amounted to about $4,754.97. No direct proof was given that any of the policies in force on May 1, 1871, or on June 2, 1871, had been renewed or extended, or that any of the annual premiums becoming payable after those dates had been paid to the company or received by it. The court instructed the jury, in effect, that if A. had been removed from his agency without just cause, they might find from this evidence what amount the company should have received of renewal premiums, but if they found that he had been justifiably removed, there was no proof for their consideration of the amount of renewal premiums received or collected, in the hands of the company, upon which he was entitled to commissions. *Held*, 1. That A. had no just ground of exception to the charge. 2. That the burden was on him to prove that the premiums had been *actually paid* to the company. *Manning* v. *Insurance Company*, 693.

3. It is error to submit to the jury to find a fact of which there is no competent evidence. *Id.*

4. The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Id.*

COURT FILES AND PAPERS. See *Practice*, 10–12.

COURT OF CLAIMS.

1. Where the claim of a party for loss and damage growing out of the alleged failure of the United States to perform its contracts with

COURT OF CLAIMS (*continued*).

him, as to time and manner of payment, is, by a special act of Congress, referred to the Court of Claims, "to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, if any, for such loss and damage,"—*Held*, that the rules of law applicable to the adjudication of claims by that court in the exercise of its general jurisdiction must govern, and that interest, not having been stipulated for in the contracts, cannot be allowed thereon. *Tillson* v. *United States*, 43.

2. The limitation prescribed by the act of March 3, 1863 (12 Stat. 765), amendatory of an act establishing the Court of Claims, does not bar in that court claims referred to it for determination by the head of an executive department, provided they were presented for settlement at the proper department within six years after they had first accrued. *United States* v. *Lippitt*, 663.

3. Pursuant to orders, the colonel of a regiment reported, July 25, 1863, to the head-quarters of a department, there to "await further orders." While awaiting them, he was not furnished fuel or quarters. *Held*, that he is entitled to recover their commuted value. *Id.*

COURT-MARTIAL. See *Naval Court-Martial.*

COVENANTS. See *Swamp and Overflowed Lands*, 4.

CREDITORS. See *Municipal Corporations*, 3.

CRIMINAL LAW. See *Constitutional Law*, 2–5; *Limitations, Statute of*, 1.

A conspiracy to defraud the United States of the duties on certain imported goods is not "a crime arising under the revenue laws," and the persons charged therewith cannot be prosecuted therefor unless they be indicted within three years next after the alleged committing thereof. *United States* v. *Hirsch*, 33.

CROSS-EXAMINATION. See *Practice*, 15.

CUSTOMS DUTIES. See *Limitations, Statute of*, 1, 2.

1. In an action against a collector of customs, to recover duties alleged to have been wrongfully exacted upon chicory imported in 1873, it was not error for the court to charge the jury that ground chicory was the same thing as burnt chicory, and to submit to them to determine from the evidence, as a matter of fact, whether the imported article in question was a new preparation something other than ground chicory. *Arthur* v. *Herold*, 75.

2. In September, 1872, A. imported from India a product known as "jute rejections," upon which the collector of the port of Boston imposed a duty of ten per cent *ad valorem* under sect. 24 of the Tariff Act of March 2, 1861 (12 Stat. 196), as a non-enumerated manufactured article, and of five dollars per ton under sect. 11 of the act of July 14, 1862 (id. 554), as a vegetable substance not enumerated. A. paid the duty under protest and brought suit against the collector to recover the specific duty, five dollars per ton. The jury were

CUSTOMS DUTIES (*continued*).
instructed that it was for them to find "whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in sect. 11 of the act of July 14, 1862. If they were, then the duty was properly assessed; if not, then their verdict must be for the plaintiff." *Held*, that the instruction was proper. *Wills* v. *Russell*, 621.

DEBT, SITUS OF.
For the purposes of taxation, a debt has its *situs* at the residence of the creditor, and may be there taxed. *Kirtland* v. *Hotchkiss*, 491.

DEED. See *Mining Claim*, 4.
1. Where a trustee's sale is valid, the title passing thereunder should be conveyed to the purchaser by a deed properly made and acknowledged. *Clark* v. *Trust Company*, 149.
2. A condition in a deed conveying land that intoxicating liquors shall never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort thereon, and that if this condition be broken by the grantee, his assigns or legal representatives, the deed shall become null and void, and the title to the premises revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy. *Cowell* v. *Springs Company*, 55.
3. Upon breach of the condition, the grantor has a right to treat the estate as having reverted, and, under a statute of Colorado, can maintain ejectment without a previous entry or a demand. *Id.*
4. In such a suit, the grantee is estopped from denying the validity of the title conveyed by the deed whereunder he took possession of the land. *Id.*

DEMAND. See *Bills of Exchange and Promissory Notes*, 3; *Official Bond*, *Action on.*

DEPARTMENTS, EXECUTIVE. See *Executive Departments, Clerks and Employés in.*

DEPUTY MARSHAL. See *Constitutional Law*, 25–33.

DISCOUNT. See *Bills of Exchange and Promissory Notes*, 2.

DISMISS, MOTION TO. See *Practice*, 4.

DISTRICT OF COLUMBIA.
1. In the District of Columbia, the legal rate of interest is six per cent per annum, but parties may, in writing, stipulate for any other rate not exceeding ten. *Holden* v. *Trust Company*, 72.
2. Where a party made there his promissory note, whereby he promised to pay a certain sum therein named, "with ten per cent interest," — *Held*, that interest should be computed at that rate up to the maturity of the note, and thereafter at six per cent. *Id.*

DISTRICT OF COLUMBIA, SUPREME COURT OF. See *Jurisdiction*, 3, 4.

EJECTMENT. See *Mandamus*, 1; *Mining Claim.*

ELECTION, SUPERVISOR OF. See *Constitutional Law*, 25–33.

ENFORCEMENT ACT. See *Constitutional Law*, 25–33.

EQUITY. See *Bills of Exchange and Promissory Notes*, 2; *Municipal Corporations*, 3; *Swamp and Overflowed Lands*, 3.

ESTOPPEL. See *Deed*, 4; *Lands, Action for Possession of.*

A., the owner in fee of lands in Michigan, died in February, 1853, leaving his two children B. and C. his only heirs-at-law. On March 3, C. and her husband conveyed the lands by warranty deed to D., who put it upon record March 6, 1854, and entered into possession of them April 1 of that year. D. learning of the existence of B., and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1, 1856, the latter addressed from California to his sister C., in Michigan, a letter, wherein he said, "You can tell D. for me he need not fear any thing from me. . . . You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." The contents of that letter becoming known to D., he, for a valuable consideration and by deeds with covenants of warranty, conveyed in fee the lands to E. and others, who thereunder have ever since occupied and improved them. July 9, 1865, B. conveyed the undivided half of them by quitclaim deed to F., who, March 6, 1873, brought ejectment. *Held*, 1. That B.'s letter of April 1, 1856, operates as an estoppel *in pais* which precludes him from setting up a claim to them, and is an available defence to the action. 2. That F. was not a *bona fide* purchaser, and that whatever title he acquired was subject to the legal and equitable rights of D. and those claiming under the latter. *Dickerson* v. *Colgrove*, 578.

EVIDENCE. See *Court and Jury*, 2; *Internal Revenue, Collector of.*

The admission of immaterial and irrelevant evidence, which it is manifest could not have affected injuriously the case of the plaintiff in error, does not entitle him to a reversal of the judgment. *Mining Company* v. *Taylor*, 37.

EXCEPTION. See *Exceptions, Bill of.*

EXCEPTIONS, BILL OF.

1. Where a party moving for a new trial assigns as reasons therefor that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions and in refusing others, — *Held*, that, as he did not at the time except to the ruling of the court in regard to the instructions, they cannot be reviewed by the appellate court, although they are incorporated in the bill of exceptions allowed on the refusal of the court of original jurisdiction to grant a new trial. *Railway Company* v. *Twombly*, 78.
2. The Supreme Court of the Territory of Colorado, therefore, properly held that such a bill of exceptions only presented for review the refusal of the District Court, on the motion for a new trial, to set aside the verdict on the ground that it was not sustained by the

EXCEPTIONS, BILL OF (*continued*).
evidence. Such a question cannot be re-examined here on a writ of error. *Id.*

EXCISE TAX.
1. The tax on interest paid by corporations under sect. 122 of the internal-revenue law, as amended by the act of July 13, 1866 (14 Stat. 138), is an excise tax on their business, to be paid by them out of their earnings, income, and profits. *Railroad Company* v. *Collector*, 595.
2. In order that its payment might be secured, this tax was laid on the subjects to which these earnings were applied in the usual course of business of such corporations; namely, dividends, interest on funded debt, construction, or some reserve fund held by the company. *Id.*
3. Such a tax is not invalidated by the provision that the amount of it may be withheld from the dividend or the interest due or payable to the stockholder or the bondholder, who is a citizen or a subject of a foreign government, with no residence in this country. *Id.*

EXECUTION. See *Chattels, Contract for Sale of.*

EXECUTIVE DEPARTMENTS, CLERKS AND EMPLOYÉS IN.
1. Owing to the partial exhaustion of the appropriation, A., a clerk in the Treasury Department, was granted leave of absence without pay for five months from Feb. 1, 1874. He performed no service thereafter. His name was continued on the rolls to allow his transfer to some other bureau, should an opportunity offer. He was, June 30, informed in writing by the Secretary of the Treasury that his services had terminated January 31. *Held*, that he has no claim against the United States after the last-mentioned date. *United States* v. *Murray*, 536.
2. The joint resolution approved June 23, 1874 (18 Stat., part 3, p. 289), providing for two months' pay to clerks and employés of the executive departments at Washington, applied to such only as should be discharged at the close of the fiscal year by reason of the reductions made necessary by the legislation of that session of Congress. *Id.*

FACTS, AGREED STATEMENT OF. See *Jurisdiction*, 1.

FEDERAL QUESTION.
The decision of the Court of Appeals of the State of New York, that, in the absence of fraud or intentional wrong, the members of the board of assessors for the city of Albany are not personally liable in damages to a party for any error they commit in officially assessing his shares of national bank stock, does not present a Federal question, and cannot be reviewed here. *Williams* v. *Weaver*, 547.

FIRST AUDITOR OF THE TREASURY. See *Internal Revenue, Collector of.*

FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. See *Constitutional Law*, 6–9, 13–23.

FRANCHISES, ASSIGNMENT OF. See *Municipal Bonds*, 1, 2.

FRAUD. See *Practice*, 16, 17; *Passengers, General Carriers of*, 4.

Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *National Bank* v. *Graham*, 699.

FRIENDLY INDIANS, LIABILITY OF THE UNITED STATES TO, FOR PROPERTY STOLEN.

1. An Indian, whose property within the Indian country is stolen by a negro, is not entitled to any payment therefor out of the treasury of the United States. *United States* v. *Perryman*, 235.
2. The legislation touching the liability of the United States for the property of friendly Indians which is taken, injured, or destroyed, examined. *Id.*

FUEL, COMMUTATION OF.

Pursuant to orders, the colonel of a regiment reported, July 25, 1863, to the head-quarters of a department, there to "await further orders." While awaiting them, he was not furnished fuel or quarters. *Held*, that he is entitled to recover their commuted value. *United States* v. *Lippitt*, 663.

GAUGER. See *Internal Revenue, Collector of.*

GENERAL COURT-MARTIAL. See *Naval Court-martial.*

GRAND JURORS. See *Constitutional Law*, 20.

GRANT. See *Swamp and Overflowed Lands.*

GROUND CHICORY. See *Customs Duties*, 1.

GUADALUPE HIDALGO, TREATY OF. See *Pueblo Lands*, 2.

GUARANTY.

On the afternoon of Feb. 23, 1875, A. executed to a national bank in Cincinnati, Ohio, an instrument whereby he stipulated to guarantee and make good to said bank any sum or sums which might thereafter be held against B. to an amount not exceeding $50,000, and waived notice from time to time of the amount and extent of such indebtedness. On the morning of that day C. had presented for deposit therein a check to his order drawn on said bank by B. The bank, claiming that said check was within the terms of the guaranty, brought suit against A. to recover the amount thereof. The evidence of the plaintiff tending to show that pursuant to a general and notorious usage among the banks in Cincinnati, by which checks left in the morning by depositors were held until after business hours for the purpose of examining the accounts of the drawers, B.'s check was placed aside by the teller for such examination, and C. informed that it would not be placed to his credit unless found good, and that, on the part of the defendant, no such usage existed, and that C. had no knowledge or understanding in regard to said check except that it was received as a deposit by the bank when left there by him, — the court charged the jury that it was for them to determine whether

GUARANTY (*continued*).

at the time said check was left at the bank by C. it was offered as a deposit and so received. The jury so found. *Held*, 1. That the charge was not erroneous. 2. That the jury having found that said check was so offered and received, it was not a debt due by B. within the meaning of A.'s undertaking. 3. That in view of such finding the question of usage was immaterial. *National Bank* v. *Burkhardt*, 686.

HABEAS CORPUS, WRIT OF. See *Jurisdiction*, 6–10; *Naval Court-martial*, 2.

1. A., a judge of a county court in Virginia, charged by the law of that State with the selection of jurors to serve for the year 1878 in the circuit and county courts of his county, was, in the District Court of the United States for the Western District of Virginia, indicted for excluding and failing to select as grand jurors and petit jurors certain citizens of his county, of African race and black color, who, possessing all other qualifications prescribed by law, were excluded from the jury lists made out by him as such officer, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace, &c., of the United States, and against the form of the statute in such case made and provided. Being in custody under that indictment, he presented to this court his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the inferior court, that he might be discharged, averring that the finding of the indictment, and his arrest and imprisonment thereunder, were unwarranted by the Constitution of the United States, in violation of his rights and the rights of the State of Virginia, whose judicial officer he is, and that the inferior court had no jurisdiction to proceed against him. A similar petition was presented by Virginia. *Held*, that while a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order which an inferior court of the United States had no jurisdiction to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all. *Ex parte Virginia*, 339.
2. The appellate jurisdiction of this court, exercisible by the writ of *habeas corpus*, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not. *Ex parte Siebold*, 371.
3. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act. *Id.*

HABEAS CORPUS, WRIT OF (*continued*).

4. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error, and, of course, cannot be reviewed at all if no writ of error lies. *Id.*
5. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ. *Id.*
6. Certain judges of election in the city of Baltimore, appointed under State laws, were convicted in the Circuit Court of the United States, under sects. 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under sects. 2016, 2017, 2021, 2022, title xxiv., of the Revised Statutes. *Held*, that the question of the constitutionality of said laws is good ground for the issue by this court of a writ of *habeas corpus* to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged. *Id.*
7. The circuit courts have jurisdiction of indictments under these laws, and a sentence in pursuance of a verdict of condemnation is lawful cause of imprisonment, from which this court has no power to relieve on *habeas corpus*. *Id.*

HOLDER FOR VALUE. See *Bills of Exchange and Promissory Notes*, 1; *Municipal Bonds*, 4; *National Bank*, 1.

A creditor who before its maturity accepts a negotiable note, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, in consideration of an extension of time granted to the debtor, is a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice. *Oates* v. *National Bank*, 239.

ILLINOIS. See *Comity*, 2–5.

IMPORTS, DUTIES ON. See *Customs Duties.*

INDIAN. See *Friendly Indians*, *Liability of the United States to, for Property Stolen.*

INDICTMENT. See *Causes, Removal of*, 2; *Constitutional Law*, 19–23; *Jurisdiction*, 6–9.

INFERENCE. See *Presumption.*

INSANITY. See *Life Insurance*, 1.

INSURANCE. See *Life Insurance*

INSURER. See *Passengers, General Carriers of.*

INTEREST. See *Court of Claims*, 1; *Official Bond, Action on; Receiver, National Bank*, 1.

1. In the District of Columbia, the legal rate of interest is six per cent per annum, but parties may, in writing, stipulate for any other rate not exceeding ten. *Holden* v. *Trust Company*, 72.
2. Where a party made there his promissory note, whereby he promised to pay a certain sum therein named, "with ten per cent interest," — *Held*, that interest per annum at that rate should be computed up to the maturity of the note, and thereafter at six per cent. *Id.*

INTERNAL REVENUE. See *Excise Tax.*

1. Manufactured tobacco shipped in bond from the manufactory and stored in an export bonded warehouse on the 14th of June, 1872, was subject to the tax of thirty-two cents per pound, prescribed by the Internal Revenue Act of July 20, 1868. 15 Stat. 152. *Jones* v. *Blackwell*, 599.
2. The "Argilite Mining and Manufacturing Company" was incorporated by an act of the General Assembly of Kentucky passed March 4, 1865. Its name, by an amendment to the charter, was changed to the "Kentucky Improvement Company," and it was authorized to "construct one or more rail tracks from any lands owned or improved by said corporation to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said track or tracks, and to draw cars over the same by suitable motive power." For the "construction and convenient and proper use and maintenance of such railroads" the company was authorized to condemn and appropriate the necessary lands and materials. Pursuant to said authority, the company built and equipped a railroad, and on Aug. 15, 1866, issued in payment therefor its six per cent coupon bonds to the amount of $500,000, secured by mortgage on its landed property and improvements. The road was finished in June, 1868, and thereafter the company transported over it its own freight, officers, and agents, and in addition thereto, though not in terms so authorized by the charter, from time to time other passengers and freight for hire. *Held*, that the company was, within the meaning of the ninth section of the act of July 13, 1866 (14 Stat. 138), a railroad company, and as such, for the year 1870, liable to the tax of five per cent on coupons thereby imposed. *Improvement Company* v. *Slack*, 648.

INTERNAL REVENUE, COLLECTOR OF.

Debt on the bond of a collector of internal revenue, bearing date Jan. 12, 1867. *Held*, 1. That the audit of his accounts was the duty of the First Auditor. 2. That the settlement of them, as the same appears by the transcript from the books of the Treasury Department, duly certified and authenticated, is *prima facie* evidence of the balance thereby shown, and it is competent for the accounting officer to correct mistakes and restate the balance. 3. That the

INTERNAL REVENUE, COLLECTOR OF (*continued*).
sureties are liable for the gauger's fees received by the collector. 4. Where a bond given by the latter is objectionable in point of form, the direction of the Commissioner of Internal Revenue to execute a new one must be considered as that of the Secretary of the Treasury, and the bond given in compliance therewith cannot be considered as having been extorted from the collector and his sureties contrary to the statute. *Soule* v. *United States*, 8.

INVALID PENSIONERS. See *Soldiers' Home*.

IOWA. See *Swamp and Overflowed Lands*.
Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced. *Removal Cases*, 457.

JUDGMENT. See *Judicial Mortgage*.

JUDICIAL COMITY. See *Comity*.

JUDICIAL DISCRETION. See *Mandamus*, 2; *Review, Bill of*.

JUDICIAL MORTGAGE.
In Louisiana, if a person dies pending suit against him, and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them; if, without reference to the revival of the suit, it be entered only against the deceased *eo nomine*, and be so recorded, it is, as a judicial mortgage, void against third persons. *Montgomery* v. *Sawyer*, 571.

JURISDICTION. See *Federal Question*, 3; *Habeas Corpus, Writ of*, 1; *Jury, Waiver of; Officer of the Army*, 3; *Naval Court-martial*, 2; *New Trial*, 2; *Writ of Error*, 2.

I. Of the Supreme Court.

1. Where, by an agreed statement of facts in the nature of a special verdict, the plaintiff's claim was admitted by the defendant, except $3,134.20, — *Held*, that that sum was the amount actually in dispute, and although judgment was entered below for the entire claim, exceeding $5,000, the writ of error from this court must be dismissed for want of jurisdiction. *Tintsman* v. *National Bank*, 6.
2. This court cannot on writ of error re-examine the decision of the Supreme Court of the Territory of Colorado that the only question presented there for review by the bill of exceptions, was the refusal of the District Court, on the motion for a new trial, to set aside the verdict, on the ground that it was not sustained by the evidence. *Railway Company* v. *Twombly*, 78.
3. Where a judgment for the recovery of money, affirmed in the Supreme Court of the District of Columbia, is brought here for re-examination, the amount thereof, without adding interest or costs, determines the value of "the matter in dispute," under the act of Feb. 25, 1879

JURISDICTION (*continued*).

(20 Stat. 320), and, if it does not exceed $2,500, this court has no jurisdiction. *Railroad Company* v. *Trook*, 112.

4. A bill filed in the Supreme Court of the District of Columbia by A. against B. and C., alleging that each held certificates of indebtedness belonging to him, was, on final hearing, dismissed, and he appealed. *Held*, that, as the recovery, if any, must be against the defendants severally, and as the amount claimed from each does not exceed $2,500, this court has no jurisdiction. *Paving Company* v. *Mulford*, 147.

5. On the trial of a cause, when the judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; but the judgment rendered conformably thereto may, without regard to its amount, be reviewed on a writ of error, upon their certificate stating such question. *Dow* v. *Johnson*, 158.

6. The appellate jurisdiction of this court, exercisible by the writ of *habeas corpus*, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not. *Ex parte Siebold*, 371.

7. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act. *Id.*

8. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error; and, of course, cannot be reviewed at all if no writ of error lies. *Id.*

9. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas ocrpus* by a superior court or judge having power to award the writ. *Id.*

10. An officer of election, at an election for a representative to Congress in the city of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under sect. 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open. *Held*, 1. That, in such a case, a *habeas corpus* for discharge from imprisonment under the conviction was rightfully issued by a justice of this court, returnable before himself; and he had the right, if it could be done without injury to the prisoner, to refer the matter to this court for its determination, it being a case which involved the exercise of appellate jurisdiction. 2. That had the case involved

JURISDICTION (*continued*).
original jurisdiction only, this court could not have taken jurisdiction of it. *Ex parte Clarke*, 399.

11. Where in replevin judgment was rendered in favor of the plaintiff for a portion of the property delivered under the writ, and in favor of the defendant for a return of the residue, or its value, the same not being $5,000, and the plaintiff sued out a writ of error to this court, — *Held*, that the writ must be dismissed for want of jurisdiction. *Pierce* v. *Wade*, 444.
12. This court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Wyoming, unless the record shows that the matter actually in dispute exceeds $1,000 *Nagle* v. *Rutledge*, 675.

II. OF THE CIRCUIT COURTS.

13. A receiver appointed by a State court in a suit which, under the act of March 3, 1875 (18 Stat., part 3, 470), was subsequently removed to the Circuit Court of the United States, reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities. *Held*, that the Circuit Court had authority to require him to account for the fund, and that he is chargeable with interest on so much thereof as he on receiving deposited in a bank to his credit as receiver, and then withdrew and deposited on his private account in another bank, he declining to explain the transaction, when he was examined as a witness by the master to whom the court had referred his accounts. *Hinckley* v. *Railroad Company*, 153.
14. The Circuit Courts have jurisdiction of indictments under sects. 2011, 2012, 2016, 2017, 2021, 2022, 5515, and 5522 of the Revised Statutes, these being the laws provided in the Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 28, 1871, for supervising the elections of representatives, and for preventing frauds therein. *Ex parte Siebold*, 371.

JURORS. See *Constitutional Law*, 18, 19, 20, 23.

JURY, WAIVER OF.

The concluding clause of the third section of the act entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875 (18 Stat., part 3, 470), does not repeal the provision of the Revised Statutes authorizing the court to try, upon the stipulation of parties, issues of fact without the intervention of a jury. *Phillips* v. *Moore*, 208.

LANDS, ACTION FOR POSSESSION OF.

1. By the law of Texas, a judgment against a plaintiff in an action for the possession of lands is conclusive, unless he commence a second action within a year. *Held*, that, in an action for the same lands commenced within the year by the former defendant against the grantees of the former plaintiff, the latter are not precluded by that

LANDS, ACTION FOR POSSESSION OF (*continued*).
judgment from setting up their claim to them. *Brownsville* v. *Cavazos*, 138.
2. Where, up to the commencement of the action, a mixed possession of the land, and a continued litigation respecting it, existed, and there was no actual occupation of a large portion of it, — *Held*, that no prescription could be maintained by either party, and that the case must be determined on the documentary evidence of title. *Id.*

LANDS, ALIENATION OF. See *Lien*.

LANDS, PATENT OF THE UNITED STATES FOR. See *Patent of the United States for Lands*.

LANDS, SALE OF, BY TRUSTEE.
1. If duly advertised, and fairly and properly conducted, a trustee's public sale of lands to a corporation which was the payee of the note secured by the deed of trust will not be set aside merely upon the ground that they brought a grossly inadequate price, and that he then and at the date of the deed was the actuary of the corporation, if the deed was made to him as an individual, and he, as such, and not in his official capacity, accepted and executed the trust thereby conferred. *Clark* v. *Trust Company*, 149.
2. Where a trustee's sale is valid, the title passing thereunder should be conveyed to the purchaser by a deed properly made and acknowledged. *Id.*

LAW MERCHANT. See *Bills of Exchange and Promissory Notes*, 1.

LEGISLATIVE INTENT. See *Statutes, Construction of*, 1.

LETTERS-PATENT. See *Practice*, 12.
1. Where letters-patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and praying for an injunction and an account, and the court below, by its decree, sustained their validity and awarded him costs, but neither damages nor profits, and the defendant appealed here, this court, as the only question now involved is that of costs, affirms the decree without examining the merits. *Elastic Fabrics Company* v. *Smith*, 110.
2. Where such letters had been reissued in separate divisions, and the patentee filed in the Patent Office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below, — *Held*, that sect. 4922, Rev. Stat., has no application to the case, and that he is entitled to costs. *Id.*
3. A. held letters-patent for making side-saddle trees. The tree, composed of side-bars, cantle behind, and crook before, is first made, and the seat constructed separately on a rim and fastened to the tree by screws, resting on the crook, and on supports attached to the side-bars in the middle and at the rear. This construction, it was claimed, simplifies and cheapens the manufacture, and leaves

LETTERS-PATENT (*continued*).

a space for air under the seat. The claim is as follows: "As a new article of manufacture, a side-saddle tree, having the side-bars and seat made separate and then united, substantially as and for the purpose shown and specified." The side-saddle tree constructed according to the letters-patent subsequently granted to B. does not have the side-bars and seat made separate and then united. Tough strips of wood, steamed and bent to a proper shape, are attached to the tree, as a part thereof, forming side-rails for the seat; that on the right or off side extending from the cantle to the crook, and that on the left or near side, from the cantle to a point on the near side-bar some distance back of the crook. The seat is stretched over these strips or side-rails. *Held*, that the advantage of separate construction claimed by A. was not attained by B.'s letters-patent, and that the invention of the latter is not an infringement of A.'s letters-patent. *Burns* v. *Meyer*, 671.

4. Courts should not by construction enlarge the claim which the Patent Office has admitted, and the patentee acquiesced in, beyond the fair interpretation of its terms. *Id.*

LIEN. *See Collateral Security*, 2; *Mechanic's Lien; National Bank*, 2.

1. Where real estate bound by a judgment or a mortgage has been alienated in separate parcels to various persons at different times, such parcels should be subjected to the satisfaction of the lien in the inverse order of their alienation. *Savings Bank* v. *Creswell*, 630.
2. The English and the American authorities on the subject considered and reviewed. *Id.*

LIFE INSURANCE.

1. An application made by A. to an insurance company, upon which a policy on his life was issued for the benefit of his wife, contains a stipulation that his statements therein "shall form the basis of the contract," and that any untrue or fraudulent answers, any suppression of facts in regard to his health, habits, or circumstances material to the risk, "shall vitiate the policy and forfeit all payments thereon." In reply to a question as to whether certain of his relatives had any hereditary disease, he answered, "No hereditary taint of any kind in family on either side of house, to my knowledge." A. having died, his widow brought suit and made out her case. The company then proved that B., an uncle of A., had been insane for more that a year preceding his death, and had died in an insane asylum upwards of twenty years before the date of A.'s application. The jury were instructed to find for the plaintiff. *Held*, 1. That the instruction was proper. 2. That, to maintain its defence, the company was bound to prove, not only the insanity of B., but that it was hereditary, and that both facts were known to A. when he answered the question. *Insurance Company* v. *Gridley*, 614.
2. *National Bank* v. *Insurance Company* (95 U. S. 673) cited and approved. *Id.*

LIMITATIONS, STATUTE OF. See *Court of Claims*, 2; *Lands, Action for Possession of; Mining Claim*, 2; *National Bank*, 2; *Nevada, Statute of Limitations of.*

1. A period of less than five years will not bar a prosecution for effecting an entry of goods at the custom-house by a fraudulent invoice of them, and a false classification as to their quality and value. *United States* v. *Hirsch*, 33.
2. A conspiracy to defraud the United States of the duties on certain imported goods is not "a crime arising under the revenue laws," and the persons charged therewith cannot be prosecuted therefor unless they be indicted within three years next after the alleged committing thereof. *Id.*
3. The statute of California which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. *Meeks* v. *Olpherts*, 564.
4. When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him, and he represents their interests. *Id.*

LIS PENDENS.

A *bona fide* purchaser of negotiable securities before their maturity is not affected with constructive notice of a suit respecting them. *County of Warren* v. *Marcy* (97 U. S. 107) cited on this point and approved. *County of Cass* v. *Gillett*, 585.

LOUISIANA. See *Judicial Mortgage.*

MANDAMUS.

1. In ejectment, where A., B., and the other defendants were respectively in the separate possession of specific parcels of the land, judgment was rendered against them for the recovery thereof and costs of suit, and also against each for damages for withholding the parcel whereof he was in possession, which exceed in the aggregate $6,000. A writ of error was sued out by all the defendants. A. and B., to render it a *supersedeas* of the judgment against them, severally gave a bond, which was duly approved and accepted. The court below thereupon ordered that the proceedings on the judgment as to A. and B. be stayed, and that a writ of restitution and execution be issued against the remaining defendants. *Held*, that a *mandamus* directing that the judgment be carried into execution against all the defendants would not lie. *Ex parte French*, 1.
2. A *mandamus* does not lie to control judicial discretion, except when that discretion has been abused. But it may be used as a remedy where the case is outside of that discretion and outside the jurisdiction of the court or officer to which or to whom the writ is directed. One of its peculiar and more common uses is to restrain inferior courts, and keep them within their lawful bounds. *Virginia* v. *Rives*, 313.

MANUFACTURED TOBACCO.

Manufactured tobacco shipped in bond from the manufactory and stored in an export bonded warehouse on the 14th of June, 1872, was subject to the tax of thirty-two cents per pound, prescribed by the internal-revenue act of July 20, 1868. 15 Stat. 152. *Jones* v *Blackwell*, 599.

MARSHAL. See *Constitutional Law*, 25–33.

MASTER AND SERVANT.

1. The general rule exempting the common master, whether a natural person or a corporation, from liability to a servant for injuries caused by the negligence of a fellow-servant recognized and considered. *Hough* v. *Railway Company*, 213.
2. To that rule there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servants, when conducting his business, to perils or hazards against which they may be guarded by proper diligence upon his part. *Id.*
3. Therefore, although his liability to them is not that of a guarantor of the absolute safety or perfection of the machinery or other apparatus provided for their use, he is bound to exercise the care which the exigency reasonably requires, in furnishing such as is adequate and suitable. *Id.*
4. A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in that regard are, in discharging it, guilty of negligence, from which injury to an innocent party results. *Id.*
5. If the servant of such a company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company to show contributory negligence. *Id.*

MECHANIC'S LIEN. See *Collateral Security*, 2.

Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced. *Removal Cases*, 457.

MEXICO. See *Pueblo Lands; Texas, Sale of Lands in.*

MINING CLAIM.

1. In ejectment for an undivided interest in a mining claim in Nevada, where both parties derive title from the original owner, the validity

MINING CLAIM (*continued*).
and regularity of his location are not in question. ***Mining Company*** v. *Taylor*, 37.
2. Where the plaintiff was a tenant in common with the defendants, their possession of the claim was his possession until he was ousted. The Statute of Limitations would then run against him, but not bar his recovery, unless, after such ouster, their adverse possession was maintained two years before the commencement of the suit. *Id.*
3. Where the Circuit Court, under a written stipulation of the parties, tries the issue, its special finding should set forth the ultimate facts, and not the evidence establishing them. Where, therefore, both parties claimed under A., and the court found his ownership, the chain of conveyances by which he acquired it need not be set forth. *Id.*
4. A conveyance in writing is not necessary to the valid transfer of a mining claim. *Id.*

MISSOURI, CONSTITUTION OF. See *Municipal Bonds*, 1.

MORTGAGE. See *Mechanic's Lien; Trust and Trustee; Vessel, Mortgage of.*

MUNICIPAL BONDS. See *Comity*, 3–5.
1. The court adheres to its ruling in *County of Henry* v. *Nicolay* (95 U. S. 619), that the provisions of sect. 14, art. 11, of the Constitution adopted by Missouri in 1865, which require the assent of two-thirds of the qualified voters of a county to a subscription on its behalf for stock in a corporation, do not apply to cases where such subscription is made for stock in a railroad company pursuant to the power conferred by its charter granted prior to the adoption of that Constitution, notwithstanding the contemplated road is a branch road, the construction of which, although authorized by such charter, is undertaken as an independent enterprise under the act of March 21, 1868, entitled "An Act to aid in the building of branch railroads in the State of Missouri." *County of Cass* v. *Gillett*, 585.
2. Where the company authorized a committee to take charge of the construction of such road, and solicit subscriptions in the name of the company to the use of such branch, and it subsequently assigned a portion of its franchises to another company, — *Held*, that the branch being thus organized and invested with the powers and privileges conferred by the charter of the company to enable it to prosecute the work, a subscription by a county through which such road passed is not rendered invalid by the fact that when made such partial assignment by the company of its franchises had taken place. *Id.*
3. Where the county court made an order to subscribe to the capital stock of the company for the use of one of its branches, and issued county bonds which were accepted by the construction committee,

MUNICIPAL BONDS (*continued*).

in payment, — *Held*, that an actual manual subscription on the books of the company was not necessary to entitle the county to the stock, or to bind it as a subscriber thereto. *Id.*

4. A *bona fide* purchaser of negotiable securities before their maturity is not affected with constructive notice of a suit respecting them. *County of Warren* v. *Marcy* (97 U. S. 107) cited on this point and approved. *Id.*

MUNICIPAL CORPORATIONS.

1. Where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the State creating them. *Mount Pleasant* v. *Beckwith*, 514.
2. Where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities, and severally liable for a proportionate share of all its then subsisting legal debts, and are vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon. *Id.*
3. The remedy of the creditors of the extinguished corporation is in equity against the corporations succeeding to its property and powers. *Id.*

NATIONAL BANK. See *Federal Question.*

1. At the request of its debtor, a national bank in Alabama gave him further time, in consideration of his transferring, before maturity, a negotiable note, as collateral security, and paying in advance usurious interest, for the period of extension. The note was so indorsed as to make the bank a party to the instrument, responsible for its due presentation, and for due notice of non-payment. The consideration being in part legal and in part vicious, it was *held*, 1st, that the former was itself sufficient to sustain the contract of extension and transfer, and to constitute the bank a holder for value; 2d, that the National Banking Act subjects the bank to liability for taking usurious interest, but does not declare the contract of indorsement void, and that no such penalty being prescribed, the courts cannot superadd it. *Oates* v. *National Bank*, 239.
2. A., in order to secure the payment of his note to B., pledged to the latter certain shares of the capital stock of a national bank in Louisiana, with authority to sell them in default of such payment. Default having been made, B. sold them, and in March, 1873, applied to the cashier of the bank to have them transferred on its books. That officer refused to allow the transfer, on the ground that A. was indebted to the bank. Before the transfer could be enforced, the bank failed, and C. was appointed a receiver, against whom B., Feb. 24, 1876, brought this action to recover damages for the loss sustained by him. It does not appear that the bank ever adopted any by-law providing for a lien on the shares of a stockholder in

NATIONAL BANK (*continued*).

debted to it, or that A.'s debt to it had been contracted before his stock was pledged to B. *Held*, 1. That the action is not prescribed by the limitation of one year. 2. That the cashier having been intrusted by the directors of the bank with the transfers of stock, his refusal to permit the transfer was the refusal of the bank. 3. That judgment having been rendered, the court below had power to order C. to pay the claim, or certify it to the comptroller. *Case* v. *Bank*, 446.

3. The provision in sect. 5219 of the Revised Statutes of the United States, that State taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon. *People* v. *Weaver*, 539.

4. The statute of a State, therefore, which establishes a mode of assessment by which such shares are valued higher in proportion to their real value than other moneyed capital, is in conflict with that section, although no greater percentage is levied on such valuation than on that of other moneyed capital. *Id.*

5. The statutes of New York which permit a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, tax them at a greater rate than other moneyed capital, and are, therefore, void as to them. *Id.*

6. A national bank is liable for damages occasioned by the loss, through gross negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors. *National Bank* v. *Graham*, 699.

7. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *Id.*

8. The doctrine of *ultra vires* has no application in favor of corporations for wrongs committed by them. *Id.*

9. Sect. 5228 of the Revised Statutes, which provides that it shall be lawful for a national bank after its failure to "deliver special deposits," is as effectual a recognition of its power to receive them as an express declaration to that effect would have been. *Id.*

10. The phrase "special deposits," so employed, embraces the public securities of the United States. *Id.*

NAVAL COURT-MARTIAL.

1. Where, pursuant to the "regulations for the administration of law and justice" in the naval service, a general court-martial is duly ordered, the officer clothed with the revising authority may, before it is dissolved, direct it to reconsider its proceedings and sentence; and if it, upon being reconvened, renders a sentence which he approves, such sentence cannot be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority. *Ex parte Reed*. 13

NAVAL COURT-MARTIAL (*continued*).

2. A., the clerk of a paymaster in the navy, was, by a court-martial, found guilty of certain charges and specifications of malfeasance in the discharge of his official duties. Sentence was passed upon him, and transmitted, with the record, to the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon A. a severer punishment. A., who was imprisoned pursuant thereto, alleging that it was illegal and void, and that he was thereby unlawfully deprived of his liberty, prayed for a writ of *habeas corpus*. *Held*, that the court-martial had jurisdiction of the person and of the subject-matter, and was competent to pass the sentence whereof A. complained. *Id.*

NAVAL PAYMASTER, CLERK OF. See *Naval Court-martial*, 2.

The regularly appointed clerk of a paymaster in the navy is a "person in the naval service of the United States," within the meaning of art. 14, sect. 1624, of the Revised Statutes, and, for a violation of its provisions, is subject to be tried, convicted, and sentenced by a naval general court-martial. *Ex parte Reed*, 13.

NAVY.

The "regulations for the administration of law and justice" in the naval service, established by the Secretary of the Navy with the approval of the President, have the force of law. *Ex parte Reed*, 13.

NEGLIGENCE. See *Master and Servant; National Bank*, 6, 7.

NEGOTIABLE SECURITIES. See *Bills of Exchange and Promissory Notes; Lis Pendens.*

NEGRO, PROPERTY OF FRIENDLY INDIANS STOLEN BY. See *Friendly Indians, Liability of the United States to, for Property stolen.*

NEVADA. See *Mining Claim.*

NEVADA, STATUTE OF LIMITATIONS OF. See *Mining Claim*, 2.

The Statute of Limitations of Nevada, as construed by the Supreme Court of the State, excepts from its protection a foreign corporation *Mining Company* v. *Taylor*, 37.

NEW TRIAL.

1. Where a party moving for a new trial assigns as reasons therefor that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions and in refusing others, — *Held*, that, as he did not at the time except to the ruling of the court in regard to the instructions, they cannot be reviewed by the appellate court, although they are incorporated in the bill of exceptions allowed on the refusal of the court of original jurisdiction to grant a new trial. *Railway Company* v. *Twombly*, 78.

NEW TRIAL (*continued*).

2. The Supreme Court of the Territory of Colorado, therefore, properly held that such a bill of exceptions only presented for review the refusal of the District Court, on the motion for a new trial, to set aside the verdict on the ground that it was not sustained by the evidence. Such a question cannot be re-examined here on a writ of error. *Id.*

NEW YORK. See *Taxation*, 5, 6.

NOTARY, DEMAND OF PAYMENT BY. See *Bills of Exchange and Promissory Notes*, 3.

NOTICE. See *Bills of Exchange and Promissory Notes*, 3; *Lis Pendens.*

OFFICE, SUSPENSION FROM.

April 20, 1867, the President duly commissioned A. as deputy postmaster at Nashville, Tenn., for the term of four years, "subject to the conditions prescribed by law," and May 5, 1869, under the act of April 5, 1869 (16 Stat. 6), signed an order suspending him from office until the end of the next session of the Senate, and designating B. to perform the duties of that office. A. delivered the office to B. May 27, 1869. The nomination of B. was sent to the Senate at its next session, which terminated July 15, 1870, and on that date it was rejected. Pursuant to instructions from the Post-office Department, A. took possession of said office July 25, 1870. B., when holding the office, received the salary. A. brought suit therefor against the United States. *Held*, that he was not entitled to recover. *Embry* v. *United States*, 680.

OFFICER OF THE ARMY.

1. An officer of the army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required to justify or explain them in a civil tribunal upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government. *Dow* v. *Johnson*, 158.
2. When any portion of the insurgent States was in the military occupation of the United States during the rebellion, their municipal laws, if not suspended or superseded, were generally administered by the ordinary tribunals for the protection and benefit of the inhabitants and others not in the military service. Their continued enforcement was not for the protection or control of officers or soldiers of the army. *Id.*
3. A district court of Louisiana — continued in existence after the military occupation of the country by the United States, and authorized by the commanding general to hear causes between parties — summoned a brigadier-general of the army of the United States to answer a petition filed therein, setting forth that a military company

OFFICER OF THE ARMY (*continued*).

had, pursuant to his order, seized and carried off certain personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war, or martial law, or by the superiors of that officer. Judgment by default was rendered April 9, 1863, against him for the value of the property. When sued in the Circuit Court of the United States, upon the judgment, he pleaded that the property was taken to supply the army. *Held*, on demurrer to the plea, that the State court had no jurisdiction of the alleged cause of action, and that its judgment was void. *Id.*

OFFICIAL BOND, ACTION ON.

The United States, in an action against the sureties of a paymaster in the army, assigned as the breach of the conditions of his official bond that he did not, when thereunto required, refund $3,320.02, with interest. He rendered his account Nov. 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account at the Treasury Department, that sum was found to be due at said date. No demand therefor was made of his personal representatives, and the sureties had no notice of the claim before the service of the writ in the action. The adjustment was the only evidence of the sum due. *Held*, that the United States is entitled to recover that sum, but with interest only from the date of such service. *United States* v. *Curtis*, 119.

PARTIES. See *Trust and Trustee.*

PASSENGERS, GENERAL CARRIERS OF.

1. It is competent for general carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with a statute or their duties to the public, to protect themselves against liability, as insurers of his baggage which exceeds a fixed amount in value, except upon additional compensation proportioned to the risk. *Railroad Company* v. *Fraloff*, 24.
2. As a condition precedent to a contract for its transportation, they may require information from him as to its value, and demand *extra* compensation for any excess beyond that which he may reasonably demand to be transported as baggage under the contract to carry the person. *Id.*
3. They may be discharged from liability for its full value, if he, by any device or artifice, evades inquiry as to such value, whereby a responsibility is imposed upon them beyond what they are bound to assume in consideration of the ordinary fare charged for the transportation of the person. *Id.*
4. In the absence of legislation, or of special regulations by the carriers, or of conduct by him misleading them as to such value, his failure to disclose it when no inquiry is made of him, is not, in itself, a fraud upon them. *Id.*
5. To the extent that articles taken by him for his personal use when travelling exceed in quantity and value such as are ordinarily or

PASSENGERS, GENERAL CARRIERS OF (*continued*).
usually taken by passengers of like station and pursuing like journeys, they are not baggage for which the carriers are, by general law, responsible as insurers. *Id.*
6. Whether he has taken such an excess of baggage is a question not of law for the sole or the final determination of the court, but of fact for the jury, under proper guidance as to the law of the case. Their determination of it upon the evidence — no error of law appearing — is not subject to re-examination here. *Id.*
7. Sect. 4281, Rev. Stat., has no reference to the liability of carriers by land for the baggage of passengers. *Id.*

PATENT OFFICE, REGISTRATION OF TRADE-MARKS IN. See *Trade-marks.*

PATENT OF THE UNITED STATES FOR LANDS.
When a patent issued by the United States adds to the name of the patentee the word "trustee," without mention of any trust upon which he is to hold the land, such addition does not prevent the legal title from passing by the patentee's conveyance. If a trust be in fact created, it is for the *cestui que trust*, and no one else, to complain of the non-execution thereof. *Cowell* v. *Springs Company*, 55.

PAYMASTER IN THE ARMY. See *Official Bond, Action on.*

PAYMENT, DEMAND OF. See *Bills of Exchange and Promissory Notes*, 3; *Official Bond, Action on.*

PLEADING. See *Practice*, 5; *Rebellion, The*, 3.

POSSESSION, DELIVERY OF. See *Chattels, Contract for Sale of.*

PRACTICE. See *Comity*, 1, 2; *Court and Jury; Habeas Corpus, Writ of*, 1; *Jurisdiction*, 2–5; *New Trial; Review, Bill of.*
1. For the purposes of an appeal to, or a writ of error from, this court, the transcript of the record is sufficiently authenticated, if it be sealed with the seal of the court below, and signed by the deputy clerk thereof in the name of and for his principal. *Garneau* v. *Dozier*, 7.
2. Where the Circuit Court, under a written stipulation of the parties, tries the issue, its special finding should set forth the ultimate facts, and not the evidence establishing them. *Mining Company* v. *Taylor*, 37.
3. The admission of immaterial and irrelevant evidence, which it is manifest could not have affected injuriously the case of the plaintiff in error, does not entitle him to a reversal of the judgment. *Id.*
4. Where the record has not been printed, a motion to dismiss an appeal or a writ of error will not be considered where there is any question about the facts on which the motion rests. *National Bank* v. *Insurance Company*, 43.
5. In the courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the second section of the Process Act of May 8, 1792 (1 Stat. 276), which is substan-

PRACTICE (*continued*).

tially re-enacted in sect. 913, Rev. Stat. *So held*, in a case removed, under the act of Congress, to the Circuit Court from a court of Texas, where such a union is, by the laws of that State, allowed. *Hurt* v. *Hollingsworth*, 100.

6. Where letters-patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and praying for an injunction and an account, and the court below, by its decree, sustained their validity and awarded him costs, but neither damages nor profits, and the defendant appealed, this court, as the only question now involved is that of costs, affirms the decree without examining the merits. *Elastic Fabrics Company* v. *Smith*, 110.

7. Where such letters had been reissued in separate divisions, and the patentee filed in the Patent Office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below, — *Held*, that sect. 4922, Rev. Stat., has no application to the case, and that he is entitled to costs. *Id.*

8. Where the record shows who are the members of a partnership, and an appeal has been taken in the name of the firm, — *Held*, that the defect may, under sect. 1005, Rev. Stat., be cured by an amendment substituting their names. *Moore* v. *Simonds*, 145.

9. The court below properly allowed the plaintiff to file in the case a new petition, not differing in any substantial particular from the original, which was lost, without his fault. *Phillips* v. *Moore*, 208.

10. Papers properly belonging to the files of a court should not be removed therefrom, except in cases of positive necessity. When, therefore, an appeal is taken, no order for transmitting such papers ought to be made, unless the actual inspection of them as originals is required to enable the appellate court to give them their just and full effect in the determination of the suit. *Craig* v. *Smith*, 226.

11. Where, on an appeal, papers have been improperly sent here, the order of the court below will be closely examined, to determine whether they are included in its terms. *Id.*

12. Where, in a case involving the infringement and validity of letters-patent, the Circuit Court, on the allowance of an appeal from its final decree, directed its clerk to transmit with the transcript "the original exhibits, patent certificates, schedules, drawings, and models on file, along with and as part of the record and transcript," — *Held*, that certain affidavits sent here, but not copied into the transcript, although they had been filed as "exhibits" with the bill and the answer thereto, and by consent treated and read as depositions on the hearing below, cannot be considered here as proofs in the cause, as they are not embraced by the order, the purpose of which was to send what had been *exhibited* below, as contradistinguished from what had been *read*. *Id.*

13. Allowing, under a bill of review, the introduction of newly discovered evidence to prove facts in issue on the former hearing rests in the

PRACTICE (*continued*).

sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances which render it indispensable to the merits and justice of the cause. *Id.*

14. The courts of the United States are not bound by the decisions of State courts upon questions of general commercial law. *Oates* v. *National Bank*, 239.
15. Where it appears that no injury resulted to the plaintiff in error, a judgment will not be reversed merely because the court, at the trial, permitted a witness on his cross-examination to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief. *Wills* v. *Russell*, 621.
16. A *supersedeas* will be vacated when the approval of the bond therefor was obtained by fraud and perjury. *Railroad Company* v. *Schutte*, 644.
17. If it appears that the appellant had knowledge of such fraud and perjury, a new bond will not be accepted. *Id.*
18. The record in this case not being complete or properly certified, the court orders that unless appellant causes the omissions to be supplied on or before a specified day, the appeal be dismissed. *Id.*
19. A citation is not required when the appeal is taken and perfected in open court during the term at which the decree complained of is rendered; *aliter*, where, at a subsequent term, the appeal is allowed, although the solicitors of the appellee be present. *Railroad Company* v. *Blair*, 661.
20. The appeal will not, however, be dismissed in the latter case, but terms will be imposed upon the appellant. *Id.*
21. *Dayton* v. *Lash* (94 U. S. 112) cited and approved. *Id.*

PRE-EMPTION.

1. A settler upon unsurveyed public lands in California, who filed no declaratory statement after the return of the plat of the survey to the proper local land-office, could not, under the act of March 3, 1853 (10 Stat. 244), acquire by his settlement a right of pre-emption. *Lansdale* v. *Daniels*, 113.
2. A party cannot initiate a pre-emption right to public land by intrusion upon the actual possession of another; nor by settling upon land in California, a claim to which, under a foreign title, is at the time pending before the tribunals of the United States for confirmation. *Trenouth* v. *San Francisco*, 271.

PRESCRIPTION. See *Lands, Action for Possession of; National Bank*, 2

PRESUMPTION. See *Alien*, 2.

The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Manning* v. *Insurance Company*, 693.

PRINCIPAL AND AGENT. See *Master and Servant; National Bank*, 2

PRIORITY. See *Time, Computation of.*

PRIVITY. See *Attorney-at-law.*

PROMISSORY NOTES. See *Bills of Exchange and Promissory Notes; Interest*, 2.

PUBLIC LANDS. See *Pre-emption; Swamp and Overflowed Lands.*

PUBLIC POLICY. See *Deed, Condition in*, 1.

PUBLIC SECURITIES OF THE UNITED STATES. See *National Bank*, 9, 10.

PUEBLO LANDS.

1. By the laws of Mexico in force in 1826, a pueblo or town, when recognized as such by public authority, became entitled to certain lands, which to the extent of four square leagues, embracing its site and the adjoining territory, were to be measured and assigned to it. *Brownsville* v. *Cavazos*, 138.
2. By the Constitution of Tamaulipas, one of the States of Mexico, in force in 1826, the land of an individual could not be expropriated — that is, divested of its private character — for an object of common recognized utility, without previous compensation, the amount of which could be estimated only by arbiters appointed by him and the State. If such compensation was not made, though the failure to make it was caused by his refusal to appoint an arbiter, his title was not divested, and he and his grantees could recover the land after the jurisdiction over the country had been transferred by the treaty of Guadalupe Hidalgo. *Id.*

QUARTERS, COMMUTATION OF. See *Fuel, Commutation of.*

RAILROAD COMPANY. See *Internal Revenue*, 2; *Master and Servant, Municipal Bonds*, 1–3; *Trust and Trustee.*

REAL ESTATE BOUND BY JUDGMENT OR MORTGAGE. See *Lien.*

REBELLION, THE.

1. An officer of the army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government. *Dow* v. *Johnson*, 158.
2. When any portion of the insurgent States was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. Their continued enforcement was not for the protection or the control of officers or soldiers of the army. *Id.*
3. A district court of Louisiana — continued in existence after the military occupation of the State by the United States, and authorized by the commanding general to hear causes between parties — sum

REBELLION, THE (*continued*).

moned a brigadier-general of the army of the United States to answer a petition filed therein, setting forth that a military company had, pursuant to his orders, seized and carried off certain personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war, or martial law, or by the superiors of that officer. Judgment by default was rendered April 9, 1863, against him for the value of the property. When sued in the Circuit Court of the United States, upon the judgment, he pleaded that the property was taken to supply the army. *Held*, on demurrer to the plea, that the State court had no jurisdiction of the cause of action, and that the judgment was void. *Id.*

RECEIVER.

A receiver appointed by a State court in a suit which, under the act of March 3, 1875 (18 Stat., part 3, 470), was subsequently removed to the Circuit Court of the United States, reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities. *Held*, that the Circuit Court had authority to require him to account for the fund, and that he is chargeable with interest on so much thereof as he on receiving deposited in a bank to his credit as receiver, and then withdrew and deposited on his private account in another bank, he declining to explain the transaction, when he was examined as a witness by the master to whom the court had referred his accounts. *Hinckley* v. *Railroad Company*, 153.

RECORD. See *Practice*, 4, 8, 18.

REMOVAL OF CAUSES. See *Causes, Removal of.*

REPRESENTATIVES IN CONGRESS, ELECTION OF. See *Constitutional Law*, 25–33.

REVIEW, BILL OF. See *Practice*, 13; *Trust and Trustee*, 2.

Upon a bill of foreclosure against A. and the parties to whom, after mortgaging the land, he respectively conveyed separate parcels thereof, at different times, the only question raised was as to the order in which the court should direct the parcels to be sold to satisfy the debt. From the decree rendered June 5, 1875, finding the sum due, and prescribing such order, B., one of the defendants, appealed. The decree was affirmed. Thereupon C., another defendant, filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court on the appeal, and for newly discovered evidence; but, although the decree was in full force, he neither offered to pay the same or any part thereof, nor alleged any reason for not doing so. *Held*, that leave to file the bill rested in the discretion of the court below, and was properly refused. *Ricker* v. *Powell*, 104.

REVISED STATUTES OF THE UNITED STATES.

1. The Revised Statutes of the United States must be accepted as the law on the subjects which they embrace as it existed on the first day

REVISED STATUTES OF THE UNITED STATES (*continued*).
of December, 1873. When their meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the revision. *United States* v. *Bowen*, 508.

2. Sect. 4820 of the Revised Statutes admits of no other reasonable construction than that only the invalid pensioners who had *not* contributed to the funds of the Soldiers' Home were bound to surrender to it their pensions while receiving its benefits. There is no occasion, therefore, to look at the pre-existing law on the subject. *Id.*

The following sections referred to and explained: —

Sect. 641. See *Causes, Removal of*, 6–8, 10–12.
Sect. 643. See *Causes, Removal of*, 1.
Sect. 913. See *Practice*, 5.
Sect. 1005. See *Practice*, 8.
Sect. 1624. See *Naval Paymaster, Clerk of.*
Sect. 1977. See *Causes, Removal of*, 7.
Sect. 1978. See *Causes, Removal of*, 7.
Sect. 2011. See *Constitutional Law*, 25.
Sect. 2012. See *Constitutional Law*, 25.
Sect. 2016. See *Constitutional Law*, 24, 25.
Sect. 2017. See *Constitutional Law*, 24, 25.
Sect. 2021. See *Constitutional Law*, 24, 25.
Sect. 2022. See *Constitutional Law*, 24, 25.
Sect. 4281. See *Passengers, General Carriers of*, 7.
Sect. 4922. See *Letters-patent*, 2.
Sect. 5219. See *National Bank*, 3.
Sect. 5228. See *National Bank*, 9, 10.
Sect. 5515. See *Constitutional Law*, 24, 25, 34.
Sect. 5522. See *Constitutional Law*, 24, 25.

SALE, CONDITION OF. See *Swamp and Overflowed Lands*, 4.

SALE, CONTRACT OF. See *Chattels, Contract for Sale of.*

SAN FRANCISCO, MUNICIPAL LANDS OF.

1. The history of the title of San Francisco to her municipal lands stated. *Trenouth* v. *San Francisco*, 251.

2. The act entitled "An Act to quiet the title to certain lands within the corporate limits of the city of San Francisco," approved March 8, 1866 (14 Stat. 4), confirmed her claim, in trust that certain lands should be disposed of and conveyed to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the act. *Held*, that trespassers then in possession of the lands, who were afterwards ejected therefrom at the suit of those upon whose prior possession they had intruded, are not beneficiaries under the act; but that the parties who so recovered the possession are entitled to a conveyance from the city. *Id.*

SECRETARY OF THE NAVY. See *Navy.*

SECURITIES OF THE UNITED STATES. See *National Bank*, 9, 10.

SET-OFF. See *Bills of Exchange and Promissory Notes*, 2.

SOLDIERS' HOME.

Under sect. 4820 of the Revised Statutes, only the invalid pensioners who have *not* contributed to the funds of the Soldiers' Home are bound to surrender to it their pensions while receiving its benefits. *United States* v. *Bowen*, 508.

SPECIAL DEPOSITS. See *National Bank*, 1, 2.

1. Sect. 5228 of the Revised Statutes, which provides that it shall be lawful for a national bank after its failure to "deliver special deposits," is as effectual a recognition of its power to receive them as an express declaration to that effect would have been. *National Bank* v. *Graham*, 699.
2. The phrase "special deposits," so employed, embraces the public securities of the United States. *Id.*

SPECIAL VERDICT. See *Jurisdiction*, 1.

STATUTE OF LIMITATIONS. See *Limitations, Statute of.*

STATUTES, CONSTRUCTION OF.

1. The legislative intent, clearly expressed, should not be defeated by too rigid an adherence to the mere letter of the statute, nor an interpretation adopted which leads to absurd consequences. *Oates* v. *National Bank*, 239.
2. In the interpretation of statutes like that passed by the legislature of Ohio Feb. 16, 1846, providing for the location of the county seat of Mahoning County, the rule is that, as against the State, nothing is to be taken as conceded but what is given in express and explicit terms, or by an implication equally clear. *Newton* v. *Commissioners*, 548.

STATUTES OF THE UNITED STATES. See *Revised Statutes of the United States.*

The following, among others, referred to, commented on, and explained: —

1792. May 8. See *Practice*, 5.
1815. Feb. 4. See *Causes, Removal of*, 5.
1833. March 2. See *Causes, Removal of*, 5.
1850. Sept. 28. See *Swamp and Overflowed Lands.*
1853. March 3. See *Pre-emption.*
1861. March 2. See *Customs Duties*, 2.
1862. July 14. See *Customs Duties*, 2.
1863. March 3. See *Court of Claims*, 2.
1866, March 8. See *San Francisco, Municipal Lands of*, 2.
1866. July 13. See *Causes, Removal of*, 5.
1866. July 13. See *Excise Tax*, 1; *Internal Revenue*, 2.
1866. July 20. See *Internal Revenue*, 1.
1869. April 5. See *Office, Suspension from.*

STATUTES OF THE UNITED STATES (*continued*).
1870. May 31. See *Constitutional Law*, 25.
1874. June 23. See *Executive Departments, Clerks and Employés in*, 2.
1875. March 1. See *Constitutional Law*, 20, 22.
1875. March 3. See *Causes, Removal of*, 13; *Jury, Waiver of.*
1875. March 3. See *Jurisdiction*, 13.
1879. Feb. 25. See *Jurisdiction*, 3.

STOCK, SUBSCRIPTION TO. See *Municipal Bonds.*

SUPERSEDEAS. See *Mandamus*, 1; *Practice*, 16, 17.

SUPERVISORS OF ELECTION. See *Constitutional Law*, 25–33.

SURETY. See *Internal Revenue, Collector of.*

SUSPENSION FROM OFFICE. See *Office, Suspension from.*

SWAMP AND OVERFLOWED LANDS.

1. Though the grant by the act of Congress of Sept. 28, 1850 (9 Stat. 519), of the swamp and overflowed lands to the States in which they lie, is declared to be made for the exclusive purpose of enabling such States, with the proceeds thereof, to reclaim the lands by means of levees and drains, it is questionable whether the security for the due application of the proceeds does not wholly rest upon the good faith of the several States, and whether they may not exercise their discretion in this behalf without being liable to be called to account, and without affecting the title to the lands: at all events, it seems that Congress alone has the power, in a clear case of violation of the trust, to enforce the conditions of the grant, by revocation or otherwise; and since, by the act, the proceeds are to be applied to the designated persons only "as far as necessary," each State has, at least, a large discretion as to the "necessity" of employing the proceeds to the reclamation of the lands. *Emigrant Company* v. *County of Adams*, 61.
2. A grant, subject to the conditions of that act, made by a State of its swamp and overflowed lands to the several counties in which they are situated, to be disposed of for general county purposes, is valid, and the county which has disposed of them in pursuance of the State grant cannot rescind its contract on the ground of its being a violation of the act of Congress. *Id.*
3. In Iowa, such a contract, if approved by a vote of the people of the county, under the act of the legislature of that State passed in 1858, is valid, though the lands be disposed of for less than one dollar and a quarter per acre; and, if it includes also a sale of the claim of the county against the United States for indemnity for swamp lands sold by the latter, the county cannot maintain a bill in equity to set it aside, though such sale be within the law prohibiting the assignment of claims against the government. *Id.*
4. If the purchaser from the county under such a contract was bound thereby to do certain acts, such as to introduce a certain number of

SWAMP AND OVERFLOWED LANDS (*continued*).

settlers within a certain period, or to reclaim the lands, his obligation, if not made a condition of the sale, lies in covenant merely, and, if unperformed, does not avoid the sale. It is only when covenants are mutual and dependent, or when their performance is made an express condition, that a breach of them involves an avoidance of the contract. *Id.*

SWISS CONFEDERATION, TREATY WITH. See *Alien*, 3.

TAMAULIPAS, CONSTITUTION OF. See *Pueblo Lands*, 2.

TAXATION. See *Constitutional Law*, 39–44, 46; *Excise Tax; Federal Question.*

1. This court can afford the citizen of a State no relief from the enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon Federal authority nor violate any right recognized or secured by the Constitution of the United States. *Kirtland* v. *Hotchkiss*, 491.
2. The Constitution does not prohibit a State from taxing her resident citizens for debts held by them against a non-resident, evidenced by his bonds, payment whereof is secured by his deeds of trust or mortgages upon real estate situate in another State. *Id.*
3. For the purposes of taxation, a debt has its *situs* at the residence of the creditor, and may be there taxed. *Id.*
4. The provision in sect. 5219 of the Revised Statutes of the United States, that State taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon. *People* v. *Weaver*, 539.
5. The statute of a State, therefore, which establishes a mode of assessment by which such shares are valued higher in proportion to their real value than other moneyed capital, is in conflict with that section, although no greater percentage is levied on such valuation than on that of other moneyed capital. *Id.*
6. The statutes of New York which permit a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, tax them at a greater rate than other moneyed capital, and are, therefore, void as to them. *Id.*

TENANT IN COMMON. See *Mining Claim.*

TEXAS. See *Lands, Action for Possession of; Practice*, 5; *Pueblo Lands.*

TEXAS, SALE OF LANDS IN.

A sale of lands in Texas, made before her separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen. *Phillips* v. *Moore*, 208.

THIRTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. See *Constitutional Law*, 20.

TIME, COMPUTATION OF.

When the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, the rule that for most purposes the law regards the entire day as an indivisible unit is necessarily departed from. *National Bank* v. *Burkhardt*, 686.

TITLE, CERTIFICATE OF. See *Attorney-at-law.*

TRADE-MARKS.

1. Property in trade-marks has long been recognized and protected by the common law and by the statutes of the several States, and does not derive its existence from the act of Congress providing for the registration of them in the Patent Office. *Trade-mark Cases*, 82.
2. A trade-mark is neither an invention, a discovery, nor a writing, within the meaning of the eighth clause of the eighth section of the first article of the Constitution, which confers on Congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. *Id.*
3. If an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in "commerce with foreign nations, and among the several States, and with the Indian tribes." *Id.*
4. The legislation of Congress in regard to trade-marks is not, in its terms or essential character, a regulation thus limited, but in its language embraces, and was intended to embrace, all commerce, including that between citizens of the same State. *Id.*
5. That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress. *Id.*
6. The owner of a trade-mark which is affixed to articles manufactured at his establishment may, in selling the latter, lawfully transfer therewith to the purchaser the right to use the trade-mark. *Kidd* v. *Johnson*, 617.

TREASURY, FIRST AUDITOR OF. See *Internal Revenue, Collector of.*

TREATY. See *Alien*, 3; *Pueblo Lands*, 2.

TRIAL BY JURY. See *Constitutional Law*, 9, 10.

TRUST AND TRUSTEE. See *Captured and Abandoned Property; Lands, Sale of, by Trustee*, 1; *Patent of the United States for Lands.*

1. The trustee to whom a railroad company executed a mortgage upon its property, to secure the payment of its bonds, represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds

TRUST AND TRUSTEE (*continued*).
him, if he acts in good faith, binds them. *Shaw* v. *Railroad Company*, 605.

2. If bondholders not parties to the suit in which a decree was rendered in favor of the trustee can, under any circumstances, bring a bill of review, they can only have such relief as he would be entitled to in the same form of proceeding. To avoid what he has done in their behalf, they must proceed in some other way than by bill of review. *Id.*

3. Except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by means of a receiver's certificates which create a paramount lien upon the property, in order to complete the work. *Id.*

4. Upon a bill filed by the trustees to foreclose mortgages executed by a railroad company in Arkansas, one upon its road and the other upon its land grant, to secure its bonds the court found that they were valid and subsisting liens, that the whole amount of the bonds was due and unpaid, and decreed that in default of payment of principal and interest, at a specified date, the mortgaged property be sold and the proceeds thereof divided among the bondholders. A large majority in interest of the latter held, subsequently to the decree, and upon full notice, a meeting, at which a committee was appointed to purchase the property for the benefit of the bondholders. The committee accordingly purchased it at the sale. The sale was duly reported to the court, when the purchasers appeared therein and declared, and desired it to be so recorded, that it was their intention to organize a corporation under the laws of the State, to own, hold, and manage the property, and that any bondholder might, within sixty days from such organization, transfer to it his bonds and right to the proceeds of the sale, and become entitled to his proportional interest in the stock of the new corporation upon the same terms and stipulations as any other bondholder; but that said new corporation was not to be prevented thereby from requiring from any bondholder the payment of his proportion of the expenses attending the sale and purchase, and such other sums not exceeding five per cent of the principal of the bonds as it might deem for its interests to require as a condition on which such stock should be delivered, provided that the same requirement should be made of all the other bondholders; and, further, that the stipulation should not limit the power of the purchasers to organize the corporation without notice, or of the corporation so organized to mortgage its property or reserve for its own use not exceeding ten per cent of its capital stock. At the same time, the trustees in the mortgages appeared in court and consented to an approval and confirmation of the sale, upon the agreement that the stipulation of the purchasers be embodied in the decree. Thereupon a decree was passed accordingly. The proper conveyance was made, and, as part of the consideration therefor, the decree also provided for the payment or compromise by the new corporation of

TRUST AND TRUSTEE (*continued*).
certain claims against the old company. *Held*, 1. That the fact that some of the trustees were bondholders was not of itself sufficient to render them incompetent to consent to the decree. 2. That a bill filed by two bondholders not impugning the good faith of the trustees, but praying that the decree be reviewed and set aside, was properly dismissed. *Id.*

ULTRA VIRES.
The doctrine of *ultra vires* has no application in favor of corporations for wrongs committed by them. *National Bank* v. *Graham*, 699.

USAGE. See *Guaranty.*
Usage cannot make a contract where none was made by the parties. *Savings Bank* v. *Ward*, 195.

USURY. See *National Bank*, 1.

VESSEL, MORTGAGE OF.
A mortgage of a vessel of the United States is not, as against the parties, and such persons as have actual notice thereof, rendered invalid by the failure to record it. *Moore* v. *Simonds*, 145.

VIRGINIA, CONSTITUTION OF.
The Constitution and laws of Virginia do not exclude colored citizens from service on juries. *Virginia* v. *Rives*, 313.

WHARFAGE.
1. A municipal corporation, owning improved wharves and other artificial means which it maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the Constitution of the United States from charging and collecting from parties using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of the property. *Packet Company* v. *St. Louis*, 423.
2. *Packet Company* v. *Keokuk* (95 U. S. 80), affirmed. *Id.*
3. The ordinance of the city of Vicksburg passed July 12, 1865, entitled "an ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft landing and lying at the city of Vicksburg," is not in conflict with the Constitution of the United States. *Vicksburg* v. *Tobin*, 430.
4. *Packet Company* v. *St. Louis* (*supra*, p. 423), affirmed. *Id.*
5. An ordinance of Baltimore, whereunder vessels laden with the products of other States are required to pay for the use of the public wharves of that city fees which are not exacted from vessels landing thereat with the products of Maryland, is in conflict with the Constitution of the United States. *Guy* v. *Baltimore*, 434.
6. Such fees, so exacted, must be regarded not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States. *Id*

WORDS.
"Permanently established." See *Constitutional Law*, 45.
"Special deposits." See *National Bank*, 9, 10.

WRIT OF ERROR. See *Exceptions, Bill of*, 2; *Habeas Corpus, Writ of, Mandamus*, 1; *New Trial*, 2; *Practice*, 1.

1. The administratrix of A. recovered judgment for damages by reason of his death, caused by the negligence of B., who thereupon sued out of this court a writ of error. During its pendency, the statute authorizing such a suit was repealed. *Held*, that the judgment was not vacated by the writ, and that it must be affirmed, no error appearing in the proceedings below. *Railway Company* v. *Twombly*, 78.
2. On the trial of an action at law, when the judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; but the judgment rendered comformably thereto may, without regard to its amount, be reviewed on a writ of error, upon their certificate stating such question. *Dow* v. *Johnson*, 158.