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OF THE

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CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1882.

REPORTED BY

WILLIAM T. OTTO.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. SAMUEL F. MILLER.
HON. JOSEPH P. BRADLEY.
HON. WILLIAM B. WOODS.
HON. HORACE GRAY.
HON. STEPHEN J. FIELD.
HON. JOHN M. HARLAN.
HON. STANLEY MATTHEWS.
HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL.

HON. BENJAMIN HARRIS BREWSTER.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

As made April 3, 1882.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.		
Hon. M. R. WAITE, Ohio.	FOURTH. Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	1874. Jan. 21. President Grant.
ASSOCIATES.		
Hon. HORACE GRAY, Massachusetts.	FIRST. Maine, New Hampshire, Massachusetts, and Rhode Island.	1881. Dec. 20. President Arthur.
Hon. SAMUEL BLATCHFORD, N. Y.	SECOND. New York, Vermont, and Connecticut.	1882. March 27. President Arthur.
Hon. J. P. BRADLEY, New Jersey.	THIRD. Pennsylvania, New Jersey, and Delaware.	1870. March 21. President Grant.
Hon. Wm. B. WOODS, Georgia.	FIFTH. Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	1880. Dec. 21. President Hayes.
Hon. STANLEY MATTHEWS, Ohio.	SIXTH. Ohio, Michigan, Kentucky, & Tennessee.	1881. May 12. President Garfield.
Hon. J. M. HARLAN, Kentucky.	SEVENTH. Indiana, Illinois, and Wisconsin.	1877. Nov. 29. President Hayes.
Hon. S. F. MILLER, Iowa.	EIGHTH. Minnesota, Iowa, Missouri, Kansas, Arkansas, Nebraska, and Colorado.	1862. July 16. President Lincoln.
Hon. S. J. FIELD, California.	NINTH. California, Oregon, and Nevada.	1863. March 10. President Lincoln.

AMENDMENTS TO GENERAL RULES.

Amendment to Rule 1.

Ordered, That the second clause of Rule 1 be amended so that it will read as follows: —

The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court; but records on appeals and writs of error, exclusive of original papers sent up therewith, may be taken to a printer to be printed, under the requirements of Rule 10.

Amendment to Rule 10.

Ordered, That paragraphs 3, 4, 5, and 6 of Rule 10 be rescinded, and the following adopted in lieu thereof: —

3. The clerk shall take to the printer the original record in the office, except in cases prohibited by the rules. When the original cannot be taken, he shall furnish the printer with a manuscript copy. He shall supervise the printing, and see that the printed copy is properly indexed. He shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

4. In cases where a manuscript copy of the record is not furnished the printer, the fee of the clerk for his service under the last preceding paragraph shall be one-half the rates now allowed by law for making a manuscript copy, and that shall be charged to the party bringing the cause into court, unless the court shall otherwise direct. When a manuscript copy is required to be made, full fees for a copy may be charged; but nothing in addition for the other services required.

5. In all cases the clerk shall deliver a copy of the printed record to each party without extra charge. In cases of dismissal, reversal, or affirmance, with costs, the fee allowed in the last paragraph shall be taxed against the party against whom the costs are given. In cases of dismissal for want of jurisdiction, such fees shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.

ADDITIONAL GENERAL RULE.

Rule 33.

All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a cause must be taken

away by the parties within one month after the cause is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the cause, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

[The above amendments and rule were promulgated Nov. 13, 1882.]

MEMORANDUM.

In *United States* v. *Erie Railway Company*, p. 327, Mr. Justice Bradley, while assenting to the judgment of the court, delivered a separate opinion, in which Mr. Justice Harlan concurred. It was not received in time for insertion in its appropriate place, and it will be found in the Appendix, p. 703.

TABLE OF CASES.

TABLE OF CASES

CITED BY THE COURT.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1882.

PARKER *v.* MORRILL.

An appeal will be dismissed where it does not appear by the record, or otherwise, that the value of the matter in dispute exceeds $5,000.

MOTION to dismiss an appeal from the Circuit Court of the United States for the District of West Virginia.

The case is stated in the opinion of the court.

Mr. Gideon D. Camden in support of the motion.

Mr. D. D. Lord, contra.

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

This is a motion to dismiss for the reason that it does not appear in the record or by affidavits that the value of the matter in dispute exceeds $5,000. The record shows that Willard Parker, Jr., the appellant, as the owner of one undivided twentieth part of a large tract of land in West Virginia, embracing within its boundaries several hundred thousand acres, filed his bill in equity against Willard Parker, Sen., as the owner of the remaining nineteen-twentieths, and Morrill, the appellee, for a partition as between himself and Parker, senior, and to remove a cloud upon the title to a part of the tract caused by a claim set up by Morrill. Upon the hearing the court below dismissed the bill as to Morrill, and from a

decree to that effect Parker, junior, took this appeal. Parker, senior, did not appear as an actor in the court below, and has not united in the appeal.

The lands claimed by Morrill are not described either in the bill or in the answer of Morrill, otherwise than by reference to certain patents under which he assumed to hold. These patents covered between fifty and sixty thousand acres. In one of the depositions it is shown that when the suit was begun Morrill claimed about twenty-five thousand acres. The value of the property is nowhere stated. The whole tract in which Parker, junior, claimed his undivided interest included very much more than the Morrill lands. On the 11th of January, 1854, this whole tract was conveyed to Peter Clark by deed reciting a consideration of $3,090. Clark, on the 29th of March, 1854, conveyed it to William W. Campbell by deed, in which the consideration is stated to have been $8,000. On the 5th of May, 1858, Campbell conveyed to Parker, senior, for a nominal consideration, and on the 2d of November, 1872, Parker, senior, conveyed the one undivided twentieth to Parker, junior, for $2,000. In his petition for this appeal, filed Sept. 8, 1880, Parker, junior, states the value of the lands claimed by Morrill to be over $2,000. Notice of the present motion was served on the counsel for the appellant in May last. The brief in support of the motion was filed here on the 6th of May. That of the appellant was filed on the 7th of October. Notwithstanding the dismissal was claimed on account of the value of the matter in dispute, no attempt has been made by the appellant to supply the defect in the record by affidavits, as under our practice might have been done, but to defeat the motion he relies entirely on the evidence of value to be found in the record.

As the case stands, only the interest of Parker, junior, in the lands is in question here. This is one undivided twentieth part only. As Parker, senior, has not appealed, the value of his interest in the property cannot be taken into the account. The claim of Morrill is only for twenty-five thousand acres. One-twentieth of this would be twelve hundred and fifty acres, and certainly, in the light of the facts appearing all through the record, we cannot say that their value exceeds $5,000.

Appeal dismissed.

BOSTWICK *v.* BRINKERHOFF.

A judgment of reversal by a State court, with leave for further proceedings in the court of original jurisdiction, is not subject to review here.

MOTION to dismiss a writ of error to the Court of Appeals of the State of New York.

The case is stated in the opinion of the court.

Mr. J. Hervey Cook in support of the motion.

Mr. E. L. Francher, *contra*.

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

This was a suit begun in the Supreme Court of the State of New York by a stockholder in a national bank against the directors, to recover damages for their negligence in the performance of their official duties. A demurrer was filed to the complaint, which raised, among others, the question whether such an action could be brought in a State court. The Supreme Court at special term sustained the demurrer and dismissed the complaint. This judgment was affirmed at general term. An appeal was then taken to the Court of Appeals, where it was ordered and adjudged "that the judgment of the general term . . . be . . . reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs, . . . and to answer the complaint." It was also further ordered that the record and the proceedings in the Court of Appeals be remitted to the Supreme Court, "there to be proceeded upon according to law." From this judgment of the Court of Appeals a writ of error was taken to this court, which the defendant in error now moves to dismiss because the judgment to be reviewed is not a final judgment.

The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but

to execute the judgment or decree it had already rendered. *Whiting* v. *Bank of United States*, 13 Pet. 6; *Forgay* v. *Conrad*, 6 How. 201; *Craighead* v. *Wilson*, 18 id. 199; *Beebe* v. *Russell*, 19 id. 283; *Bronson* v. *Railroad Company*, 2 Black, 524; *Thomson* v. *Dean*, 7 Wall. 342; *St. Clair County* v. *Lovingston*, 18 id. 628; *Parcels* v. *Johnson*, 20 id. 653; *Railroad Company* v. *Swasey*, 23 id. 405; *Crosby* v. *Buchanan*, id. 420; *Commissioners* v. *Lucas*, 93 U. S. 108. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common-law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error. *Brown* v. *Union Bank*, 4 How. 465; *Pepper* v. *Dunlap*, 5 id. 51; *Tracy* v. *Holcombe*, 24 id. 426; *Moore* v. *Robbins*, 18 Wall. 588; *McComb* v. *Knox County*, 91 U. S. 1; *Baker* v. *White*, 92 id. 176; *Davis* v. *Crouch*, 94 id. 514. This clearly is a judgment of that kind. The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent the litigation between the parties has been terminated, so far as the State courts are concerned; but it still remains to decide whether the directors have in fact been guilty of the negligence complained of, and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit.

Writ dismissed.

Ex parte Baltimore and Ohio Railroad Company.

An appeal will not lie from a decree of the Circuit Court, which adjudged to none of the libellants in a collision suit, who had distinct causes of action against the vessel at fault, a sum exceeding $5,000.

Petition for *mandamus*.

A collision occurred in the harbor of Baltimore, Maryland, between the steamer "Knickerbocker," owned by the Baltimore and Ohio Railroad Company, and the barge "J. J. Munger," owned by Jeannette Maxon. The barge was loaded with grain belonging to the partnership firm of J. & C. Moore & Co. Both the barge and her cargo were injured in the collision, and the owner of the barge united with the owners of the cargo in a libel against the steamer to recover the damages they had respectively sustained. The suit thus begun terminated in a decree in the Circuit Court for the District of Maryland in favor of the owner of the barge for $1,471.20, and in favor of the owners of the cargo for $3,709.13. The railroad company, as the claimant of the steamer, prayed an appeal to this court, which was refused by the Circuit Court on the ground that the value of the matter in dispute between the steamer and the respective libellants was less than $5,000. The company now asks a *mandamus* from this court requiring the Circuit Court to allow an appeal.

Mr. Eben J. D. Cross for the petitioner.
Mr. John H. Thomas, *contra*.

Mr. Chief Justice Waite, after stating the case, delivered the opinion of the court.

It is impossible to distinguish this case in principle from *Oliver* v. *Alexander*, 6 Pet. 143; *Stratton* v. *Jarvis*, 8 id. 4; *Spear* v. *Place*, 11 How. 522; and *Rich* v. *Lambert*, 12 id. 347, under which, for half a century, it has been held that when in admiralty distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit, according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be

joined to give this court jurisdiction on appeal. In *Seaver* v. *Bigelows*, 5 Wall. 208; *Paving Company* v. *Mulford*, 100 U. S. 147; and *Russell* v. *Stansell*, 105 id. 303, this rule was applied to analogous cases in equity.

The cases of *Shields* v. *Thomas*, 17 How. 3; *Market Company* v. *Hoffman*, 101 U. S. 112; and *The Connemara*, 103 id. 754, relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by Chief Justice Taney in *Shields* v. *Thomas*, and that case was held to be within the latter class. It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has long been established.

Neither is the case of *The Mamie*, 105 U. S. 773, an authority in support of this application. That was a suit by the owners of the pleasure-yacht "Mamie" to obtain the benefit of the act of Congress limiting the liability of vessel owners. Rev. Stat., sects. 4283 to 4289. The aggregate of the claims against the yacht was $65,000, but no single claim exceeded $5,000. The theory of the proceeding authorized by this act of Congress is, that the owner brings into court the fund which he says belongs to all who have claims against him or his vessel growing out of the loss, and surrenders it to them collectively in satisfaction of their demands. If he succeeds, all the claimants have a common interest in the fund thus created, and are entitled to have it divided between them in proportion to the amount of their respective claims. With this division the owner of the vessel has nothing to do. He surrenders the fund, and calls on all who have claims against him growing out of the loss to come in and divide it among themselves. The controversy in the suit is not in respect to his liability to the different parties in interest, but as to his right to surrender the

fund and be discharged of all further liability. His dispute is not with any one claimant separately, but with all collectively. He insists that his liability in the aggregate does not exceed the value of his interest in the vessel; they, that he must pay all their several demands amount to. He does not seek to have it determined how much he owes each one of them, but to what extent he is liable to them collectively. The difference between what he admits his liability to be, and the aggregate amount of the demands against him, is the amount in dispute. In the case of *The Mamie* this difference was more than $5,000, and we consequently took jurisdiction.

It follows that the Circuit Court properly refused to allow the appeal, and the petition for a *mandamus* is therefore

Denied.

COUGHLIN *v.* DISTRICT OF COLUMBIA.

1. After the adjournment without day of a term, whereat a final judgment on a verdict was rendered by one justice of the Supreme Court of the District of Columbia, and an appeal taken therefrom to the general term, but no bill of exceptions or case stated filed, a new trial cannot be granted upon a case stated filed by him at a subsequent term.
2. When a verdict and a judgment for the plaintiff were wrongly set aside, and the error appears of record, he may, without a bill of exceptions, avail himself of it upon a writ of error to reverse a final judgment afterwards rendered against him.
3. When a judgment for the plaintiff in a personal action was erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the first judgment *nunc pro tunc*.

ERROR to the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Mr. Walter D. Davidge and *Mr. Reginald Fendall* for the plaintiff in error.

Mr. Albert G. Riddle for the defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an action to recover damages for a personal injury sustained by reason of a defect in a highway. The Supreme

Court of the District of Columbia originally held that the action could not be maintained against the defendant, and gave judgment in its favor. But this court on writ of error reversed that judgment and ordered a new trial. *Dant* v. *District of Columbia*, 91 U. S. 557. Upon the present record that decision of this court must, as was assumed by both counsel at the argument, be considered as settling the law of the case on the question then decided.

This record shows the following proceedings: At October Term, 1876, of the Supreme Court of the District of Columbia, held by one justice, a new trial was had pursuant to the mandate of this court. On the 18th of November a verdict was returned for the plaintiff in the sum of $5,000, and judgment rendered thereon, and the defendant moved the judge for a new trial, because the verdict was contrary to law and the instructions of the court, and to the evidence in the case, and because the damages were excessive. On the 26th of December that motion was overruled. On the 5th of January, 1877, the defendant filed this appeal: "And now comes the defendant by its attorney, and appeals from the judgment rendered against it at this term to the general term of said court, having first filed in said cause a statement of the case;" and on the same day October Term, 1876, was adjourned without day.

No statement of the case was filed until the next term, at which, on the 9th of March, 1877, a transcript of the pleadings and of the instructions to the jury, and an abstract of all the testimony given in the cause, were filed, with a certificate, under the hand and seal of the judge who presided at the trial, to their correctness, and "that, for the purpose of making a case stated on appeal by the defendant from the verdict of the jury and the order of the justice refusing a new trial, I sign and seal this paper, and order it to be filed as of the day of appeal, January 5, 1877, the defendant not having been guilty of laches in the case; that to my signing and sealing this paper the plaintiff objects, which objection is overruled by me, and to the overruling of which objection the plaintiff excepts."

At September Term, 1877, there was a "motion for new trial on case stated filed in general term October 3, 1877;" and on the 8th of December, 1877, the court in general term re-

versed the judgment below, and remanded the case to be tried anew. At the third trial the jury returned a verdict for the defendant, under an instruction that the plaintiff could not recover because the evidence showed contributory negligence on his part. To this instruction he tendered a bill of exceptions, which was allowed and made part of the record, and, after judgment on this verdict for the defendant, was entered at a general term of the court, which, on the 11th of November, 1878, affirmed the judgment, and on the next day the plaintiff sued out this writ of error.

Since the entry of the case in this court the plaintiff has died, and the action is prosecuted by his administrator.

The Revised Statutes of the United States relating to the District of Columbia contain the following provisions: An exception taken at the trial of a cause may be reduced to writing at the time, or "may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised." Sect. 803. The justice who tries the cause may, in his discretion, entertain a motion, entered on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; "but such motion shall be made at the same term at which the trial was had." Sect. 804. "When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner." Sect. 805. "A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term." Sect. 806.

By the rules of the Supreme Court of the District of Columbia, which are made part of the record, every motion for a new trial must be in writing, and state the grounds upon which it is based, and be made within four days after verdict, and be entered on the minutes of the court on the day on which it is presented, Rule 61; "the bill of exceptions must be settled

before the close of the term, which may be prolonged by adjournment in order to prepare it," Rule 65; and "in every case the fact of the settling and filing of the bill of exceptions and that it is made part of the record shall be noted on the minutes of the court," Rule 68.

By the statutes above quoted, although a motion for a new trial on a case or bill of exceptions may "be heard in the first instance at a general term," any exception stated in the case or bill must either have been reduced to writing at the trial, or have been then entered on the minutes of the justice, and "afterwards settled in such manner as may be provided by the rules of the court;" and those rules require it to be "settled before the close of the term."

The record in this case shows that October Term, 1876, was adjourned without day on the 5th of January, 1877, and does not show, otherwise than by the certificate afterwards filed by the judge, what were his rulings in matter of law, or that any exception to such rulings was taken by the defendant. The only motion for a new trial made within four days after verdict, as required by the sixty-first rule, was the motion filed at that term. Even if the court in general term could dispense with its rules so far as to entertain an original motion for a new trial after the time therein prescribed, and if the "motion for a new trial upon case stated filed in general term October 3, 1877," can be deemed a distinct motion filed for the first time in the general term, the difficulty remains that the only case stated which appears of record is the case stated by the judge two months after the final adjournment of the term at which he had overruled the motion made before him for a new trial, on the ground, among others, that the verdict for the plaintiff was contrary to law, and had rendered judgment on that verdict, and an appeal from his judgment had been taken to the general term. At that stage of the case the judge could not, without contravening the express provisions of the statutes and the decisions of this court, present for consideration in an appellate court questions of law which had not been made part of the record at the term at which his judgment was rendered. *Generes* v. *Bonnemer*, 7 Wall. 564. The judgment setting aside the verdict for the plaintiff and ordering a new trial was

therefore erroneous, whether it is to be treated as proceeding upon a distinct motion filed at the general term, or upon an appeal from the decision of the judge on the original motion filed before him.

As the error appears on the record, no bill of exceptions was necessary to secure the rights of the party aggrieved. *Bennett* v. *Butterworth*, 11 How. 669. As the erroneous order directed further proceedings in the court below, he could not bring the case to this court until after such proceedings had been had and a final judgment rendered against him. *Baker* v. *White*, 92 U. S. 176; *Bostwick* v. *Brinkerhoff*, *ante*, p. 3. As without that error the final judgment could not have gone against him, the question is open on his writ of error upon the final judgment.

The judgment rendered upon the verdict in favor of the plaintiff having been erroneously set aside, the subsequent final judgment for the defendant must be reversed, and the former judgment for the plaintiff affirmed as of the date when it was rendered, in order to prevent the action from being abated by the subsequent death of the plaintiff. *Mitchell* v. *Overman*, 103 U. S. 62.

Ordered accordingly.

MR. JUSTICE FIELD was not present at the argument, and took no part in the decision of this case.

BAYLY *v.* UNIVERSITY.

1. A composition between a bankrupt and his creditors, under sect. 17 of the act of June 22, 1874, c. 390, although ratified by the proper District Court, did not discharge him from a debt or a liability incurred by him while acting in a fiduciary character.
2. That section did not repeal sect. 5117 Rev. Stat. *Wilmot* v. *Mudge*, 103 U. S. 217, cited upon this point and approved.

ERROR to the Supreme Court of the State of Louisiana.

The facts are sufficiently stated in the opinion of the court.

Mr. John H. Kennard and *Mr. William Wirt Howe* for the plaintiff in error.

Mr. James Leovy for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

In the Second District Court of the Parish of Orleans, in the matter of the succession of R. H. Bayly, there was an opposition to the homologation of the account presented by George M. Bayly, executor of said R. H. Bayly, by the Washington and Lee University, which was a legatee under the will of the deceased.

This opposition, so far as the case before us is concerned, was to an item of $18,021.79, which that court decided to be a debt from the firm of Bayly & Pond, the members of which had been declared bankrupt, and in regard to whom a resolution of composition by the creditors had been confirmed by the District Court of the United States.

The plaintiff in error here relied upon this composition as discharging him, both as executor of the estate of his brother, and as a member of the partnership of Bayly & Pond, from liability for the item; and the inferior court accepting this view of the matter, made an order that it should only be paid in due course of administration.

On appeal of the Washington and Lee University, the Supreme Court of Louisiana decided that the item represented a debt by the executor of a fiduciary character, which was not barred by the composition order, and directed a judgment against Bayly in cash for the amount of it, to which judgment this writ of error is prosecuted.

The proposition argued here, namely, that a composition in a bankruptcy case, ratified by order of the District Court, operates as a discharge of the bankrupt from all his debts, including those arising from fraud or growing out of a fiduciary relation, as well as others, was decided adversely by this court some two years after the present writ of error was sued out, in the case of *Wilmot* v. *Mudge*, 103 U. S. 217.

It is there held that notwithstanding the comprehensive terms in which sect. 17 of the act of June 22, 1874, c. 390, declares such a composition to be binding, it was not intended

to repeal sect. 5117 of the Revised Statutes, which enacts that "no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

This disposes of the only question in the record of which this court has jurisdiction, and decides that whatever may be due by plaintiff in error to the succession as executor is not discharged by the proceeding in bankruptcy, and he is left to account with the court in that character as though no composition in bankruptcy had been made. Whether in that accounting he was executor or not, and whether as such he had so dealt with the item in question as to be relieved of liability as executor or to be bound for it, are matters depending on the application of the law of Louisiana to the facts of the case, and involve no question under the bankrupt law.

Judgment affirmed.

THE "NEW ORLEANS."

1. The court, upon the facts found by the Circuit Court, affirms the decree whereby the steamer "New Orleans" was condemned to pay the damages occasioned by her collision with a schooner.
2. The evidence which in another suit a part owner of the schooner gave as to the extent and cost of the repairs put upon her, is not in this suit admissible against the other part owners.

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

The owners of the "Allie Bickmore" filed, in their own behalf and as carriers of her cargo, their libel in a cause of collision, civil and maritime, against the "New Orleans." The District Court adjudged the "New Orleans" to be wholly in fault, and rendered a final decree accordingly for $15,682.37, with interest thereon and costs. Both parties appealed to the Circuit Court, which found the following facts: —

1. A little after five o'clock in the morning of the 6th of September, 1874, a collision occurred between the schooner

"Allie Bickmore," owned by the libellants, and the steamer "New Orleans," in the Atlantic Ocean, about forty miles southeasterly from Cape Henlopen.

2. The schooner had a carrying capacity of over six hundred tons, though she registered only three hundred and ninety or thereabouts. She was less than a year old, and bound on a voyage from Fernandina, Florida, to New York, with a full load of pine lumber, stowed below and on deck.

3. The steamship was 245 feet long, and of 1,448 tons burden. She was on one of her regular trips between New York and New Orleans.

4. When the collision occurred it was broad daylight, and a vessel without lights might have been seen at least two miles away. The wind was very light from the southward and eastward, but a considerable swell was rolling from the southeast.

5. The course of the schooner was about NE. by N. She had all sails set, but there was not wind enough to keep them full, and she was not making more than a mile and a half or two miles an hour. Her lights were properly set and burning, and she was in all respects well equipped and manned.

6. The course of the steamer was about S. by W. ½ W., and her speed eleven miles, or a little more, an hour. This was full speed. About twenty minutes before the collision her lookout was withdrawn from his station on the forecastle and set to work, with all the other men then on watch, washing decks. The second officer, whose watch it was, was with his men superintending their work. From the time the lookout was withdrawn there was no one where he could in any respect perform that duty except the man at the wheel, and he did not discover the schooner until his attention was called to her by the mate at the time and in the manner hereinafter stated.

7. When the vessels were two or three miles apart the steamer was discovered, and duly reported by the lookout on the schooner. From that time she was closely watched. The schooner was kept steadily on her course until the steamer was not more than seven or eight hundred feet away, when, the danger of collision being imminent, the second mate, who was on deck, gave an order to luff, and at the same time called out

an alarm to the steamer; but before any material change in her course had been made the vessels came together.

8. The schooner was not seen at all from the steamer until the second mate, hearing the cry of alarm which came from her, stepped from where he was standing on the main deck to the starboard side, and saw her close upon him. He immediately ran up from the main deck into the wheel-house, where he ordered the wheel to port, at the same time assisting to port it over himself. The order to port aroused the captain, who was in a room opening out of the wheel-house, and he, without stopping to put anything on, opened his door, and, seeing the schooner, rang the proper bells to slow and stop. Before the course of the steamer was materially changed by the porting of the wheel, or her headway was sensibly affected, she struck the schooner on the port bow, between the stern and the cathead, and cut into her about twenty feet on a line but slightly angling across the keel. The wound extended very nearly to the foremast, and to within four feet of the keel.

9. In a short time the steamer took the schooner in tow and carried her to the Delaware breakwater. From there she was taken by a tug to Philadelphia, where she was unloaded, and her cargo taken on to New York. She was also put in repair and refitted at that port.

10. The account of damages as stated by the commissioner in his report is sustained by the evidence, except the item of $1,000 for damages to the starboard side. As to that the evidence shows that when the repairs were completed the vessel was in as good general condition as she was before the collision, and that if the bill of Bisely, Hillman, & Streaker is paid in full, without the deduction of $600 for increase of value, full compensation will be made for any injury to the starboard side.

The court found as conclusion of law, —

1. That the collision was caused solely by the fault of the "New Orleans" in not keeping a sufficient lookout, and in not seeing the schooner in time to keep out of her way.

2. That the libellants are entitled to recover for the amount of the decree below with interest on $14,026.92 from the date of that decree, at the rate of six per cent per annum.

The court also held that as both parties had appealed and the decree below was sustained, the costs of the Circuit Court must be equally divided between them.

Upon the hearing before the commissioner, the claimants offered in evidence the testimony of the owner of one-fourth of the schooner in reference to the value and amount of the repairs put upon her, which he gave in another suit. The evidence was, on the objection of the libellants, excluded, and an exception duly taken.

A decree was rendered in favor of the libellants, and the claimants thereupon appealed.

Mr. John E. Parsons for the appellants.

Mr. Henry J. Scudder for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

The findings of the Circuit Court, which are conclusive here, show that the steamer was wholly in fault for its collision with the schooner; and she was therefore justly condemned to pay all the damages inflicted.

The only question open for our consideration arises upon the exception to the exclusion by the commissioner of the testimony given in another suit by one of the part owners of the schooner as to the extent and value of its repairs. The exclusion, we think, was correct. The statements of the part owner, expressing his judgment as to the matters upon which he was examined, could, at most, bind only himself. They were not evidence against his co-owners, who were merely tenants in common with him, not partners. Story on Partnership, sect. 453.

Decree affirmed.

THE "NORTH STAR."

1. In cases of collision, where both vessels were in fault, the maritime rule is to divide the entire damage equally between them, and to decree half the difference between their respective losses in favor of the one that suffered most, so as to equalize the burden.
2. The obligation to pay that difference is the legal liability arising from the transaction.
3. The practice, which obtains in England, of decreeing to each party half his damage against the other party, thus necessitating two decrees, is only an indirect way of getting at the true result, and grows out of the technical formalities of the pleadings, and the supposed incongruity of giving affirmative relief to a respondent.
4. *Semble*, that there is no good reason why, in such cases, the respondent, if he claims it in his answer, should not have the benefit of a set-off or recoupment of the damage which he sustained, at least to the extent of that done to the libellants.
5. If both parties file libels, the courts of the United States have the power to consolidate the suits, prescribe one proceeding, and pronounce one decree for one-half of the difference of the damage suffered by the two vessels.
6. The statute of limited liability is not to be applied in such a case, until the balance of damage has been struck; and then the party against whom the decree passes may, if otherwise entitled to it, have the benefit of the statute in respect of the balance which he is decreed to pay. The decision to the contrary in *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D. 157, examined and disapproved. [See Appendix, p. 705.]
7. A collision occurred at sea, in the night, between the steamers W. and N., pursuing nearly opposite courses. W. was sunk, and N. much damaged. Both were held to have been in fault. Cross-actions were brought and heard together, and one decree was made, being in favor of the owners of W. for one-half the difference of damage sustained by the two vessels, that of W. being the greater. This decree was affirmed, and both parties appealed therefrom. The owners of W. then claimed under the limited liability act entire exoneration from liability, and a decree for half of their damage, without deducting the damage of N. *Held*, that the claim must be disallowed, because that act can only be applied to the balance decreed to be paid, and that was in favor of the owners of W.
8. *Quære*, Can such a claim, if there were any ground therefor, be allowed in favor of a party who does not set it up in his pleadings.

APPEALS from 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 Allen Butler for the "North Star."

Mr. Robert D. Benedict, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arose out of a collision off the Jersey shore, south of Sandy Hook, on the evening of the 9th of February, 1863, between two steamships, the "Ella Warley," bound from New York to New Orleans, and the "North Star," bound from Key West to New York. The former was struck about midships, and was sunk and lost; and the "North Star" was considerably damaged. The owners of the "Ella Warley" libelled the "North Star," and the owners of the latter filed a cross-libel *in personam* against the owners of the "Ella Warley." The suits were tried together, and the District Court held the "Ella Warley" alone in fault, and rendered a decree accordingly. The Circuit Court held both vessels in fault, and rendered a decree in favor of the owners of the "Ella Warley" for so much of their damage as exceeded one-half of the aggregate damage sustained by both vessels. This was the proper decree to make if the conclusion reached, as to both vessels being in fault, was correct, unless the question arising on the limited liability act, hereafter discussed, required a different decree. Each vessel being liable for half the damage done to both, if one suffered more than the other, the difference should be equally divided, and the one which suffered least should be decreed to pay one-half of such difference to the one which suffered most, so as to equalize the burden.

Since both of the courts below held the "Ella Warley" to be in fault, we would not disturb this decision without preponderating evidence against it; and such evidence we do not find. On the contrary, we think that the whole evidence taken together sustains the conclusion reached.

The vessels were approaching each other in contrary directions, nearly head on, one going down the coast, the other coming up, and saw each other's mast-head lights when eight or ten miles apart. The "Ella Warley," instead of porting her helm according to the rule, starboarded it in order to pass outside. This was evidently the first cause of the disaster; for, as the "North Star" obeyed the rule, it brought the vessels directly together. It is also obvious that the persons in charge of the "Ella Warley" did not keep a sufficient lookout; for they allege that they only saw the green light of the "North Star"

until the instant before the collision; whilst it is demonstrable, both from the diagram produced on the part of the "Ella Warley," and from the courses which the two vessels must have pursued, that after they were near enough to discern their respective side lights, the red light of the "North Star" was exposed to the view of the "Ella Warley" during the entire approach, and must have been seen by her men if they had exercised the least diligence. One of the grounds of complaint against the "North Star" is, that her lights were not properly screened, and could be seen across her bow. This only makes it the more certain that, from the relative position of the vessels, her red light must have been visible. It is impossible that it was hidden from view up to the time immediately preceding the collision.

As to the question whether the "North Star" was also in fault, we agree with the Circuit Court that she was. The rules of navigation in force at the time required that the side lights of steamers navigating the sea, bays, &c., should be fitted with in-board screens of at least six feet in length (clear of the lantern), to prevent them from being seen across the bow; and to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith. 1 Parsons's Maritime Law, 679, ed. 1859. In flat defiance of this rule the screens of the "North Star" did not project two inches forward of the bull's-eye of the lights, so that the lights could be seen two or three points across the bow. This was undoubtedly one reason why the green light of the "North Star" caught the eye of the mate and others on board of the "Ella Warley" so readily as it did, and, indeed, goes to some extent to mitigate their negligence in not discerning the red light. This was clearly a fault on the part of the "North Star," and one that probably contributed to the accident. We think, therefore, that both parties were in fault.

The counsel for the owners of the "Ella Warley" now, for the first time, raise a question upon the statute limiting the liability of ship-owners. They contend that as the "Ella Warley" was a total loss, the owners are not liable to the owners of the "North Star" at all, not even to have the balance of damage struck between the two vessels; but that the half of their

damage must be paid in full, without any deduction for the half of the damage sustained by the "North Star." This proposition is so startling that the reasoning employed to support it should be scrutinized with some care before yielding to its force.

The rule of admiralty in collision cases, as we understand it, is that, where both vessels are in fault, they must bear the damage in equal parts, — the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case the duty of payment fell upon the "North Star," the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule.

The contrary view is based on the idea that, theoretically, (supposing both vessels in fault) the owners of the one are liable to the owners of the other for one-half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one-half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. On the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or (as in some authorities), it is spoken of as a case of average. Thus, Lord Stowell says: "A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or of skill on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them." *Woodrop-Sims*, 2 Dods. 83. This statement of the law was adopted in the text of Abbott on Shipping, pt. iii. c. 1, sect. 2. It is also adopted by Mr. Bell in his Commentaries on the Laws of

Scotland, vol. i. 580, 581, who remarks: "By the maritime law this is a case of average loss or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss." It is also adopted in the later text-writers. See Maclachlan on Merchant Shipping, 274. In Hopkins on Average, p. 189, it is stated thus: "If, as the result of cross-actions in admiralty, both vessels be found in fault, the rule of the court is, to add the damages, losses, and costs of the two ships together, and to divide the joint sum in moieties, and decree each vessel to bear an equal portion."

If we go back to the text of the law, in the Rules of Oleron, followed in the laws of Wisbuy and other laws, we find it expressed in substantially the same manner. The case is supposed of a ship coming into port negligently managed, and striking a vessel at anchor in an improper position, so that both are in fault and both are damaged. The Rule says: "The damage ought to be appraised and divided half and half between the two ships, and the wines that are in the two ships ought to divide the damage between the merchants." 1 Pardessus, Collection de Lois Maritime, 334; Cleirac, Us et Coutume de la Mer, 55; Sea Laws, 141; 1 Peter's Admiralty Decisions, App. xxiii.

In Jacobsen's Laws of the Sea it is said: "If the damage is done reciprocally, such damage is apportioned in common between the parties." The French Ordinance of 1681 expresses the rule in exactly the same way: "The damage shall be paid equally by the ships which have caused it and suffered it." Valin, l. iii. tit. vii. art. 10. On this, Valin remarks: "Whenever damage by collision is adjudged common average between the two ships, the decree is that the costs of suit and the appraisement of the damage shall be equally borne in common, to effect which they are made into one mass with a calculation of the average." Emerigon, who had great experience as an admiralty lawyer and judge, says, upon the same article: "The damages sustained by both ships are appraised and made into one mass, which is equally divided." Assurances, c. 12, sect. 14, § 3. Boulay-Paty, commenting on the Code de Commerce, art. 407, which relates to the same subject, says: "We conclude, then, that, after due regard is had to the

character of the damaged parts of each ship, the injury and damage which they have sustained and the appraisal thereof, being added together in a single mass, must be divided so as to be equally borne by each of the ships which have been struck." Droit Commercial, vol. iv. 497.

In this country the same mode of expressing the law has always prevailed. The first case in which the question came before this court was that of *The Catharine* v. *Dickinson*, 17 How. 170, in which both vessels were adjudged to have been in fault; and the court, by Justice Nelson, adopted the admiralty rule as it had been administered in the District and Circuit Courts. Justice Nelson said: "The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the District and Circuit Courts, we understand, has been to divide the loss;" and he cites the case of *The Rival*, decided by Judge Sprague (Sprague's Decisions, 160), and the leading English decisions on the subject. Subsequent decisions have invariably used the same language. *Owners of the James Gray* v. *Owners of the John Fraser*, 21 How. 184; *The Washington and The Gregory*, 9 Wall. 513; *The Sapphire*, 11 id. 164; s. c. 18 id. 51, 56; *The Alabama and The Gamecock*, 92 U. S. 695; *The Atlas*, 93 id. 302, 313; 3 Kent, Com. 231.

These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties.

But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode. If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libellant one-half of the damage sustained by him, — the damage sustained by the respondent not being regarded as the subject of investigation determinable in

that suit. This technical result of the form of proceeding and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party; and that each claim is independent of the other. But where both parties file libels, as they are entitled to do, although, to conform to the pleadings, a decree may be rendered in each suit in favor of the libellant for one-half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal. This is an awkward way of arriving at the result contemplated by the law. It may have its conveniences in some cases, as where the innocent owners of cargo are the libellants, for they are not responsible for any part of the loss. But as between the ship-owners themselves it involves an apparatus of two distinct suits to get at one result, when one suit, or two suits consolidated together, would be in every respect more convenient. The difficulty is obviated in England, to a certain extent, where each party has brought suit, by directing, with the assent of the parties, that the proceedings shall be conducted together so as to save the expense of a double investigation.

To show the difficulties under which the English admiralty courts have labored, in seeking to do complete justice, one or two cases may be referred to. In *The Seringapatam*, reported in 2 W. Rob. 506, and 3 id. 38, a collision had occurred between that ship and the Danish ship "Harriet," by which the latter was sunk, with a loss of ship and cargo. A libel was filed by the owners of the "Harriet" and cargo against the "Seringapatam," and an appearance was entered. A cross-libel was also filed; but as the owners of the "Harriet" resided abroad, no process could be served, and no appearance was entered, and the suit was discontinued. A decree was made in the original suit, declaring that both parties were in fault, and that the damage should be equally borne by them, and condemning the respondents to pay a moiety of the damages suffered by the "Harriet" and her cargo. After an appeal and affirmance of the decree, motion was made in behalf

of the owners of the "Seringapatam," praying that the court, in estimating the compensation due to the owners of the "Harriet," would direct the registrar to ascertain and deduct therefrom a moiety of the damage sustained by the "Seringapatam." But it was objected that the owners of the latter were only defendants, and no prayer for compensation was made in their behalf, and none could be allowed. Dr. Lushington said: "If the two actions had been going on according to the ordinary usage and practice in these cases, the sentence of the court would have attached to both vessels, and the court would have decreed a joint reference to ascertain the amount of the total damage and would have directed the said damage, with the costs, to be equally divided between the respective owners. The cross-action, however, having been abandoned, the court made its decree for a moiety of the damage done to the 'Harriet,' and this decree has been affirmed by the Privy Council." Then, after showing that the appeal and affirmance would not stand in the way of doing justice, he adds: "I do not exactly see how I can deal with the second suit, which has been abandoned, as an existing suit, and say to the owners of the 'Seringapatam,' you shall have the benefit of a decree which, in point of fact, has never been pronounced in their favor. The difficulty, it is true, is created by the peculiar circumstances of the case itself; and if I could have foreseen the result of the proceedings before the Trinity Masters, I would certainly have made some arrangements at the time to meet the circumstances of the case; for I never will be induced, unless compelled by law, to further the commission of an injustice towards either party upon a mere matter of form. Taking all the circumstances of the case into my consideration, the course I shall adopt is this, — I shall not depart from my original decree, but shall confine the reference to the amount of the compensation to which the owners of the 'Harriet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them unless they submit to the deduction of a moiety of the damages sustained by the owners of the 'Seringapatam.'"

In the case of *The Calypso*, Swab. 28, a collision had occurred with the "Equivalent." The owners of the "Calypso"

brought suit, and the decree was that both parties were in fault, and pronounced for half the "Calypso's" damage. Then the owners of the "Equivalent" sued, and the owners of the "Calypso" presented a petition that the suit should be dismissed because of the former adjudication. Dr. Lushington declined to dismiss, but without deciding whether the matter might not be set up as a defence, and intimated that it was not commendable to wait the result of one action before bringing a cross-action, and he refused costs. He said: "The usual practice is, that when one vessel has been proceeded against in a cause of collision, and the owners of the other think they have any chance of obtaining a decree in their favor to enter a cross-action, and it is generally agreed between the practitioners that the decision in the one case shall govern the decision in the other. I am not aware that it is in the power of the court, if the proctors were not consenting to such an agreement, to say that both actions should be governed by the one as a matter of right."

These cases serve to show how, by reason of the technicalities of procedure, and the clumsiness of the process used for attaining the correct result, the original maritime rule, though in itself simple and easy of application, became involved and obscured.

Thus, where the Merchant Shipping Act declared that if certain rules of navigation were infringed the owner should not recover for any damage sustained in a collision, it was held that he should not have the benefit of average. *The Aurora*, Lush. Adm. 327. And where the same act exempted the owner from responsibility for the acts of a compulsory pilot, it was held that he should not be subject to average, though entitled to recover half of his own loss from the other vessel in fault. *The Montreal*, 17 Jur. 538; s. c. 24 Eng. L. & E. Rep. 580. These decisions were contrary to the maritime rule, though perhaps, in the former case, the words of the statute required the construction given to it. See 1 Parsons's Shipping and Adm. 596; 2 id. 115–117.

A like departure from the maritime rule, we think, was made in the late case of *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D. 157, which is much relied on by the counsel of the "Ella Warley." In that case a collision occurred between the "Savernake," owned by Chapman & Co., and the

"Vesuvius," owned by The Netherlands Company, by which the "Vesuvius" was sunk, with a total loss of ship and cargo, valued at £28,000, and the "Savernake" was damaged £4,000. The owners of the "Vesuvius" brought suit, and the owners of the "Savernake" put in a counterclaim, the substitute created by the late judicature act, for the old cross-action. Both parties being declared in fault, a reference was made to the registrar to ascertain the damages of the various parties. At this point, the owners of the "Savernake" filed a bill in equity to obtain the benefit of limited liability, proffering £5,064 as the value of their ship at £8 per ton; and obtained a decree for paying into court that fund with interest. The question then arose as to the disposition of this fund, and for what amount each party in interest should be permitted to prove for dividend. Sir George Jessel, Master of the Rolls, decided that the owners of the cargo of the "Vesuvius" and her master and crew were entitled to prove for half of their loss. As to the owners of the ship his decision was that the proper amount to be proved was the half of her value less the half of the loss sustained by the "Savernake," according to the maritime rule as before explained. The owners of the "Savernake" appealed, and contended that their claim for a moiety, of damage sustained by them (which was £2,000), should stand good against the owners of the "Vesuvius" absolutely, and should not be deducted from the moiety of loss sustained by the "Vesuvius," but that the owners of the latter should prove against the fund for their entire moiety of loss without deduction. This would have the effect of enabling them to set off the £2,000 against any dividend which might be awarded to the owners of the "Vesuvius," and would enable them to get back so much of the amount paid into court. The Master of the Rolls had considered this a preposterous claim, and contrary to the meaning of the maritime rule. But the majority of the Lords Justices, Baggallay and Cotton, against the opinion of Lord Justice Brett, reversed the decision, and decreed in the manner contended for by the appellants. We have carefully considered the reasons given by the various judges, and are unable to avoid the conclusion that the Master of the Rolls and Lord Justice Brett took the proper view of the subject.

In this country the courts of the United States are not sub-

ject to the same disabilities which embarrass the proceedings of the English courts. By the act of Congress of July 22, 1813, c. 14, Rev. Stat., sect. 921, it is enacted that "where causes of a like nature, or relative to the same question, are pending before a court of the United States, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." The power of consolidation here given enables the District Courts sitting in admiralty to provide for cases of the kind under consideration in a manner adapted to the ends of justice and the exact rights of the parties. We understand that it is freely exercised by them. At all events, it clothes them with the necessary authority, in cases of collision, to combine the suits arising thereon into a single proceeding, and where both parties are found to be in fault, to make a single decree (as was done in this case), in accordance with their rights and obligations as resulting from the law. And even where no cross-libel is filed, if the respondents in their answer allege damage sustained by them in the collision, and charge fault against the vessel of the libellants, and pray a set-off or recoupment, in case they should themselves be held to be in fault, we see no good reason why they should not have the benefit of average afforded by the law, at least to the extent of the claim of the libellants. This would be more in accord with the liberal spirit in which the rules of pleading are administered in this country, than a rigid adherence to the English practice would admit of. In *The Sapphire*, 18 Wall. 51, 56, Mr. Justice Strong, delivering the opinion of this court, observed: "We do not say that a cross-libel is always necessary in a case of collision, in order to enable claimants of an offending vessel to set off, or recoup, the damages sustained by such vessels, if both be found in fault. It may, however, well be questioned whether it ought not to appear in the answer that there were such damages." As it nowhere appeared by the pleadings in that case that the respondents had sustained any damage, it was held that they had waived any claim for such damage. The suggestion of Justice Strong, however, as to the non-necessity of a cross-libel is a very pregnant one.

But waiving further discussion as to the proper, or admissible, mode of pleading, — for the respondents in this case did file a cross-libel, — it is sufficient to say that the forms and modes of proceeding in the courts of the United States are not such as to interpose any serious difficulties in the way of carrying out the simple rule of the maritime law with regard to averaging the damages occasioned by a collision where both vessels are in fault. And if they were, it would not alter the relative rights of the parties as settled by that law. We have referred to the embarrassments caused by the technical rules of procedure in the English courts for the purpose of accounting for their apparent departure from the maritime rule of liability in some cases.

In conclusion, it is proper to remark that the British statutes on the subject of limited responsibility of ship-owners, as well as those which regulate the forms of proceeding, are different from ours. The rule of limitation as administered by us is much more liberal to the ship-owners than the English rule. We only make them liable, when free from personal fault, for the value of their ship after the collision, so that if the ship is lost, their further liability is extinguished; whilst in England it is maintained to the extent of £8 per ton, and in some cases £15 per ton, of their ship's measurement. To apply to our law the rule of construction which was given by the Lords Justices in the case of *Chapman* v. *The Netherlands Company* would often result, and would in this case result, in positive injustice. It would enable the owners of the "Ella Warley" to obtain full compensation for a moiety of their loss, whilst the owners of the "North Star" would have to sustain both their own entire loss and half of that of the owners of the "Ella Warley," whilst both vessels were alike to blame for the collision. A rule which leads to such results cannot be a sound one.

Applying to the present case the maritime rule as we understand it, it being ascertained that both parties were in fault, the damage done to both vessels should have been added together in one mass or sum, and equally divided, and a decree should have been pronounced in favor of the owners of the "Ella Warley" (which suffered most) against those of the "North Star" (which suffered least) for half the difference

between the amounts of their respective losses; for the "Ella Warley" by her loss discharged her portion of the common burden, and so much more as the amount that would thus be decreed in her favor. Her delivery to the waves was tantamount to her surrender into court in case she had survived. It extinguished the personal liability of her owners by the mere operation of the maritime rule itself. As there was no decree against her owners for the payment of money, there was no room for the application in their favor of the statute of limited liability. The owners of the "North Star" do not claim the benefit of the law, and probably could not, because the fault of that ship lay in her original construction, and was attributable to the owners themselves. So that, in fact, the question of limited liability had no application to the case. At the same time it is proper to say, that it is at least questionable whether the benefit of the statute can be accorded to any ship-owner or owners, in the absence of any claim therefor in the pleadings. Such claim must always be based on the collateral fact that the loss or damage was "occasioned or incurred without the privity or knowledge of such owner or owners," Rev. Stat., sect. 4283; and it would seem that an allegation of that fact should somewhere appear in the pleadings. As no such allegation is made and no claim of the kind is set up by the owners of the "Ella Warley," it would be exercising a greater latitude of indulgence to allow it to be set up now, than has ever been asked of this court before. Nevertheless, as the time within which a party may be allowed to institute supplemental proceedings for obtaining the benefit of the law has never been precisely defined, we have deemed it best to decide the case upon the rights of the parties on the merits, in order to save further litigation and expense.

Since, therefore, the decree of the Circuit Court was made in precise conformity with the views which we have expressed, it must be affirmed with interest from its date, but inasmuch as both parties have appealed from the decree upon grounds which have not been sustained, each party should pay their own costs on this appeal. The cause must be remitted to the Circuit Court for such further proceedings as may be in accordance with law; and it is

So ordered.

PHŒNIX INSURANCE COMPANY *v.* DOSTER.

1. A case should not be withdrawn from the jury, unless the facts are undisputed, or the testimony is of such a conclusive character that a verdict in conflict therewith would be set aside.
2. Circumstances stated which estop a mutual life insurance company from setting up that the policy sued on was forfeited by the non-payment *ad diem* of the stipulated annual premium. *Insurance Company* v. *Norton*, 96 U. S. 234, and *Insurance Company* v. *Eggleston*, id. 572, approved.
3. Where that premium is, by the contract, subject to a deduction equal in amount to the dividends to which the assured is entitled, it is the duty of the company to give him such notice of that amount, that he may, in due time, pay or tender the balance of the premium.

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. H. E. Barnard for the plaintiff in error.

Mr. John W. Lynn and *Mr. Frank Doster* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error from a judgment for the amount of a policy of insurance upon the life of Jackson Riddle, issued on the twentieth day of September, 1871, by the Phœnix Mutual Life Insurance Company of Hartford, Connecticut.

The policy purports to have been issued in consideration as well of the representations made in the application for insurance, as of the payment by the wife and children of the insured (the payees named in the policy) of the sum of $215, and the annual payment of a like amount on or before the twentieth day of September in every year during its continuance. It contains a stipulation that if the premium be not paid at the office of the company in Hartford, or to some agent of the company producing a receipt signed by the president or secretary, on or before the day of its maturity, then, in every such case, the company shall not be liable for any part of the sum insured, and the policy shall cease and determine, all previous payments being forfeited to the company. The policy is upon the half-note plan, and it is part of the contract that the dividends set apart to the insured be applied in the discharge, *pro tanto*, of

annual premiums. The secretary of the company, in his evidence, states that under the half-note plan the insured is permitted to discharge one-half of the first four premiums by notes (the interest thereon to be paid in advance), and upon the fifth and subsequent payments, to have his dividends, if any, applied in reduction of the premium. It was in proof that prior to the maturity of the respective premiums, payable on the twentieth days of September, 1872, 1873, and 1874, the company's general agent sent to the insured, at his residence in Monticello, Ill., printed notices showing when the premium became due, the amount of cash to be paid, the interest on the notes given under the half-note plan, and the amount for which an additional note, under that plan, was required. Prior to the 20th of September, 1875, — when the fifth annual premium was due, — the notice to the insured stated the amount of dividends to be applied in reduction of that premium, the interest to be paid in advance upon the notes previously executed, and the sum to be paid in cash.

The amounts due in the years 1872, 1873, 1874, and 1875 were paid, but not until the expiration of several — in some instances ten or more — days after the time fixed by the policy. They were received, in each instance, so far as the record discloses, without objection upon the part of the company or its agents.

On the 6th of October, 1876, the insured lost his life in a railroad collision, leaving unpaid the premium due on the twentieth day of September of that year. His residence and post-office, for more than a year prior to his death, had been at Oxford, Ind. Of his removal to that place the general agent of the company at Chicago was distinctly informed, as the evidence tended to show, as early as October, 1875. The letter from that office acknowledging the receipt of the premium due on 20th September, 1875 (but not paid until about Oct. 9, of that year), was addressed to the insured, at his new residence in Oxford, Ind. On the fourth day of October, 1876, — fourteen days after the premium for that year was due, — there was sent from the office of the company's general agent at Chicago, addressed, by mistake, to the insured at Fowler, Ind., a notice similar to that given in 1875. This

notice, the evidence tended to show, was received from the post-office at Fowler, Ind. (where the father never resided), by a son of the insured, on the day the latter was killed, and a few hours only before his death. There was also proof that the insured, before leaving his home, at Oxford, Ind., made arrangements to pay the amount required in that year as soon as the customary notice, showing the sum to be paid, was received. On the ninth day of October, 1876, the amount due was, in behalf of the payees, tendered to the company's general agent at Chicago. He declined to receive it, upon the ground that the policy lapsed by reason of the non-payment of the premium, at maturity, in the lifetime of the insured.

Upon the part of the payees it is contended that the company waived strict compliance with the provision making the continuance of the policy dependent upon the payment of the annual premium on the day named therein; and that, in view of the settled course of business between the company and its agents on one side and the insured on the other, it is estopped to rely upon the non-payment of the last premium, at the day, as working a forfeiture of the policy.

The facts and circumstances established by the testimony are sufficiently indicated in the charge of the court, to certain parts of which, to be presently examined, the company objected. It is enough to say that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. *Greenleaf* v. *Birth*, 9 Pet. 292; *United States* v. *Laub*, 12 id. 1; *Bank of the Metropolis* v. *Guttschlick*, 14 id. 19; *Bevans* v. *United States*, 13 Wall. 56; *Hendrick* v. *Lindsay*, 93 U. S. 143.

We now proceed to an examination of those parts of the charge which were made the subject of exceptions by the company.

After saying that the policy, with the application, contained the agreement of the parties; that the clause providing for a forfeiture for non-payment of the premium at maturity, and declaring the want of authority in agents either to receive premiums after the time fixed for their payment, or to waive forfeitures, constituted a part of the contract, binding upon both parties unless waived or modified by the company or by its agent thereunto authorized; also, that strict performance of the forfeiture provision could be waived by the company, either expressly or by implication, — the court proceeded to lay down the rules by which the jury should be guided in determining whether there was such waiver. It said, in substance, that if the conduct of the company in its dealings with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter, the company ought not, in common justice, to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly, or by receiving and retaining the premiums, with full knowledge of the circumstances, the same consequences should follow.

The court further told the jury, in substance, that if they found from the evidence that the company was in the habit of sending renewal receipts for the premium on this policy to its local agent, at the place of residence of the insured, duly signed by the president and secretary of the company, leaving their use subject entirely to the judgment of that agent, and the latter was accustomed to receive the premiums from the insured, without objection, several days after the same became due, and to issue the receipt therefor, and the home company or the managing agents or officers had full knowledge of such practice, and received from its agent, and retained, the pre-

miums so paid, the insured had a right to believe that the company waived a strict compliance, and they might find that there was a waiver by the company of the forfeiting clause of the policy ; and if the insured, relying on such practice, within a reasonable or the usual time, paid or offered to pay the premium after the day the same was due, the policy remained in full force and effect, and the company was liable thereon, notwithstanding the insured had in the mean time died.

The objection of the company to these parts of the charge was overruled, and an exception taken. The objection would have more weight had the charge ended with these remarks, because in such a presentation of the case the court would have placed before the jury only one side of the issues to which it directed attention. But the charge is not liable to such criticism, since the court, in the same connection, instructed the jury that if the company had not authorized its local agent, to whom the renewal receipts were sent, to extend the time for payment of the premium beyond the day named in the policy, nor had habitually accepted from the insured through its agent the premiums on the policy after the same became due, with full knowledge that the same were so paid after due and the receipt issued by its agent, then that they could not find that the company had, either expressly or by implication, waived a strict compliance with the terms of the policy in reference to payment of the premiums, and the policy became forfeited according to its terms.

It seems to the court that the charge was as favorable to the company as it could have demanded. It was, as to its essential parts, in substantial harmony with recent decisions of this court. In *Insurance Company* v. *Norton*, 96 U. S. 234, we said, in reference to a policy, similar to the one here in suit, that the company was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures, but might, at any time, at its option, give them such power ; that the declaration was tantamount to a notice to the insured, which the company could waive and disregard at pleasure. "In either case," said the court, "both with regard to the forfeiture and to the powers of its agents, a waiver of the stipulation or notice would not be repugnant to the written

agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not, was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing." In the same case it was said that, although in life insurance time of payment was material, and could not be extended against the assent of the company, where such assent was given, the court should be liberal in construing the transaction in favor of avoiding a forfeiture. And in *Insurance Company* v. *Eggleston*, id. 572, it was said, that the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Consequently, said the court, speaking by Mr. Justice Bradley: "Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declaration, or acts of an agent, contrary to the terms of the policy, of course, will not be sufficient, unless sanctioned by the company itself. *Insurance Company* v. *Mowry*, 96 U. S. 544. But when the latter has, by its course of action, ratified such declarations, representations, or acts, the case is very different." These authorities abundantly sustain the rulings in this case to which reference has been made.

The court below then passed to an examination of the remaining ground relied on as excusing the non-payment of the last premium on the day it fell due; viz., the failure of the company to give the insured seasonable notice of the amount of dividends to be applied in reduction of the premium.

After stating that by the terms of the policy the premiums could be paid either at the home office or to an agent of the company, producing the proper receipt, and that by the terms of the application, which was the basis of the contract of insurance, the annual dividends due the insured could be applied in discharge of premiums, the court instructed the jury that if

they found from the evidence that it had been the invariable custom of the company to transmit to the insured, by mail or by its local agent, a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom, the premium could be paid, then the insured had good reason to expect and rely on such statement, and notice being sent to him; and that if the insurance company, by its managing agent, had notice of the post-office address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice to the insured at his post-office address until the fourth day of October, and the same did not reach him or the payees in the policy until October 6th, and that the insured or payees were ready and waiting to pay said premium when the notice and statement should be received, and by reason of such failure of the company to send the notice and statement, and by reason of that alone, the premium due in September, 1876, was not promptly paid; and that in a reasonable time thereafter, to wit, on Monday, the ninth day of October, 1876, the payees tendered the company at Chicago the full amount of the premium due, then the policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and in the lifetime of the insured.

To that part of the charge the company excepted. In the same immediate connection the court below, it may be observed, further instructed the jury that if it had not been the uniform custom of the company to send the insured such notice and statement at or about the time the premium became due, or if the company or managing agent had not been notified of the change of the post-office address of the insured until about the fourth day of October, or that the company had in reality sent the notice, by mail or otherwise, at a prior date, properly addressed to the insured, then it was not the fault of the company that the insured was not notified, and the want of such notice would not excuse him from making payment at the day, and the policy would, consequently, become forfeited.

We are of opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below

are in conflict with our decision in *Thompson* v. *Insurance Company*, 104 U. S. 252. In that case it appeared that the insured, for a part of an annual premium, had given a note containing the special provision that in the event of the non-payment of the note at maturity the policy should be void. The note was not paid at maturity, nor was payment ever tendered, while the insured was alive nor at any time after his death, by or in behalf of the payees in the policy. To pleas setting up these facts replications were filed, in which it was attempted to excuse the failure to make due tender of the amount of the note upon the ground that it was the usage and custom of the company, practised with the insured and others, as well before as after the making of the note, not to demand punctual payment at the day, but to give thirty days of grace; further, that it had been its uniform custom and usage, in advance of the maturity of notes, to give notice of the day of payment, whereas no such notice was given to Thompson, and thereby, it was alleged, he was put off his guard and misled as to the time of payment. It was held that the failure to tender the amount due, within the period named in the replication, was, in every view, fatal to the entire case set up by the payees in the policy. "A valid excuse for not paying promptly on the day is," said the court, "a different thing from an excuse for not paying at all." Touching the alleged failure of the company, in conformity with its uniform practice, to give notice of the day of payment, it was said that the insured knew, or was bound to know, when his premiums became due, and that the company was under no obligation to give him notice, nor did it assume any responsibility by giving notice on previous occasions.

The present case has features which plainly distinguish it from the Thompson case. In the former, there was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends or for any other reason, and the insured, therefore, knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now, although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must

be construed in connection with the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the company, in any particular year, declared dividends, and what amount was available in reduction of the premium, were facts known, in the first instance, only to the company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office, or at the office of its general agent in Chicago, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the company. Independently of that circumstance, and waiving any determination of the question whether the forfeiture was not absolutely waived by the act of the general agent, in sending notice to the insured after the day fixed for the payment of the premium due Sept. 20, 1876, it was, we think, the company's duty, under any fair interpretation of its contract, having received information as to the post-office of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made to the general agent at Chicago. No such features were disclosed in the Thompson case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the company complains.

The assignments of error bring to our attention numerous exceptions taken by the company to the admission of evidence, and to the refusal to give instructions asked in its behalf. We deem it unnecessary to consider them in detail. So far as they affect the substantial rights of the parties, they are disposed of by what has been said touching the charge of the court upon the essential questions in the case.

Judgment affirmed.

CALL v. PALMER.

Rule 32 applies only to cases remanded to a State court by the Circuit Court, or dismissed under the authority of sect. 5 of the act of March 3, 1875, c. 137.

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

Motion to advance under Rule 32.

Mr. J. H. Call in support of the motion.

There was no opposing counsel.

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

Rule 32 applies only to cases which have been remanded by a Circuit Court to a State court, or dismissed, under the authority of sect. 5 of the act of March 3, 1875, c. 137. This is an appeal from a decree on the merits in a suit removed from a State court to the Circuit Court. The record shows that a motion to remand was denied, and that the cause was regularly heard and decided.

Motions under this rule should be accompanied by an agreed statement of the case, or by such extracts from the record as will show that the case is one to which the rule is applicable.

Motion denied.

GOSLING v. ROBERTS.

1. The first claim of reissued letters-patent No. 5644, granted to John W. Gosling Nov. 4, 1873, for an "improvement in step-covers and wheel-fenders for carriages," if construed to be broad enough to cover the structure made in accordance with the specification annexed to letters-patent No. 90,584, granted to John Roberts May 25, 1869, is void, because the invention is not new, nor is it embraced in the original letters.
2. The invention covered by the claim of Gosling's original letters (*post*, p. 42) was new, and they are adequate to secure it.

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

This was a bill filed by Gosling, wherein he alleges that, being the first inventor of a new and useful improvement in step-covers and wheel-fenders for carriages, he obtained letters-

patent therefor, No. 62,406, bearing date Feb. 26, 1867; that on his surrendering them, reissued letters No. 5,644, dated Nov. 4, 1873, were granted to him for that invention, and that Roberts, the defendant, was infringing them. He prays for an injunction, an account, and general relief.

Roberts denies as well the alleged infringement, the novelty, and utility of the improvement described in the reissued letters, as Gosling's claim to be the first inventor thereof. He also sets up as a defence that they are void, because they include matters not covered by the original letters.

The court, upon a final hearing, dismissed the bill, and Gosling appealed.

The specifications and claims which are set forth in the opinion of the court refer to certain drawings. Those annexed to Gosling's original letters are as follows: —

FIG. 1.

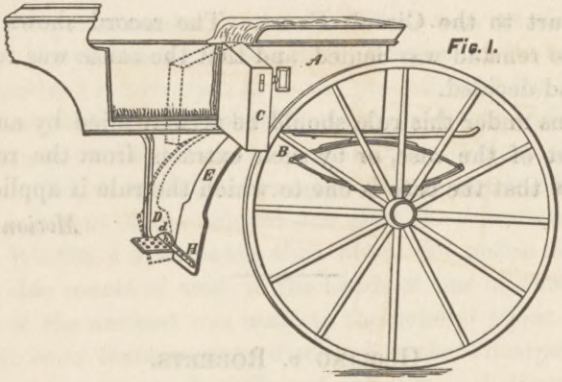
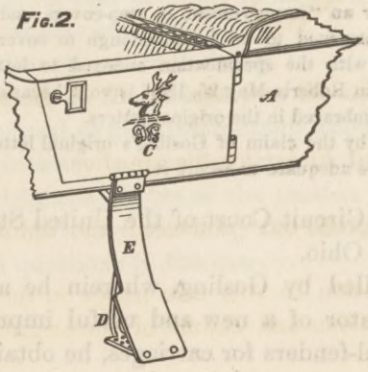


FIG. 2.



The drawings annexed to his reissued letters are as follows:—

FIG. 1.

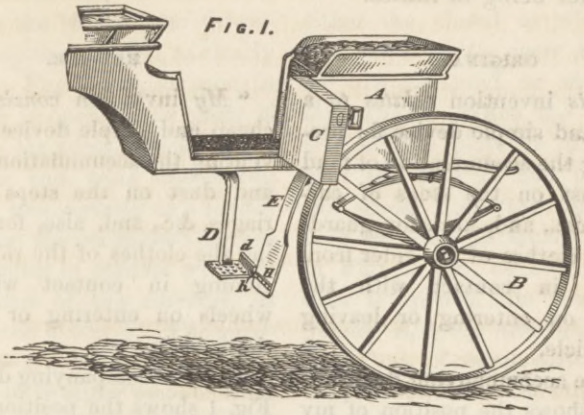
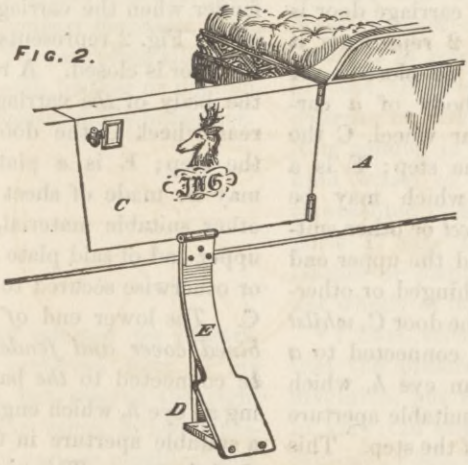


FIG. 2.



Mr. Charles L. Mitchell and *Mr. D. H. J. Holmes* for the appellant.

Mr. William Hubbell Fisher for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

As a material question in this case arises on the difference between the specifications and claims of the original and the

reissued patents granted to the appellant, they are subjoined in parallel columns, the portions in each which are not found in the other being in italics.

ORIGINAL.

"*This* invention *relates to* a cheap and simple device for preventing the accumulation of mud and dust on the steps of carriages, &c., and, also, for guarding the clothes of the rider from coming in contact with the wheels on entering or leaving the vehicle.

In the accompanying drawings Fig. 1 shows the position of my fender when the carriage door is open, *and* Fig. 2 represents it when the door is closed. A represents the body of *a* carriage, B the rear wheel, C the door, and D the step; E is a *yielding* plate, which may be made of sheet *steel* or other suitable material, and the upper end of said plate is hinged or otherwise secured to the door C, *whilst its* lower end *is* connected to *a* bar H, having an eye *h*, which engages with a suitable aperture in the flange *d* of the step. This provision of the perforated flange *d* and eye *h enables* the *plate* E to turn in either direction as the door C is opened or closed. The *flexibility of the plate* E *enables it to* bend *up* in the act of opening *or* closing the door (see dotted lines in Fig. 1), and its elasticity enables it to hold the door firmly in either closed or

REISSUE.

"*My* invention *consists of* a cheap and simple device for preventing the accumulation of mud and dust on the steps of carriages, &c., and, also, for guarding the clothes of the rider from coming in contact with the wheels on entering or leaving the vehicle.

In the accompanying drawings Fig. 1 shows the position of my fender when the carriage door is open; Fig. 2 represents it when the door is closed. A represents the body of *the* carriage, B the rear wheel, C the door, and D the step; E is a plate, which may be made of sheet *metal* or other suitable material, and the upper end of said plate is hinged or otherwise secured to the door C. *The* lower end *of the combined cover and fender* E *may be* connected to *the* bar H, having an eye *h*, which engages with a suitable aperture in the flange *d* of the step. This provision of the perforated flange *d* and eye *h*, *by reason of its loose character*, *permits* the *cover and fender* E to turn *freely* in either direction as the door C is opened or closed. The *cover and fender* E *I prefer to make of flexible material*, *so that it may* bend in the act of opening *and* closing

wide-open position. When the door is shut, the plate E closes up over the step D, and *this* prevents the wheel from throwing dirt *upon said* step, as clearly shown in Fig. 2, but, as soon as the door is opened, the *plate* E *turns on the pivot device, d h, at its lower end, thus uncovering the step and serving* as a fender to prevent the *occupant's* clothes from coming in contact with the hind wheel of the carriage, as represented in Fig. 1. *The yielding plate* E *acts as a spring to hold the door either open or shut, and also prevents said door from striking against the wheel, when opened.* The said plate E may be covered with leather or painted, or may consist wholly of leather.

"I have selected for illustration the preferred form of my invention, but reserve the right to vary the same, it being susceptible of various modifications. For example, instead of being pivoted to the step D, the lower end of the plate E may be hinged or otherwise coupled to a frame projecting from the carriage body and passing under the step. In some cases, *for example,* when the distance from the wheel to the body is short, I provide slots on both step and fender, or one

the door (see dotted lines in Fig. 1), and its elasticity enables it to hold the door firmly in either the closed or wide-open position, *when the cover and fender are connected, as shown, to the step D.* When the door C is shut the plate E closes up over the step D and prevents the wheel from throwing dirt *over the* step, as clearly shown in Fig. 2, but, as soon as the door is opened, the *cover and fender* E, *being attached to the door* C, *is, of course, carried with the door, and thus the step is uncovered, and the plate* E *then occupies such a position as to enable it to serve* as a fender to prevent the *rider's* clothes, *on entering or leaving the carriage,* from coming in contact with the hind wheel of the carriage, as represented in Fig. 1. The said plate E may be covered with leather or painted, or may consist wholly of leather.

"I have selected for illustration the preferred form of my invention, but reserve the right to vary the same, it being susceptible of *being made to assume* various *forms and* modifications. For example, instead of being pivoted to the step D, the lower end of the plate E may be hinged or otherwise coupled to a frame projecting from the carriage body and passing under the step. In some cases, when the distance from the wheel to the body is short, I provide slots on both

of them, to partially or wholly relieve the plate of the flexion incident to opening or closing the door.

"I claim *herein as new and of my invention* a combined step-cover and wheel-fender for carriages, consisting of the flexible plate E, *whose* upper end is attached to the carriage door, and *whose* lower end *is connected, d h,* to the step *or other fixed object, the whole being arranged to operate* substantially as *herein described and for the purpose* set forth."

step and fender, or one of them, to partially or wholly relieve the plate of the flexion incident to opening or closing the door.

"*The important feature of my invention is the plate E attached to the door of the carriage, and operating, by reason of such attachment, as a step-cover when the door is closed, and as a wheel-fender when the door is open.*

"I claim: 1. *In combination with the step D and the door C, the plate E attached to the door, to operate as a step-cover when the door is closed, and a wheel-fender when the door is open, substantially as and for the purpose specified.*

"2. A combined step-cover and wheel-fender for carriages, consisting of the flexible plate E, *the* upper end *of which* is attached to the carriage door, and *the* lower end to the step, *all being combined to operate as a step-cover, wheel-fender, and a spring connection to retain the door in the opened and closed positions, all* substantially as set forth."

Attention is at once arrested by certain marked differences between the two specifications. The drawings are alike. In the original specification the plate E is described as a yielding plate, while in the reissue it is merely a plate. In the original it is said that the lower end of the plate E *is* connected to the step through a bar with an eye in it which engages with an aperture in a flange on the step. In the reissue it is said that the lower end of the plate E *may be* so connected. In the origi-

nal the plate E is described as being flexible. In the reissue the inventor says that he prefers to make it of flexible material. In the original it is said that the elasticity of the plate E enables it to hold the door firmly either closed or open. In the reissue it is said that such elasticity will produce that effect when the plate E is connected to the step as shown in the drawings. In the original the description is that, as the door is opened, the plate E turns on the pivot device at its lower end, which connects it to the step. This is omitted in the reissue. In the original the plate is said to act as a spring to hold the door either open or shut. This is omitted in the reissue. The object of these changes is apparent. Unless the plate E is connected at the bottom with the step, the door cannot be kept open or closed by the operation of elasticity in the plate, for no elasticity can be developed unless the plate is held at its bottom. In the original the holding of the plate at its bottom to the step is made the rule; in the reissue it is made the exception. In the original the plate is said to be flexible, and is not said to be ever other than flexible. In the reissue only a preference for flexibility is asserted. The object of these changes is to arrive at a claim for a plate not held at its bottom to the step. Accordingly, the reissue makes the statement, not found in the original, that the important feature of the invention is to have the plate attached to the door, and thus operate as a step-cover and a wheel-fender. The first claim of the reissue is not found in the original, and grows out of the changes above mentioned. It is a broad claim to a combination with the step and the door of the plate E attached to the door, to operate as a step-cover and a wheel-fender, substantially as and for the purpose specified. The second claim in the reissue is substantially the same as the single claim of the original. It combines the features of the attachment of the plate, at its bottom, to the step, and, at its top, to the door, and of elasticity in the plate to hold the door open or closed.

The defendant's apparatus is a piece of material rigidly attached at its top to the door, and not attached at its bottom to the step, and operating as a combined step-cover and wheel-fender. It is plain that this construction did not infringe the claim of the original patent. It is alleged that it infringes the

first claim of the reissue. The defendant obtained a patent, No. 90,584, May 25, 1869, for an "improvement in step-covers and wheel-fenders for carriages." It was granted more than four years before the plaintiff applied for his reissue. The defendant's apparatus is constructed substantially in accordance with the description in that patent. That apparatus has on the rear part of the door elastic guards, which come against the wheel when the door is open. The claim of the patent is to the combined arrangement.

It is shown by the evidence that prior to the plaintiff's invention a combined wheel-fender and step-cover was in use in several forms, the step-cover being attached by a vertical arm or vertical arms to the bottom of the door by a rigid connection, and swinging back by the opening of the door, the vertical arm or arms then serving as a wheel-fender. In those structures the step-cover was a horizontal plate, projecting from the lower end of the vertical arm, and overlapping and covering, when the door was shut, the horizontal step, and being parallel with it. The defendant's structure differs from these old forms solely in having the vertical arm, which is rigidly attached to the lower part of the door, so extended in width as to itself cover the step and permit the horizontal part of the step-cover to be dispensed with. There is no difference in principle or mode of operation between the old structures and the defendant's structure. The difference is merely in form and shape. The plaintiff departed, in his original patent, from the principle of the old structures by joining his step-cover to the step and having the vertical plate yielding and flexible, so that its elasticity may keep the door open or closed. This, so far as appears, was a new invention, and he was entitled to claim it. He did claim it, and the original patent was adequate to secure it to him. The first claim of the reissue, if construed so as to cover the defendant's structure, must equally cover the old structures referred to. They had combined a step and a door, and a plate attached to the door, the plate operating as a step-cover when the door was closed, and as a wheel-fender when the door was open. Extending the vertical arm in width, so as to dispense with the horizontal projection from it, and make the vertical arm wide enough to cover the

step, or contracting the vertical arm in width and putting on the lower end of it a horizontal piece parallel with the step and overlying it, involved no new principle of structure or operation.

There is no suggestion in the specification of the original patent that the plate E is to be used disconnected at its lower end from the step, or to be any other than a yielding plate, so arranged as to keep the door open and shut, in addition to acting as a step-cover and wheel-fender. The first claim of the reissue, if construed so as to cover the defendant's structure, is void for want of novelty, being anticipated by the old structures referred to. Moreover, if so construed, it is invalid as being for a different invention from any found in the original patent. And, if it is so limited as to be no broader than the claim of the original patent, there has been no infringement of it. Under any view, the decree of the court below was correct; and it is

Affirmed.

CHICAGO AND VINCENNES RAILROAD COMPANY *v.* FOSDICK.

SAME *v.* HUIDEKOPER.

1. A railroad company executed, March 10, 1869, to a trustee, by way of security for its bonds payable thirty years thereafter, a first mortgage upon its road, and stipulated that if "default should be made in the payment of any half-year's interest on any of them, and the coupon for such interest be presented and its payment demanded, and such default continue six months after such demand without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the bonds thereby secured should be and become immediately due and payable, anything in the bonds to the contrary notwithstanding; and the trustee might so declare the same, and notify the company thereof; and, upon the written request of the holders of a majority of the bonds then outstanding, should proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as therein provided." Claiming that there had been a default for more than six months after a demand for the payment of the coupons due in 1873, the trustee declared the principal of the bonds to be due, and notified the company thereof. He then, without obtaining the written request of a majority of the holders of the bonds outstanding, brought suit praying for a decree for a sum equal to the entire amount of the bonds and interest due thereon, and for the

foreclosure and sale of the mortgaged property. *Held*, that, if there had been such default, he was not entitled to the decree.

2. Where by the stipulations of the mortgage it is a security for the payment of the interest as it semi-annually accrues, as well as of the principal, the trustee, on the non-payment of either, or, on his failure to act, any bondholder, may, to enforce the security, bring suit, and if it results in a sale of the mortgaged premises as an entirety which is confirmed by the court, the purchaser takes an absolute title to them as against the parties to the suit or their privies, and the proceeds of the sale will be applied first to the arrears of interest, then to the mortgage debt, then to the junior incumbrances, according to their respective priority of lien, and the surplus, if any, will be paid to the mortgagor.
3. In such a suit, the decree should declare the fact, nature, and extent of the default which constitutes the breach of the condition of the mortgage, and the amount then due, and a substantial error in that regard will, on appeal, vitiate the subsequent proceedings. A reasonable time for payment should be allowed, and, on such payment within the prescribed period, further proceedings will be suspended until another default occurs. At any time prior to the confirmation of the sale under the decree, the mortgagor, by bringing into court the amount then due, and costs, will be allowed to redeem. *Howell* v. *Western Railroad Company*, 94 U. S. 463, touching the form of the decree where moneys payable by instalments are secured by mortgage, cited and approved.
4. An appeal may lie from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which originate in it; but when such decrees are dependent upon the decree, to execute which they were rendered, they are vacated by its reversal; in which case, the appeal which brings them into review will be dismissed for want of a subject-matter on which to operate.
5. A decree *in personam* for the amount remaining due upon a mortgage debt, after the execution of a decree of foreclosure and sale, is of this description; but, when rendered in favor of other parties than the complainant, it will be reversed for the same error that required the reversal of the decree of foreclosure and sale.

APPEALS 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. Edwin Walker and *Mr. R. Biddle Roberts* for the appellants.

Mr. James D. Campbell for the appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

These appeals bring into review decrees in the same suit. The bill was filed by Fosdick and Fish, as mortgagees in trust for holders of bonds, for the foreclosure of a mortgage, given by the Chicago, Danville, and Vincennes Railroad Company

upon its railroad, and for a sale of the mortgaged premises. A decree in accordance with the prayer of the bill was rendered, and under it a sale was had and confirmed by the court. From these decrees respectively the present appeals are prosecuted.

The bonds, amounting to $2,500,000 in all, secured by the mortgage in question, were dated March 10, 1869, and payable April 1, 1909, with interest at the rate of seven per cent per annum, payable semi-annually on the first day of April and October of each year, on the delivery of annexed interest warrants in the city of New York, at such place as might be designated by the company, by advertisement published in that city. The mortgage bears even date with them, and, after reciting the resolutions of the board of directors which authorize the issue of the bonds and the execution of the mortgage, conveys to Fosdick and Fish, as trustees, and to their successors and assigns, the road of the company, extending from its terminus, in Chicago, southerly through certain named counties to Danville, and thence southeasterly to a point on the State line of Indiana, connecting at that point with the Evansville, Terre Haute, and Chicago Railroad, being in length about one hundred and fifty miles, "including all the property between said terminal points, which said party of the first part now has and possesses, or may hereafter acquire," &c..

The conditions and trusts, upon which the conveyance is made, are expressed in a series of articles, nine in number, of which it is important to notice only the following: —

The fifth article provides, in substance, that in case default shall be made in the payment of any interest, or of the principal of any of said bonds, without the consent of the holder, the company shall, within six months thereafter, the same default still continuing, on demand of the trustees, surrender to them possession of the road and mortgaged property; the trustees operating the same shall apply the net profits and income to the payment of the interest so in default until such default shall have been satisfied, when the mortgaged premises shall be surrendered to the mortgagor; but it is provided that no such demand for possession shall be made by the trustees until they shall have been required to take such possession by the holders

of at least one-half of all of the said issue of bonds then unpaid and outstanding.

The sixth article provides further, that in case default shall be made and shall continue as aforesaid, it shall be lawful for the trustees, after entry into possession, taken as above authorized, or other entry, or without entry, to sell and dispose of, to the highest bidder, the mortgaged premises, as an entirety, at public auction, in Chicago, at such time as they may appoint, first having demanded of the mortgagor payment of all money then in default, and having given sixty days' notice of the time and place of sale, by advertisement, as specified; and to convey the same, when sold, to the purchaser, on payment of the purchase-money, in fee-simple, which conveyance, it is declared, shall be a perpetual bar, in law and equity, against the title of the mortgagor, or any other person claiming under it. The net proceeds of such sale are to be applied by the trustees to the payment of the interest on the bonds then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to the payment of the principal; and any surplus, to the mortgagor, — the payments to be made on the bonds, whether the same shall then have become due or not.

By the seventh article it is provided that at any sale of the mortgaged premises, made under the power contained in the deed, or by judicial authority, the trustees may become purchasers of the same in behalf of the bondholders, at a price, in case the sale is of the whole property as an entirety, not exceeding the whole amount of said bonds and interest then outstanding.

The eighth article is as follows: —

"8th. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written

request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided."

It is averred in the amended bill of Fosdick and Fish that all the bonds described in the mortgage had been issued and were outstanding.

It is also alleged that on March 4, 1872, the Chicago, Danville, and Vincennes Railroad Company became consolidated into one corporation, by the same name, with the Rossville and Indiana Railroad Company; and on March 9, 1872, a further consolidation was effected, by the same name, with the Western Railroad Company, an Indiana corporation, whereby the consolidated company was empowered to build and operate a railroad, from the State line in Warren County, to Brazil, in Indiana; and that on March 12, 1872, the consolidated company, to raise means wherewith to construct its Indiana Division, issued its bonds to the amount of $1,500,000, bearing interest at the rate of seven per cent per annum, and payable forty years after date; to secure which, on the same day, it executed a mortgage to Fosdick and Fish, the complainants, covering its Indiana Division, and a branch road extending from a point three miles south from Covington to the village of Newburg, being about eighty miles in all. All the bonds secured by this mortgage were issued.

It is further alleged, that, as further security for both these issues of bonds, the company, on April 24, 1872, executed another mortgage to the complainants, conveying the Indiana Division as security for the first issue of bonds on the Illinois Division, and conveying the Illinois Division as security for the bonds issued originally on the Indiana Division. The company made a subsequent consolidation on May 6, 1872, under the same name, with the Attica and Terre Haute Railroad Company.

The road as built in Illinois extends from Dalton about twenty miles south of Chicago to Danville, about one hundred and eight miles, with a branch from Bismark in Vermilion County to the east line of the State of Illinois, about seven miles. It obtains an entrance into Chicago over the roads of other companies. The company has constructed, in Indiana,

its line from a point where the Bismark branch intersects the State line, a distance of eighteen miles, and has done a large proportion of the work required to carry its road to Brazil.

It is further alleged that the company paid all coupons on both classes of bonds maturing on and prior to April 1, 1873, but that "none of the coupons maturing since that time, or any part thereof, have ever been paid, but the said company, though often requested, has never paid the same, but so to do has made default."

Shortly after the first default on Oct. 1, 1873, to wit, on Nov. 11, 1873, the company issued a circular to the holders of its bonds, proposing to fund the coupons maturing from Oct. 1, 1873, to April 1, 1875, in convertible seven per cent bonds, to be issued for that purpose, the coupons to be deposited with Fosdick, one of the complainants, as a trustee, to be held by him until Oct. 1, 1876, when they were to be cancelled, but in case of non-payment of any coupons becoming due up to Oct. 1, 1876, the coupons deposited with the trustee were to be returned to the original owners, and the second mortgage or convertible bonds surrendered to the company.

In response to this proposition coupons to a considerable amount were deposited with the trustee and convertible bonds received in exchange.

Soon after, on Nov. 20, 1873, another proposition was submitted to the bondholders, to exchange these four coupons for certificates of indebtedness payable in five years from Feb. 1, 1874, with interest payable semi-annually, the coupons to be held by the trustee until after that date, when they were to be cancelled; but in case of non-payment of the interest or principal of the certificates, or of the coupons on the first-mortgage bonds, between Oct. 1, 1875, and Feb. 1, 1879, both inclusive, then the coupons were to be returned by the trustee to their owners, upon surrender of their certificates, with their original rights unimpaired.

It is alleged that the holders of $2,801,000 of both classes of bonds accepted one or the other of these propositions, and deposited their coupons accordingly.

To secure the convertible bonds referred to in the first proposition, a mortgage was executed by the company, of which

James W. Elwell was trustee, to the amount of $1,000,000, payable, with interest semi-annually at the rate of seven per cent per annum, on Feb. 1, 1893, covering the entire line and both divisions of the railroad. It is alleged in the bill that all these bonds, except about $45,000, have been issued.

It is charged that the company failed to pay all the coupons upon the certificates of indebtedness due Feb. 22, 1875, and that it has not paid any that fell due Aug. 1, 1875. It is also charged that the company has never paid any of the coupons upon any of the $4,000,000 of bonds, which were not funded and which matured subsequent to Oct. 1, 1873, amounting to $1,199,000, and that the coupons thereon are overdue and remain unpaid, the owners thereof never having consented to such default; and it is alleged that the company is wholly insolvent.

It is further shown that on June 12, 1875, the railroad company made a further issue of bonds to the amount of $1,000,000, due Jan. 12, 1877, and to secure the same executed a chattel mortgage to R. Biddle Roberts, upon its rolling-stock, engines, cars, tools, and equipment; but it is charged that the same was not executed, acknowledged, and recorded as required by law, and is, therefore, null and void; but that, if valid, it is subject to each of the three mortgages of prior date. About $936,000 of these bonds, it is averred, are held as collateral to debts due by the company, the remainder not having been issued.

It is claimed, also, that by reason of its insolvency the company will not be able to pay the certificates of indebtedness issued by it, or the interest thereon, and that, in consequence of its failure to pay the interest thereon already accrued, the owners of the unpaid coupons of the $4,000,000 of bonds are entitled to rescind the funding arrangement, and to demand and enforce payment of the coupons funded as aforesaid.

It is further alleged that, "by reason of the default of said company in the payment of the coupons due Oct. 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable; and all of the said Illinois Division bonds and of the said Indiana Division bonds were, by the terms and conditions of

the mortgage securing the same, and in consequence of the defaults aforesaid, due and payable prior to the commencement of this suit. Your orators further allege that, of the said Illinois Division bonds, $698,000 thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the continuance of the default in the payment of interest thereon. Your orators allege that they have been requested by the holders of a majority of said Illinois Division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property, and appurtenances of said company within the State of Illinois."

It is also alleged that the Indiana Division of the road is wholly insufficient to secure the payment of the Indiana Division bonds, and that, while the Illinois Division is more than sufficient to secure the payment of the Illinois Division bonds in full, it is not sufficient in addition to pay in full the whole of the Indiana Division bonds.

The original bill was filed Feb. 27, 1875, and made no party defendant except the company. It contained the following averments, which are not found in the amended bill: —

"Your orators further show to your Honors that they have been required by the holders of more than one-half of the twenty-five hundred bonds to demand possession of the said railroad property, franchises, and appurtenances of and from the said railroad company, and have made such demand in pursuance of said requirement, but that said railroad company has not delivered the possession thereof to your orators, but so to do have wholly neglected and refused.

"Your orators further show unto your Honors that they are informed and believe, and therefore charge the fact to be, that at least ninety per cent of the said coupons which matured upon said bonds on the first day of October, 1873, have been duly presented for payment to the said railroad company, and payment thereof demanded from said company, and that the same have never been paid, nor any part thereof; and that the holders of six hundred and ninety-eight of said bonds have never in any way consented to the continuance of said default;

and that, in consequence of the continuance of said default, without the consent of said holders of said six hundred and ninety-eight bonds, the principal and interest of all of the said bonds have become due and payable, and that your orators, as trustees as aforesaid, under and by virtue of the provisions of said mortgage, and the authority therein conferred upon them, have declared the principal of all of said bonds to be due and payable, and have notified the said railroad company thereof."

On May 17, 1875, James W. Elwell, acting trustee in the mortgage of Dec. 16, 1872, appeared and filed a cross-bill, setting out the terms of the mortgage, the issue of the bonds secured thereby, and alleging that, while the interest upon about $160,000 of the bonds had been paid by the company, that upon the remainder was wholly unpaid. The cross-bill proceeds to set out the particulars of the agreements alleged to have been entered into between the railroad company and the holders of its first-mortgage bonds, and continues with the following averments: —

"And your orator therefore avers that said corporation is not in default in the payment of interest upon its said first-mortgage bonds to the amount of one million eight hundred and two thousand dollars, but on the contrary your orator avers that said company has adjusted and settled with the holders of said bonds to the amount as above stated, and received an extension of payment of all such interest coupons now past due and that will mature prior to the first day of October, 1875.

"Your orator states that said corporation has paid to the holders of said certificates of indebtedness all interest coupons attached to said certificates as the same matured, and in accordance with the terms thereof, which had been presented before the appointment of the receiver, as hereinafter stated.

"And your orator represents, upon information and belief, that the holders of the balance of said issue of twenty-five hundred bonds have acquiesced in said extension of payment of interest and excused such default, and have not demanded the payment of their interest coupons nor attempted to enforce the collection of the same.

"And your orator further states that notwithstanding said

agreement of the holders of said first-mortgage bonds to extend the payment of said interest warrants as hereinbefore stated, and the payment of the interest at maturity by said company upon said certificates of indebtedness, yet your orator is informed and believes, and so charges the fact to be, that by reason of divers persons claiming and pretending to be in the interest of a part of said first-mortgage bondholders combining and confederating to wrong and injure your orator and the holders of said second or convertible mortgage bonds and other creditors of said corporation, said company was by the action of the Circuit Court of Will County, in said State of Illinois, on the 22d of February last past, wrongfully and unlawfully dispossessed of all its property so conveyed to your orator by said deed of trust; that all of said property, together with the rights, privileges, and franchises of said company, were on said 22d of February wrongfully and fraudulently taken from the custody and control of said company, and without the knowledge or consent of said corporation, your orator, or of the defendants herein, placed in the charge and under the custody of strangers to said company, and to each of said deeds of trust; that said parties still wrongfully retain the possession of said property and control the revenue and income thereof, thereby preventing said company and your orator from providing funds for the payment of the interest warrants to mature upon the bonds secured by said trust deed so made to your orator, thereby endangering such property and materially depreciating the value of such securities.

"Your orator further states that he is advised and believes, and charges the fact to be, that the property conveyed to the defendants, Fosdick and Fish, by the trust deed so made to them, greatly exceeds in value the amount of bonds so issued under their said deed of trust; and that the net income or revenue derived from a proper and economical use of said property is, and will continue to be, more than sufficient to pay all of the interest warrants as they may become due and payable on all the bonds issued under the said deed of trust.

"And your orator further states, upon information and belief, that certain holders of bonds issued under the deed of trust so made to the defendants, Fosdick and Fish, trustees as aforesaid,

whose names your orator will furnish if required by this honorable court, have resolved and determined to demand and require of them that they shall without delay declare the principal of all of their said bonds presently due and payable, and that they shall prosecute said action to a speedy decree of foreclosure of said trust mortgage, and shall enforce sale of all the property and franchises of said railroad company under said decree, thereby rendering the security of the bonds issued under the deed to your orator utterly valueless.

"And your orator avers that such action will be grossly unjust and inequitable towards the *cestuis que trust* of your orator and other creditors of said company, especially as about eighty per cent of all of said bondholders have extended the payment of their said interest warrants as hereinbefore stated, and waived and excused the default of said company in the payment of said interest.

"And your orator further represents, upon information and belief, that none of the holders of the bonds issued under the said trust deed executed to the defendants, except a very inconsiderable number thereof, have presented to and demanded of said railroad company payment of any of the past-due interest warrants or coupons of said bonds, as required by the eighth article or condition of said trust deed, and, therefore, your orator says that the said trustees, Fosdick and Fish, have no authority under said trust deed to proceed to collect the principal of said bonds by foreclosure and sale or otherwise."

The amended bill of Fosdick and Fish, of which an abstract has already been given, was filed Sept. 14, 1875. Its prayer for relief is that the said Chicago, Danville, and Vincennes Railroad Company, and the said James W. Elwell, whose appearance has already been entered in this cause as parties defendant thereto, may be required to answer this, your orators', amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this, your orators', bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed upon the prayer of the original bill in this cause may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and

direction of this honorable court; and that an account be taken of the amount due by the said railroad company upon the said Illinois Division bonds, and upon the said Indiana Division bonds separately, and that the said railroad company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois Division of the said railroad, together with all of the franchises, equipment, and appurtenances thereof, may be sold by the master in chancery of this court, for the payment, first, of the said 2,500 Illinois Division bonds; and, secondly, of the 1,500 Indiana Division bonds, which are the first and second liens upon the said Illinois Division of said railroad, its equipments, franchise, and property, as hereinbefore set forth, or for such other and further relief as to your Honors shall seem meet, and to equity shall appertain.

On Oct. 23, 1875, the Chicago, Danville, and Vincennes Railroad Company filed a demurrer to so much of the amended bill of Fosdick and Fish as charges that it will be impossible for said company to fulfil the conditions of the funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of said amended bill as charges that the principal of said bonds has become due and payable.

On the same day it also filed an answer, containing, among others, the following averments: —

"Said respondent says that on the twenty-second day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his *ex parte* application to the judge of the Circuit Court of Will County, in the said State of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets, and income of the said respondent within the State of Illinois, and that such receivers forcibly took possession of the offices and all the property of said respondent on said twenty-second day of February, and by the aid of writs of assistance and other process issued by said court, or the judge thereof, held the possession of all said property of this respondent, its earnings and income, until the first day of June, 1875, at which time said receivers were removed by the order of this honorable court, and a receiver of

all such property appointed under the prayer of the complainants in the said original bill of complaint contained.

"And this respondent says that on said twenty-second day of February it was not in default in the payment of any of said certificate warrants that matured February 1st, 1875; that all of said warrants were paid as presented to this respondent prior to said twenty-second day of February, and that such balance of $3,167.77 was not paid for the reason that the action of said State court had deprived this respondent of the power to meet such payments. But the said respondent denies that the said corporation was, on said first day of February, 1875, insolvent and unable to meet the payment of said certificate warrants, as charged in said amended bill of complaint, but, on the contrary, avers and charges that at all times after the maturity of said interest, and until said twenty-second day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest warrants when presented.

"And the said respondent further says and charges the fact to be that the net earnings of said company, during the year 1874, and the months of January, February, April, and May, of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust deed to the complainants, and also the interest upon said certificates of indebtedness, and upon all other mortgage bonds that had been negotiated and sold by said respondent.

"And the said respondent says that the said company is not in default in the payment of any certificate interest coupons, after proper demand, and that, therefore, none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond interest warrants so funded and deposited with the said Fosdick.

"Your respondent admits that the contracts for funding said interest warrants are substantially set forth in said complainant's amended bill, and that the holders of about four-fifths of the said 4,000 first-mortgage bonds then, and about three-fourths of all now outstanding, entered into said agreement, and so funded their said interest warrants.

. . . . . .

"Your respondent further answering, says that it has no knowledge, information, or belief of the number of said bondholders, under said deeds of trust, that have made demand upon said complainants that they should execute their said trust; but respondent says that said company is not, and was not at the commencement of this action, in default to one-half of such interest, and, therefore, respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondent required to accede to such demands, by the terms of said trust deed.

"And the said respondent further answering, says that it has no means of knowledge of the per cent of the holders of said interest warrants that matured October 1st, 1873, that presented such warrants to the company and demanded payment thereof; but respondent says, if it is true, as charged, that at least ninety per cent made such demand, at least eighty per cent of the entire number afterwards waived such payment, and consented to an extension thereof, as hereinbefore stated, and that as to such eighty per cent said company is in no default whatever.

"And as to the holders of said six hundred and ninety-eight of said bonds who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest, and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said company their assent to such extension, and promised and agreed (but not in writing) that they would in no manner interfere with, or by their adverse action defeat, the plans of said company for the extension of payment of said interest.

"And respondent further says that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of a default of said company, with the exception of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood, the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has any one at his request, ever demanded of said company, or of any of its officers or agents, payment of any

of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected, or that he demanded payment of either principal or interest, was derived from his said bill of complaint filed in said Circuit Court of Will County, as aforesaid, on said twenty-second day of February. And the said respondent further avers that on the twenty-third day of February, 1875, the said defendant offered and tendered the attorney of record of said Osgood, in open court, in said county of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney. And that respondent at the same time offered to deposit in court the full amount of said principal and interest, upon condition that said receivers should be discharged, and said property restored to said respondent, which offer was refused."

On Jan. 6, 1876, a petition was filed by Stephen Osgood, who had commenced the original proceeding in the State court on Feb. 22, 1875, and seven others, claiming to be holders of bonds and coupons secured by the mortgages to Fosdick and Fish, in which they recite the previous proceedings in respect to the bill filed by the latter, and allege, among other things, that on Oct. 1, 1873, the railroad company had made default in the payment of interest on its bonds, and that large numbers of coupons maturing on that day were presented at the office of the corporation in the city of New York, payment thereof duly demanded and refused. It also rehearses the funding arrangements, and charges that as they were based on false and fraudulent statements of the company, the owners of the bonds, who funded their coupons, on the faith thereof, are entitled to rescind the agreement and to enforce their claims against the company; that Osgood had never funded his coupons; that demand was made at the office of said corporation in New York, in December, 1874, for the payment of sundry coupons due April 1, 1874, which were never funded or agreed to be so, and that payment thereof was refused; that the said presentment and non-payment were duly evidenced by a public instrument of protest by a notary public in and for said county and city of New York, and that the said coupons still

remain unpaid. More than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the default thereupon, the petitioners claim that by the conditions of said conveyances the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of $4,700,000 upon said first-mortgage indebtedness.

The petition prays for an account of the sums due on account of the said bonds, and that the mortgaged property be sold to satisfy the same, &c.

An answer was filed by R. Biddle Roberts, setting up his rights as trustee under the chattel mortgage; and James W. Elwell also answers the amended bill, repeating substantially the allegations of his cross-bill. Fosdick and Fish filed an answer to the cross-bill of Elwell on March 10, 1876, and filed general replications to all the answers to their amended bill. Their answer to the cross-bill contains the following averments: —

"These respondents, further answering, upon information and belief, admit that certain holders of bonds under the deed of trust to these respondents have determined to demand and require of these respondents that they shall without delay declare the principal of all of said bonds presently due and payable, and will insist that these respondents proceed to prosecute their original bill in this behalf to speedy foreclosure and procure the sale of the property and franchises of said railroad company to satisfy said bonds.

"These respondents, further answering, say that they are also informed and believe, and therefore charge the fact to be, that other holders of said bonds are in favor of and propose to demand that no such foreclosure and sale shall be had for the present, but what number of bondholders are in the one class or in the other these respondents are not advised and cannot state, but in that regard they say that they will endeavor to faithfully perform all their duties as trustees in this behalf and submit all such questions as may arise to the determination of this honorable court.

"Further answering, respondents say that they are not advised, and cannot state, what precise number the holders of past-due coupons of bonds issued under the trust deed to these respondents have presented for payment, but they allege that it is immaterial whether one or more of said coupons have been so presented; that inasmuch as the said coupons have not been paid, and a large amount thereof as hereinbefore stated have long since become due and payable, and these respondents have been by some of the holders of said coupons called upon as trustees to foreclose the said mortgage, they are thereby vested with full authority to proceed to such foreclosure."

An exhibit is filed with the amended bill, being a declaration, signed by Fosdick and Fish, as trustees, which, after reciting the issue of the bonds of March 10, 1869, and the mortgage given to them to secure the payment of the same, and the provision thereof, that the principal should become due, in case of the specified default in the payment of interest, continues as follows: —

"And whereas default has been made by said company in the payment of the half-year's interest on all of said bonds which fell due on the first day of October, A. D. 1873.

"And whereas the coupons for such interest have been presented and payment demanded, and whereas such default has continued for more than six months after such demand, and whereas the holders of said bonds have never consented thereto, and in consequence thereof the principal of all of the said bonds has become due and payable:

"Now, therefore, the said Chicago, Danville, and Vincennes Railroad Company are hereby notified that we, William R. Fosdick and James D. Fish, as trustees as aforesaid, and under and by virtue of the provisions of said trust deed and the authority conferred upon us thereby, do hereby declare the principal of all of said bonds to be due and payable."

Service of this declaration and notice upon the railroad company is acknowledged to have been made Feb. 26, 1875.

Upon the issues thus made by the pleadings, an order of reference was made to a master to take testimony, and report the same with his findings, and a large amount of evidence taken before him is contained in the record.

On June 24, 1876, the master filed his report. In it, he reported, among other findings, that, on Oct. 1, 1873, the said corporation did not pay any of the interest falling due on that day on the issue of bonds dated March 10, 1869, or upon the issue dated March 12, 1872; nor has the said corporation paid any of the subsequent instalments on any of said $4,000,000 bonds falling due at either of the following-named days: April 1, 1874, Oct. 1, 1874, April 1, 1875, Oct. 1, 1875, and April 1, 1876; and that demand was duly made for the payment of divers of such coupons on Oct. 1, 1873, and one of such coupons was protested for such non-payment more than six months prior to the institution of this action, or the written notice of such trustees declaring the principal of such bonds to be due and payable, and there is, consequently, now due to the divers holders of bonds dated March 10, 1869, the sum of $3,505,500. This sum includes the principal of the bonds of the issue of March 10, 1869, the several coupons thereon of the dates mentioned, with interest to July 1, 1876, and the additional sum of $389,500, being twelve and one-half per cent premium on the nominal amount due for payment in gold, according to the stipulation in the bonds and mortgage to that effect.

The master further reported that, as to all matters relating to the funding scheme, referred to in the pleadings, and the effect of the surrender of the funded coupons, and of the failure of the company to pay the coupons due Oct. 1, 1875, he was not required to examine or report upon, and, therefore, made no finding, nor as to any allegations of fraud set up in the pleadings, no testimony having been taken before or submitted to him upon either matter.

The railroad company filed exceptions to this report, of which the sixth is as follows: —

"For that whereas the said master has decided, and in his said report stated, that on the twelfth day of October, 1873, said company did not pay any of its interest falling due on that day; that demand was duly made, and that one of said coupons was duly protested for such non-payment more than six months prior to the institution of this action, and to the date of the written notice of the trustees, and, therefore, the

said master assumes, and so decides, that the principal and interest of all of said bonds has become due; when the fact is, as shown by the proof offered by the complainants and intervening petitioners, that no coupon was protested until the nineteenth day of December, A. D. 1874, less than three months prior to the date of said notice, and the commencement of this action, and there is no proof that there was ever any other demand upon said company for the payment of said coupons."

On the hearing, a decree was rendered, in which, among other findings, it is declared: —

That the railroad company had paid all the coupons, on the bonds both on the Illinois and Indiana Divisions, which fell due April 1, 1873, and that none of the coupons which had matured since that date had been paid;

That, under the two proposals of the company for funding, there had been deposited coupons due Oct. 1, 1873, to April 1, 1875, inclusive, on all the $2,500,000 of Illinois Division bonds, except $698,500 thereof, which coupons still remained in the hands of Fosdick, as trustee under the agreements; that the semi-annual interest upon the convertible bonds and certificates of indebtedness, issued in exchange therefor, which fell due Aug. 1, 1874, was paid in full, and that the instalment of interest thereon, which became due Feb. 1, 1875, was duly paid by said company upon all of the same which were presented for payment, which was the great bulk thereof, and that no interest has been paid on any part of the same since that time;

That no payment of interest had been made upon the $698,500 of Illinois Division bonds, which had not been funded, since payment of the coupon due April 1, 1873.

The decree then recites as follows: "That heretofore, and on the twenty-sixth day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust deed to them, dated March 10th, 1869, did declare the principal of the said twenty-five hundred Illinois Division bonds to be due and payable by reason of the default of said railroad company in the payment of certain of the coupons of said bonds which fell due October 1st, 1873, payment of which had been duly de-

manded, and the continuance of such default for more than six months after such demand."

The decree then proceeds to declare that there is due and owing from the railroad company to the complainants, as trustees under the mortgage deed of March 10, 1869, the several sums of $87,500 in gold coin, for the coupons on the $2,500,000 of bonds secured thereby, falling due respectively semi-annually from Oct. 1, 1873, to Oct. 1, 1876, inclusive, less the payments made on account of the four coupons on the convertible bonds and certificates of indebtedness, with interest on said sums at the rate of six per cent per annum, and, as the decree reads: "In the further sum of two million five hundred thousand dollars in gold coin, for the principal of the said Illinois Division bonds so declared to be due as aforesaid, together with interest thereon from and after the first day of October, A. D. 1876, at the rate of seven per cent per annum in gold."

It was then "ordered, adjudged, and decreed that the said defendant, the Chicago, Danville, and Vincennes Railroad Company, pay, or cause to be paid, to the said complainants as trustees, for the holders of the said Illinois Division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and in default thereof, that all of the said railroad, premises, property, and franchises described in the said trust deed, dated March 10th, A. D. 1869, and hereinbefore described as the Illinois Division of said railroad, &c., and all the right, title, interest, and equity of redemption of the said Chicago, Danville, and Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction, to the highest and best bidder for cash therefor, payable as hereinafter provided, at the west door of the Republic Life Insurance Company Building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the city of Chicago for the space of thirty days prior to such day of sale."

The decree also contains the usual declaration that a con-

veyance of the title to the property sold, after confirmation of the sale, shall be a perpetual bar, in law and equity, against every claim of the railroad company, or other person claiming under it.

Under this decree a sale was had and reported to the court, and confirmed by a subsequent decree, of the mortgaged property to F. W. Huidekoper, T. W. Shannon, and J. M. Denison, for $1,450,000, and the purchase-money having been paid, $362,500 in cash, and by the surrender of $2,328,000 of the Illinois Division bonds, with the coupons and certificates of indebtedness or convertible bonds thereto attached and belonging, a conveyance of the title to the mortgaged property was made to the purchasers.

It is assigned for error upon the decree of foreclosure and sale, —

First, That the court below required from the mortgagor, payment of the principal of the debt secured by the mortgage, as then due, and on non-payment thereof, within twenty days, that the mortgaged property should be sold; and,

Second, That it decreed foreclosure and sale on this condition, without proof of the written request of the holders of the majority of the bonds.

It is undeniable that at the date of the filing of the bill, which was Feb. 27, 1875, the defendant, the Chicago, Danville, and Vincennes Railroad Company, was in default for non-payment of the coupons on $698,500 of the issue of $2,500,000 of the Illinois Division bonds, which matured Oct. 1, 1873. The holders of that amount of these bonds did not fund their coupons, and none of them were paid. This failure on the part of the mortgagor constituted a breach of one of the conditions of the mortgage; and continuing for six months, entitled the trustees under the fifth article to take possession of the mortgaged premises, on being so required by the holders of not less than one-half the outstanding bonds, and collect the net income, until the default should have been satisfied; or, to sell the mortgaged premises under the power conferred by the sixth article of the conditions. In the latter event, the mortgaged premises would be sold as an entirety, free from the incumbrance of the mortgage, and the proceeds of the sale applied,

first, to the payment of the amount due and in arrears, and then to the mortgage debt, not then due, and any surplus to the mortgagor. But, inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article, the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal, on any of the bonds, we are of opinion that, independently of the provisions of the other articles, the trustees, or on their failure to do so, any bondholder, on non-payment of any instalment of interest on any bond, might file a bill for the enforcement of the security, by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by, and in the name of, the latter, but, if necessary, may be prosecuted without and even against them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms. And in case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due, or when the property is not properly divisible; it conveys a clear and absolute title, as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not. *Olcott* v. *Bynum*, 17 Wall. 44; *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521. This doctrine is stated by this court in *Howell* v. *Western Railroad Company*, 94 U. S. 463, 466, where an authoritative rule of practice in such cases is prescribed. "We are of opinion, then," say the court, speaking by Mr. Justice Miller, "that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice,— a decree which will ascertain the sum so due and give the com-

pany a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase-money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal."

The decree *nisi*, mentioned in this extract, like that in a suit against an infant, in which a day is given him to show cause against it, after he attains full age, and like that, where the bill is ordered to be taken *pro confesso*, is preliminary in its nature, requiring a further order to complete it. According to the practice of the English chancery, a decree of this nature in a foreclosure suit, after directing an account to be taken of the principal and interest due to the complainant upon the mortgage, orders, that upon the defendant's paying the amount ascertained and certified or found to be due, within six months, at such time and place as are appointed, the complainant shall reconvey the mortgaged premises; but that in default of such payment, the defendant shall thenceforth be absolutely debarred and foreclosed of his equity of redemption. It is necessary, however, for the complainant, in order to complete his title, to procure a final order confirming it; otherwise the decree of foreclosure will not be pleadable. This order of confirmation is procured on proof to the court of non-payment according to the terms of the decree. 2 Daniell, Ch. Pr. 997.

The time usually allowed by the decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, was six months. But that was not regarded as an absolutely fixed period, but might be varied so as to be reasonable, according to the discretion of the court and the particular circumstances of the case. The courts, however, were very liberal in cases of foreclosure, in extending and enlarging, from time to time, this period of redemption, though not in cases of bills to redeem,

where the mortgagor came into court professing his readiness to pay the amount due, when ascertained, nor in cases of sales, where the mortgagor was not subjected to the severe and absolute forfeiture of his right. *Perine* v. *Dunn*, 4 Johns. (N. Y.) Ch. 140; *Harkins* v. *Forsyth*, 11 Leigh (Va.), 294.

Where, according to the English practice, a sale, instead of foreclosure, was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties. 2 Daniell, Ch. Pr. 1266.

In the early practice in Kentucky, the preliminary decree, finding the amount due and giving day for payment, was interlocutory merely and separate from the subsequent decree, finding the default in not performing the former decree and directing a sale in consequence thereof. *Downing* v. *Palmateer*, 1 Mon. (Ky.) 64; *Oldham* v. *Halley*, 2 J. J. Marsh. (Ky.) 113; *Hanks* v. *Greenwade*, 5 id. 250; *Champlin* v. *Foster*, 7 B. Mon. (Ky.) 104. The ground of this practice seems to have been, that the mortgagor had the right to have the record show that he had failed to pay according to the decree *nisi* before a sale of his property was ordered. But there seems to us to be no sufficient reason why, as it was according to the English practice, and generally in this country, all these matters may not be embraced in a single decree. What is indispensable in such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed. *Woodard* v. *Fitzpatrick*, 2 id. 61.

This is that final decree of foreclosure and sale, which determines and fixes the rights of the parties, and from which, on that account, an appeal lies. *Ray* v. *Law*, 3 Cranch, 179;

Whiting v. *Bank of the United States*, 13 Pet. 6; *Forgay* v. *Conrad*, 6 How. 201; *Railroad Company* v. *Swasey*, 23 Wall. 405.

But as in cases of strict foreclosure, so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem.

It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption. *Brine* v. *Insurance Company*, 96 U. S. 627.

It is obvious that the finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away, except upon a strict compliance with the steps necessary to divest it. *Bigler* v. *Waller*, 14 Wall. 297; *Shillaber* v. *Robinson*, 97 U. S. 68. In *Clark* v. *Reyburn*, 8 Wall. 318, a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken *pro confesso* as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences undoubtedly would have followed, if it had been a decree of foreclosure and sale, instead of a strict foreclosure; and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.

It becomes, then, of the first importance to ascertain whether

the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due.

The errors alleged in the amount are two. The first is, that there was declared to be payable $252,220, the amount of the several coupons, maturing from Oct. 1, 1873, to April 1, 1875, both inclusive, the payment of which, it is claimed, as to all the bonds of the Illinois Division, except $698,500 thereof, had been, by the funding agreements, extended until Feb. 1, 1879. The second is, that the principal sum of $2,500,000 of these bonds, contrary to the agreement between the parties, was also declared to be due and payable. The appellants insist that the only indebtedness of the railroad company to the bondholders, represented by the complainants at the time of the filing of their bill, was the past-due interest on six hundred and ninety-nine bonds, the interest warrants of which had not been funded, amounting to about the sum of $147,000.

It appears from a statement in the record, admitted to be correct, that there had been deposited and exchanged for convertible bonds the four coupons maturing on and from Oct. 1, 1873, to April 1, 1875, on $271,500 of the Illinois Division bonds, and that by the terms of the agreement under which that exchange was effected, dated Nov. 11, 1873, it was not to be binding unless assented to in writing by a majority in interest of the bondholders. In point of fact, such majority did not assent to it; but under the second proposition, dated Nov. 20, 1873, the four corresponding coupons on $1,530,000 of the bonds, were deposited and exchanged for certificates of indebtedness.

It appears further that the railroad company paid the accruing interest on the convertible bonds and certificates of indebtedness, issued under these arrangements, which became due prior to the filing of the bill, except $3,167.77, which was not presented. The default in respect to the coupons surrendered was, by the terms of the funding agreements, waived as long as the interest upon the securities substituted for them was punctually paid, so that at the date of the filing of the bill there was no subsisting default in the payment of interest, except upon the $698,500 of bonds which had not been funded.

The master finds — and his report in that respect is the predicate of the decree — that divers coupons falling due Oct. 1, 1873, were presented on that day, and that payment thereof was demanded and refused, and that one of such coupons was protested for such non-payment more than six months prior to the institution of the suit, and the written declaration of the trustees, that the principal of the bonds had thereby become due.

There are some statements in the answers, and in the testimony of some of the witnesses, that coupons due Oct. 1, 1873, were presented for payment and were not paid; but there is no proof of the fact as to any particular coupon identified for that purpose, and we have carefully searched the record in vain for any evidence whatever that any coupon, not afterwards funded, was presented and payment thereof refused. The master himself does not report any such. It is entirely consistent with his finding, and with the evidence on which it professes to be founded, that the payment of every coupon falling due Oct. 1, 1873, presented for payment on or after that day, and payment whereof was refused, was extended by the subsequent agreements to fund them. The intervening petition of Osgood and others, if it be considered as a pleading whereby they were allowed to become co-complainants, does not allege that any one of the coupons held by them was presented for payment. It is averred that large numbers of the coupons maturing on Oct. 1, 1873, were presented, and payment thereof was demanded and refused on that day, but the allegation that any such coupon was held by either of the petitioners seems to have been studiously avoided; and stress is laid on averments of fraudulent misrepresentations which induced bondholders to fund their coupons, in support of which the master reported that no testimony was offered, and upon the insolvency of the company, which is entirely immaterial upon the question of an actual default. It is averred in the petition that coupons were presented and payment demanded in December, 1874, which had become due the previous April, and the master so reports as to one; but the only evidence that appears in the record is an admission of the railroad company in its sixth exception to the master's report, where it is accompanied by the statement

that such demand and refusal was less than six months before the filing of the bill, and could not, therefore, have been the foundation of the declaration that the principal of the mortgage debt had become payable, which, in fact, was not predicated upon that default, but rested solely on the non-payment of the coupons due Oct. 1, 1873.

There is nothing in the record to show that any one of the bondholders, who had funded his coupons, claimed the right to rescind the funding agreements, or that any step to do so had been taken or authorized.

It is true that after the filing of the bill, and the appointment of a receiver, the company ceased to pay interest upon its securities. That was but the natural consequence of the litigation; and in taking a decree for foreclosure and sale, it might have been in strict accordance with the equitable rights of bondholders who had funded their coupons, to have rescinded the funding agreements, as incapable of execution. But the legal effect of this would have been merely to find as the true amount of the mortgage debt then due, necessary to be paid to avoid a sale, the whole amount of interest unpaid on all the coupons. It would not, however, have put the company in default as to the funded coupons from the beginning, nor deprived it of the benefit of the waiver of that default, arising from the fact of funding. It would have cancelled the arrangement only as and from the date of the decree itself, without impairing its antecedent effect by retroaction. It is true, that where a mortgage has been given to secure a debt payable in instalments, and a bill has been filed for foreclosure and sale, upon a default as to one, the decree may require payment of all instalments then due, though maturing since the institution of the suit; but that principle does not suffice to bring the case of the appellees within the meaning of the eighth article of the conditions of the mortgage, so as to justify the decree requiring payment of the principal of the debt, as presently due. For by the terms of that provision the entire debt does not become absolutely due, on the default of the company, continued for six months, without the consent of the holder, to pay an interest coupon; but only at the election of the trustees, as declared by them and notified to the mortgagor.

And the forfeiture of the time of payment to be established in a given case must stand or fall upon the fact of such declaration and notice, as it may be justified or not by the circumstances existing when they were made. It cannot be supported by subsequent occurrences. It follows, therefore, that the claim in support of the finding that the whole debt had become due must rest exclusively upon the alleged default of Oct. 1, 1873, and that, as we have seen, is not sufficient.

It does not affect this conclusion, that by the terms of the sixth article of the conditions of the mortgage it is provided that upon the exercise of the power thereby conferred, resulting in a sale of the mortgaged premises, for a single default in the payment of interest (it may be one coupon merely), the property is to be sold as an entirety, and free of the incumbrance of the mortgage, so as to pass all the title, both of mortgagor and mortgagee, and that the proceeds of the sale are to be applied, after payment of overdue interest, to the payment of the principal of the debt, though not yet due. This provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment. It is simply the application to the case of a sale by the trustees under the power, of the practice of courts of equity in cases of judicial sales upon foreclosure. In either case the right of the mortgagee to redeem, and thus prevent the sale, is preserved, on payment, not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears, — the very right which, by the decree now in question, was denied. If authority is needed on such a proposition, it will be found in *Holden* v. *Gilbert*, 7 Paige (N. Y.), 208, and *Olcott* v. *Bynum*, 17 Wall. 44.

This right cannot be regarded as other than important and valuable. Its denial in the present case was a substantial and serious wrong. This is manifest from the bare statement that the decree required payment, within twenty days, of $2,500,000, which we find was not due, as a condition of preventing the sale of property, which, it is admitted, was worth more than this debt, and which, according to the testimony in the case, was earning more than enough to pay the current interest on this mortgage. The receiver states the net earnings for the

year 1874 at $330,615.75, and adds, speaking July 31, 1875, that "the present year, like the preceding, is of almost unexampled depression in most branches of business upon which the consumption of coal depends," the transportation of which was the main traffic of the road; and adds that he believes, on the reasons he states, that "it is practicable, in a year of fair prosperity, to increase the earnings from fifty to eighty per cent over those of 1874." Upon such a showing, it is immaterial to say that the railroad company was commercially insolvent, not being able to pay all its obligations as they matured; for the fact, if admitted, would not affect its legal or equitable rights, much less be allowed to deprive its other creditors, junior incumbrancers and lienholders, of their right to prevent a sale and sacrifice of the property by paying the comparatively small amount of the interest, justly due, upon the first-mortgage bonds, and thus preserving their own estates and interests as well as those of the mortgagor.

The second assignment of error which we have noted is, in our opinion, also well founded.

The eighth article of the conditions of the mortgage, which relates to this subject, contains the provision that, after the principal of the bonds has been declared by the trustees to have become due, by reason of the default therein described, and the mortgagor notified thereof, the trustees, "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided."

It is contended on behalf of the appellees, that without the last clause the trustees have the sole right to act, according to their discretion and upon their own motion, in declaring the principal sum due on account of the default; and that upon such declaration and notice by the trustees the whole sum becomes due irrevocably for all the purposes of the mortgage; so that thereafter the trustees, at their option, may file a bill for foreclosure and sale, or may intervene, in case such a bill is filed by any bondholder, and thereupon the amount decreed must be the amount thus declared to be, and hence, actually due; and that the office of the clause in reference to the

written request of a majority of the bondholders is merely to make the obligation of the trustees imperative, instead of optional.

We cannot agree to that construction of the provision. The whole article must be taken together. It is, in fact, a unit, and is directed to a single end. And the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation. It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy. And while it is in the nature of a forfeiture, it is one against which, when it has taken place according to the fair meaning of the parties, courts of equity will not relieve. It was so held in *Noyes* v. *Clark*, 7 Paige (N. Y.), 179; *Noonan* v. *Lee*, 2 Black, 499; *Olcott* v. *Bynum*, 17 Wall. 44.

The stipulation, nevertheless, is in the nature of a penalty, and may be regarded as *stricti juris*, to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor. And the construction, in the present instance at least, which favors him, does not discriminate against the bondholders as a class, but rather between the interests of the whole number, represented by the trustees and controlled by a majority, and those of a single creditor, or a minority, associated in the like case, pursuing their remedy as individuals. For while, as we have seen, one or any number of bondholders may prosecute a bill to foreclose the mortgage, upon default as to payment of a single coupon, or the trustees may intervene on behalf of all for the same purpose, because the failure to pay a single instalment of interest is made a breach of the condition of the mortgage; yet it is apparent that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests.

In declaring the principal sum due before the date fixed by the credit, upon a default in the payment of interest, the trustee is acting for the whole number of bondholders, and the provision that subjects his action in enforcing the stipulation

to the wishes of a majority is meant, as we think, for the protection of the class. Many cases may be mentioned to illustrate the importance in their interests of such a control, rather than to put it in the power of one or a minority to require all to accept what the majority might consider to be a premature and less valuable satisfaction for their existing security. The larger number might think it to their advantage even to defer the collection of their overdue interest, much less not to anticipate the payment of the principal, even when the security was ample to meet both; for they might esteem the ultimate investment higher than present payment. While they could not and ought not to prevent others, even a single individual, from exacting the promptest payment of what is due and may be important as current income, by legal process, they may nevertheless rightfully object to an anticipation of payment that may, in their opinion, prove to be a sacrifice. And this becomes especially important when the present value of the security is insufficient to prepay the incumbrance, but contains the solid promise of future indemnity as an investment. It is that interest we think, that dictated the clause in question, and can be satisfied only by the construction which secures to the majority of the bondholders the right to veto the proceeding of the trustees.

Indeed, the other construction contended for, which gives to the majority only the right to make the obligation of the trustees to proceed, imperative, renders it nugatory. For upon that supposition, the debt having become fully due, by the declaration and notice of the trustees, for all the purposes of the mortgage, if they should delay or refuse to file a bill for foreclosure and sale, it would still be in the power of a single bondholder to proceed for himself and associates directly for the same object, and to procure the same relief.

It is therefore our opinion that, even had the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless, the foundation for proceeding to foreclose for that cause, and of the decree requiring payment of that amount, would fail, without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then out-

standing. It is not disputed that no such proof is to be found in this record.

Other errors than those already discussed have been assigned upon both appeals, which, as in the further progress of the cause they may not arise again, we have not considered and do not therefore pass upon.

For the reasons already given, both decrees will be reversed, and the cause remanded with instructions to proceed in conformity with this opinion.

So ordered

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE HARLAN, dissenting.

I am unable to agree to the judgment in this case. In my opinion default had been made in the payment of the interest on some of the bonds, within the meaning of the eighth clause of the mortgage. The company having given notice that the coupons due Oct. 1, 1873, would not be paid if presented, no presentation was necessary in order to create the default. This notice was a waiver of a presentation in form. Coupon-holders were in effect told it was useless to make a demand, because if made it would not be met. Confessedly this default as to the coupons on $698,000 of the bonds continued more than six months. Holders of bonds to this amount declined to enter into the scheme for extension. They kept their coupons, hoping some plan might be devised for payment, but retaining all their rights under the mortgage, if their hopes were not realized.

This default having happened, and having continued more than six months without the consent of the holders of the coupons, by the express terms of the eighth clause, the principal of all the bonds secured by the mortgage became immediately due and payable. If after that the holders of a majority of the outstanding bonds had requested the trustees in writing to foreclose the mortgage, it would have become the imperative duty of the trustees to institute the necessary proceedings for that purpose. But if no such request was made, it seems to me that the trustees were not precluded from commencing such proceedings on their own motion, in case the safety of the trust

made it necessary. It is possible, if a majority of the bondholders had, in an appropriate way, interfered to prevent the trustees from going on, some relief might have been afforded them; but when all came in and availed themselves of what had been done, the corporation was in no position to defend, because a request had not been formally made in advance. As to the corporation, the principal of the bonds became due and payable when a default occurred which continued the requisite length of time. Whether a foreclosure should be had because of the default, rested alone with the bondholders and trustees. The provision in the mortgage for the written request was, as it seems to me, not for the protection of the company, but the bondholders. If the bondholders are satisfied with what the trustees have done, the corporation is in no condition to complain.

That the trustees were justified in commencing proceedings on their own motions seems to me clear. Some of the bondholders, having coupons and bonds, as to which default had been made, began a suit for foreclosure in a state court, and secured the appointment of a receiver. The company was very much embarrassed financially, and, so long as the receivership continued, could do nothing to extricate itself from its difficulties. It was a necessity, therefore, for the trustees to interfere. When they did, the company did not relieve itself from the consequences of its default in the payment of coupons on the $698,000 of bonds. All the bondholders seem to have been satisfied with what was done, and they united with the trustees in pressing the foreclosure.

Under these circumstances, in my opinion, the court properly treated the principal of all the bonds as due, and decreed accordingly.

These cases were decided at the last term, before the appointment of MR. JUSTICE GRAY and MR. JUSTICE BLATCHFORD.

A petition for a rehearing in the second case was then filed. They took no part in the subsequent action of the court.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Since the announcement of our former opinion, the appellees, having filed a petition for rehearing, have suggested that the

decree brought up by the appeal in the second case is not, what it is recited to be, in the prayer for appeal in the Circuit Court, — viz. the decree confirming the sale of the mortgaged property under that of foreclosure and sale, — but one rendered subsequently thereto, and merely in execution of it, and that it is, therefore, not the subject of an appeal, and claim that the present appeal should be dismissed for want of jurisdiction.

The appeal prayed for and allowed in the Circuit Court is recited in the petition therefor filed March 26, 1879, to be as follows: —

"From the decree entered April 12, 1877, confirming the report of the sale of the property of the defendant railroad company.

"From the decree of April 16, 1877, ordering the delivery of the deed and possession of the property to the purchasers, Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison.

"From the decree entered in said cause on the nineteenth day of November, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison, and against the said Chicago, Danville, and Vincennes Railroad Company, for the sum of $1,808,646.46."

The two decrees last named, of April 16, 1877, and of Nov. 19, 1877, do not appear in the record.

An examination of the terms of the decree of April 12, 1877, shows that it is a decree, confirming the report of the master, upon a petition of the purchasers, Huidekoper, Shannon, and Dennison, asking that their bid may be satisfied by a surrender of bonds and coupons without further cash payment, and, upon that surrender, for a conveyance of the title to the property, and to be let into possession. What prior action of the court, upon a report of the sale, had taken place, the transcript of the record before us does not disclose. Counsel for the appellees state that there was in fact a prior decree, confirming the sale, rendered on Feb. 26, 1877, from which no appeal was perfected, and produce in support of their statement what is called a supplemental transcript of the record, containing such a decree. This, however, we cannot at present consider or act upon, further than to say that, in view of the

suggestions made, and to enable the parties to present whatever questions arise upon the record as it is now before us, or upon a complete record, when supplied, upon the appeal prayed for and perfected on March 26, 1879, the application for a rehearing is granted; and the decree of this court rendered at the present term, so far only as it reverses any of the decrees embraced in this appeal, is to that extent and for that purpose set aside.

At the present term the case was argued by *Mr. Edwin Walker* and *Mr. R. Biddle Roberts* for the appellants, and by *Mr. Henry Crawford*, *Mr. Charles B. Lawrence*, and *Mr. Melville W. Fuller* for the appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This appeal, heard during the last term with that from the decree of foreclosure and sale in the same case, was taken from three decrees rendered after the sale had taken place. Huidekoper, Shannon, and Dennison, the purchasers of the mortgaged property sold under the decree of foreclosure, who are appellees in this appeal, were not parties to the former appeal. All the decrees appealed from, including those now in question, were included in the order of reversal made at the former hearing; but on a petition for rehearing, it was called to the attention of the court that the transcript of the record was imperfect and incomplete, the decree confirming the sale having been omitted, and that the petition for the present appeal contained a misrecital, that the decree entered April 12, 1877, was the decree "confirming the report of the sale of the property of the defendant railroad company." The order of reversal was, therefore, set aside as to the decrees embraced in the present appeal, and a rehearing granted. The cause, on that rehearing, has now been heard at the present term upon the whole record, as amended and perfected.

From that it now appears that on Feb. 17, 1877, the master filed his report of the sale, and the purchasers, their petition for its confirmation, and for other relief; and it was on that day, on motion of the complainants' solicitors, ordered that the

report and sale be confirmed, unless objections thereto should be filed on or before the Friday next following, for which day it was set for hearing. And exceptions having been in the mean time filed by one Slaughter, on Feb. 26, 1877, the court overruled the exceptions, and as the order reads, "does in all things confirm the sale" to the purchasers. From this decree an appeal was prayed by Slaughter, but was not perfected or prosecuted. The petition of the purchasers, filed Feb. 17, 1877, in which they also asked for the immediate discharge and payment of their bid, had been referred to the master, whose report subsequently filed was confirmed by the decretal order of April 12, 1877, by which he was directed, on the surrender to him of two thousand three hundred and twenty-eight first-mortgage Illinois Division bonds of the defendant railroad company, to execute and deliver to the purchasers a deed of the property sold, and thereupon the receiver was directed to let them into possession. On April 16, 1877, the master having reported the execution of the decree of April 12 by the delivery of the deed and the acceptance of the bonds, a further decree was entered approving and confirming the same. These are the two decrees first named in the prayer for the present appeal.

It is now contended by the appellees that these decrees are merely orders in execution of the previous decrees of the court; are, therefore, not final in the sense necessary to authorize an appeal; and that consequently, as to them, the present appeal must be dismissed for want of jurisdiction.

But according to the rule sanctioned and adopted in *Forgay* v. *Conrad*, 6 How. 201, and *Blossom* v. *Railroad Company*, 1 Wall. 655, an appeal will lie from such decrees, according to the nature of their subject-matter and the rights of the parties affected.

In the present case the decree of April 12, 1877, in effect, distributes the proceeds of the sale upon the basis of the finding and declaration in the decree for foreclosure, that the principal of the bonds had become overdue; for it authorized the purchasers, to the extent of the proportion in which the bid, if treated as cash, would, when applied, extinguish the bonds held by them to use their bonds as cash in payment of their bid. It is manifest that a substantial error, to the prejudice of one

of the parties, may originate in a decree distributing the proceeds of a sale under a decree of foreclosure; and no question can be successfully raised against the right to appeal from such a decree. We cannot, therefore, dismiss the present appeal upon the ground alleged.

It is then urged by the appellees that the decrees in question, having simply followed the directions of previous decrees, originated no error, and that the only alternative is to affirm them. But the decrees involved in this appeal now under consideration are dependent upon the decree of foreclosure and sale; and the latter having been reversed, the decrees in question are left without support, and fall of themselves, by reason of that reversal, vitiated by the common error. As they are already annulled by operation of law, the subject-matter of the appeal is withdrawn, and the appeal itself must be dismissed for lack of anything on which it can operate.

The other decree involved in this appeal was entered Nov. 19, 1877, and is a personal judgment in favor of Huidekoper, Shannon, and Dennison, as trustees for themselves and other bondholders, for the deficiency arising from the excess of the amount found due by the decree of foreclosure and sale over the credit, given of the proceeds of the sale of the mortgaged property. This deficiency is ascertained to be $1,823,573.84, and execution is awarded therefor, against the railroad company, in favor of the above-named parties.

It would seem that the reasons given for dismissing the appeal as to the other decrees apply with equal force to the one now under consideration; and such, we think, would be the rule in ordinary cases; for the existence and amount of the deficiency must usually be dependent on the findings of the decree of foreclosure and sale, as to the amount due, and the extent to which that may have been reduced by the proceeds of the sale. But the present judgment is not in the customary form. Instead of finding the amount due to the complainants in whose behalf the sale was decreed, the judgment is rendered in favor of Huidekoper, Shannon, and Dennison, as trustees for the bondholders. They claim not to have been parties to the suit at the time the decree of foreclosure and sale was rendered; and as we do not consider it proper to investigate or pass upon

that claim in the present proceeding, we entertain the appeal, as to the deficiency decree, and reverse it, for the error which required the reversal of the decree of foreclosure and sale.

The argument of the present appeal, on both sides, seems to have been influenced by the consideration that it possibly involved a present adjudication of the effect its determination might have upon the rights of the purchasers at the sale and the present title of the property sold. But no question of that character is involved. Whether the purchasers were parties to the litigation, either by name upon the record or in interest and by representation, so as to be affected by the error in the proceeding for which the decrees have been reversed, or whether they or their assigns are protected by the principle and policy that uphold the titles of *bona fide* purchasers without notice, at judicial sales, and any other that may be mooted touching the point, are questions which do not arise upon the present appeal, and are left for further consideration in case they should be presented in a subsequent stage of this or by virtue of proceedings in some other suit.

For the reasons announced, it is, therefore, ordered that the appeal from the decrees of April 12, 1877, and of April 16, 1877, respectively, be dismissed, upon the ground that the decrees were vacated by the reversal of the prior decree of foreclosure and sale, rendered Dec. 5, 1876, and that the decree entered Nov. 19, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison, trustees, be reversed, and that the cause be remanded with directions to proceed therein as may be just and equitable.

The appellants are entitled to their costs on this appeal.

EQUATOR COMPANY v. HALL.

1. When judgment is rendered against either party to an action for the recovery of real property in Colorado, he is, without showing cause therefor, entitled, by a provision of the Code of Civil Procedure of the State, to one new trial.
2. That provision is binding on the courts of the United States sitting in Colorado.

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

This was an action brought by George W. Hall and Charles H. Marshall, against the Equator Mining and Smelting Company, to recover possession of a silver mine in Colorado. At the December Term, 1878, of the court below the case was, by agreement of the parties, submitted to the judge, who rendered a finding and a judgment in favor of the defendant. Thereupon the plaintiffs paid the costs of the suit up to that time, and under the provisions of sect. 254 of the Code of Civil Procedure of that State obtained a new trial without showing any cause. At the May Term, 1879, the case was submitted to a jury, and a verdict returned for the plaintiffs, on which judgment was entered on the 15th of July. The defendant then, without showing cause, moved for a new trial, which was claimed to be a matter of right under the same section. The judges were divided in opinion as to whether this new trial should be granted, and they certified that question to this court.

The section of the code of Colorado under which this motion was made is as follows: —

"Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and, upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case; but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is

vacated, the cause shall stand for trial the same as though it had never been tried."

Mr. Henry M. Teller for the plaintiff in error.

There was no opposing counsel.

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

Two questions are presented for our consideration in reviewing the action of the Circuit Court on this motion for a new trial. The first is, whether the Circuit Court of the United States sitting in Colorado is to be governed by the statute of that State on this subject.

At the common law, the fiction in an action of ejectment, by which John Doe and Richard Roe were made respectively the plaintiff and the defendant, permitted any number of trials after verdict and judgment between the same parties in interest on the same question of title, by the use of other fictitious names, and other allegations of demise, entry, and ouster.

The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party and upon the same title, that court would enjoin the unsuccessful party from further disturbance of the one who had recovered these judgments.

This form of action, with its inconclusive results, would be the law in Colorado for the recovery of the possession of real estate, but for the statutes of that State, of which sect. 254 of the Code of Civil Procedure is a part. The framers of those statutes, in abolishing the old common-law action of ejectment with its accompanying evils, and in substituting an action between the real parties, plaintiff and defendant, found it necessary to provide a rule on the subject of new trials in actions concerning the titles of land.

A title to real estate has, under the traditions of the common law, been held, in all the States where that law prevailed, to be too important, we might almost say too sacred, to be concluded forever by the result of one action between the contesting parties. Hence, those States which, by abolishing the fictions of the action at the common law, and substituting a direct suit

between the parties actually claiming under conflicting titles, which, according to the nature of this new proceeding, would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each State legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the States, but it is believed that almost all of them which have abolished the common-law action have made provision for one or more new trials as a matter of right.

We are of opinion that when an action of ejectment is tried in a Circuit Court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the State statute. There is no reason why the Federal court should disregard one of the rules by which the State legislature has guarded the transfer of the possession and title to real estate within its jurisdiction. *Miles* v. *Caldwell*, 2 Wall. 35.

As regards the construction of the statute under consideration, which is the second question, while it is not clear that the language of the statute, that "neither party shall have but one new trial in any case as of right without showing cause," gives to each party at least one new trial if he demands it, we are of opinion, on reflection, that such was the intention of the framers of the code. This conclusion is fortified by a comparison of the previous enactments of the Colorado legislature with this its last expression on the subject. By the previous law it was very clear that only one new trial was demandable as a matter of right in an action of ejectment, and the change of language adopted in the code of 1877 is indicative of intentional change in that respect, — a change which can only mean that each party against whom in turn a verdict may be rendered shall have a right to one new trial. Apart from this absolute right of the parties, the court may grant another trial upon reasonable grounds being shown.

These views require that the question whether the defendant is entitled to have the judgment of the court below vacated and a new trial in said cause without further showing, should

be answered in the affirmative, and dispense with the necessity of examining into the assignment of errors growing out of the trial before the jury.

Judgment reversed with directions to grant a new trial.

COTTON-TIE COMPANY *v.* SIMMONS.

The owner of patents for improvements in metallic cotton-bale ties, each tie consisting of a buckle and a band, granted no license to manufacture the ties, but supplied the market with them, the words, "Licensed to use once only," being stamped in the metal of the buckle. After the bands had been severed at the cotton-mill, A., who bought them and the buckles as scrap-iron, rolled and straightened the pieces of the bands, and riveted together their ends. He then cut them into proper lengths and sold them with the buckles, to be used as ties, nothing having been done to the buckles. *Held*, that A. thereby infringed the patents.

Quære, Would A.'s sale of the buckle, apart from the band, be an infringement of the patents.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The facts are stated in the opinion of the court.

Mr. Samuel A. Duncan for the appellants.

Mr. Benjamin F. Thurston for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the plaintiffs in a suit in equity from a decree dismissing the bill of complaint. The suit was brought for the infringement of three several letters-patent, — No. 19,490, granted to Frederic Cook, March 2, 1858, for an "improvement in metallic ties for cotton-bales," and extended for seven years from March 2, 1872; reissued letters-patent No. 5333, granted to James J. McComb, as assignee of George Brodie, March 25, 1873, for an "improvement in cotton-bale ties" (the original patent having been granted to Brodie, as inventor, March 22, 1859, and reissued to him April 27, 1869, and extended for seven years from March 22, 1873); and No. 31,252, granted to J. J. McComb, Jan. 29, 1861, for an "improvement in iron

ties for cotton-bales," and extended for seven years from Jan. 29, 1875. They are severally known as the Cook, the Brodie, and the McComb patents. The Cook patent expired March 2, 1879; the Brodie patent, March 22, 1880; and the McComb patent, Jan. 29, 1882. The plaintiffs are the American Cotton-Tie Company, Limited, a British corporation; James J. McComb, administrator of Mary F. McComb, deceased; and the said James J. McComb, Charles G. Johnsen, and Emerson Foote, each in his own behalf and as a copartner in a firm called the American Cotton-Tie Company. The defendants are Simeon W. Simmons and two other persons, doing business as the Providence Cotton-Tie Company. The Cook patent was assigned to McComb March 21, 1872. The Brodie reissue of 1869, with all rights to reissue, renewal, and extension, was assigned to McComb March 19, 1873. On the 22d of June, 1874, McComb assigned to himself, Johnsen, and Foote, who composed the firm called the American Cotton-Tie Company, the Cook patent as extended, and the Brodie patent as reissued in 1869 and as extended. Mary F. McComb became, in 1861, the owner of the McComb patent. She died in 1874, intestate, and McComb was appointed her administrator. On the 1st of March, 1876, the firm called the American Cotton-Tie Company assigned to the corporation called the American Cotton-Tie Company, Limited, the Cook patent as extended, and the Brodie patent as extended and as reissued in 1873. On the same day McComb, individually and as administrator, assigned to the said corporation the McComb patent and its extension.

The bill is in the usual form, and was filed in November, 1876. It alleges that the defendants have made, used, and sold to others to be used, the patented inventions, and, also, metallic ties for cotton bales containing the patented inventions. No defence affecting the validity of the patents sued on is set up in the answer. The only defence pleaded or made is as to infringement.

The corporation plaintiff, since it acquired title to the three patents in March, 1876, has carried on the business of making cotton-bale ties under the patents. The form of tie it has principally made is the form of the McComb patent, which is called the "arrow tie," from the shape of the five-sided hole

cut in the plate of the buckle. It has not granted any licenses to make the ties, but has itself supplied the demand for them. The tie consists of a buckle and a band, all made of metal. The band goes around the bale, and the two ends of it are confined by means of the buckle. On each of the buckles which the corporation has made and put upon the market it has placed the words "Licensed to use once only," stamped into the body of the metal. This practice was also observed by its predecessor, the copartnership firm. The tie, consisting of buckle and band, is purchased by the person who desires to use it to confine the cotton in the bale, and is placed around the bale on the plantation or at the cotton-press. It remains on the bale until the bale reaches the cotton-mill, and the band of the tie, which is of hoop-iron, is then cut. The buckle and the band, thus free, become scrap-iron, and are sold as such. The hoop is too short for the length required for baling, if it were to be mended by lapping and riveting the two ends at the place of severance, and to bale with it requires that there should be a free end which may be confined at the buckle in the process of baling. The defendantsb uy the buckles and severed hoops at the cotton-mills, as scrap-iron, the hoops, when bought, being in bundles, bent, and being pieces of unequal lengths, some cut at one distance from the buckle, and some at another. The defendants straighten the old pieces of hoop and roll them by cold rolling, and punch the ends with holes, and rivet the pieces together, and form a band by cutting it to the proper length, which band, with the buckle accompanying it, makes a tie ready for use. In using the tie one end of the band is attached to one end of the buckle by a loop in that end of the band, and then the band is passed around the bale, and its free end is slipped, by a loop made in it, through a slit in the buckle, around the other end of the buckle, while the bale is under pressure. When the pressure is removed the expansive force of the compressed cotton holds the looped ends of the bands in place in the buckle, the looped ends being confined between the bale and the body of the band. The use of the arrow tie has been very extensive. The defendants sell to others to be used the ties which they so prepare, and do not themselves bale cotton with them. Baled cotton is sold in the

United States without tare, that is, the iron of the buckle and the hoop is weighed with the cotton and the bagging, and the whole is sold by weight at the price of the cotton per pound. The scrap-iron consisting of the buckles and cut hoops is sold at one cent and a quarter per pound, while the corporation sells its ties at six cents per pound.

The specification of the Cook patent describes a buckle with a slot cut through one of its end bars, so that the end of the band may be slipped through sidewise instead of being pushed through endwise. The third claim is to "the herein-described 'slot,' cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise."

The specification of the Brodie reissue states that his invention "relates to the combination with open-slot ties of metallic bands having their ends free, and held in position by the expansion of the bale." Some of the drawings show an open slotted link or buckle in connection with a band, and the specification states that the ends of the band are "turned under the link and held in position by the pressure exerted by the expansion of the bale." It adds: "In the latter mode of use the slack may be readily taken up by forming the loop in the iron at the moment of making the fastening, and passing the end thus looped through the opening in the side of the link. The band is thus slipped sidewise through the opening into the slot instead of thrusting it through endwise." The third, fourth, and fifth claims of the Brodie reissue are in these words: "3. The combination of an open slot for introducing the band sidewise with a link having a single rectangular opening for holding both ends of a metallic band, and the band. 4. An open slotted link, when combined with metallic bands, the ends of which are turned under the link and held in position by the expansion of the bale. 5. The method of baling cotton with metallic bands, and taking up the slack of the band by bending the same at any desired point into the form of a loop, and passing such loop sidewise through an open slit into the slot intended to receive it and over the bar of the clasp intended to hold it."

The specification of the McComb patent states that the nature of his invention "consists in the use of a peculiarly shaped buckle as a fastening or tie for the ends of the iron hoops." It says that the "buckle is a piece of wrought-iron or other metallic substance, about the eighth of an inch thick, an inch and three-quarters wide, and two inches long (the size being modified to suit the width of the hoop used), with an oblong hole or aperture cut or punched through the centre;" that the five sides of the plate of the buckle are equal and parallel; and that the two largest of the five sides of the oblong hole are of equal length, and are equal in length to the width of the hoop. The drawings show the two sides forming the arrow part as of equal length. The slit or slot is cut through one of the sides of the plate opposite one of the two longest sides of the central hole, so that one of the loops of the hoop stretches across and covers the slit. The claim of the patent is this: "Forming a link or tie with an oblong aperture, one end of which is arrow-shaped, or rather presents two sides of an equilateral triangle, the design of this arrow-shaped end being not only to force the loop or bend of the hoop over the slot, which it does with unerring precision when the bale expands after being released from the press, but, also, to secure an equal bearing upon the separated parts of the slotted side of the tie."

A buckle without a band will not confine a bale of cotton. Although the defendants use a second time buckles originally made by those owning the patents and put by them on the market, they do not use a second time the original bands in the condition in which those bands were originally put forth with such buckles. They use bands made by piecing together severed pieces of the old bands. The band in a condition fit for use with the buckle is an element in the third claim of the Brodie reissue. That claim is for a combination of the open slot arranged to allow of the sidewise introduction of the band, the link or buckle with the single rectangular opening arranged so as to hold both ends of the band, and the band. The old buckle which the defendants sell has the slot of Cook, and the slot and rectangular opening of Brodie, and the slot and arrow-shaped opening of McComb. Whatever right the defendants could acquire to the use of the old buckle,

they acquired no right to combine it with a substantially new band, to make a cotton-bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton-mill because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that. The case is not like putting new cutters into a planing-machine in place of those worn out by use, as in *Wilson* v. *Simpson*, 9 How. 109. The principle of that case was, that temporary parts wearing out in a machine might be replaced to preserve the machine, in accordance with the intention of the vendor, without amounting to a reconstruction of the machine.

The defendants contend that they do not combine the band with the buckle, and do not infringe the third claim of the Cook patent, or the third, fourth, and fifth claims of the Brodie reissue, or the claim of the McComb patent, because they do not bale cotton with the tie. But they participate in combining the open slot, the buckle, and the band, the whole being so arranged that the ends of the band can be turned under the buckle and held in position by the expansion of the bale, and that the slack of the band can be taken up by bending the band into the form of a loop, and passing the loop sidewise through the open slit into the hole and over the holding-bar of the plate. They sell the tie having the capacity of use in the manner described, and intended to be so used. Only the bale of cotton and the press are needed to produce the result set forth in the specifications of the patents, and without the bale of cotton and the press the tie would not be made or sold. The slot through the end bar of the buckle in the Cook patent is of no practical use apart from the band and the bale of cotton, and the same thing is true of the link of the McComb patent with its arrow-shaped aperture; and although a person

who merely makes and sells the buckle or link in each case may be liable for infringing those patents, he is so liable only as he is regarded as doing what he does with the purpose of having the buckle or link combined with a band and used to bale cotton. Because the defendants prepare and sell the arrow tie, composed of the buckle or link and the band, intending to have it used to bale cotton and to produce the results set forth in the Cook and the McComb patents, they infringe those patents. *Saxe* v. *Hammond*, 1 Holmes, 456; *Bowker* v. *Dows*, 3 Banning & Arden, 518. We do not decide that they are liable as infringers of either of the three patents merely because they have sold the buckle considered apart from the band or from the entire structure as a tie.

We are, therefore, of opinion that the defendants infringed the third claim of the Cook patent, the third, fourth, and fifth claims of the Brodie reissue, and the claim of the McComb patent.

Decree reversed, with costs, with directions to enter a decree for the plaintiffs, in respect to those claims, for an account of profits and damages, as prayed in the bill, and to take such further proceedings in the suit as may be in conformity with the opinion of this court.

BROWN v. COLORADO.

The State of Colorado brought ejectment in one of her courts, and offered in evidence the defendant's deed to the Territory of Colorado for the demanded premises. He objected to its introduction, upon the ground that at its date "the Territory had no right to take a conveyance of real estate without the consent of the government of the United States." The objection was overruled. *Held*, that the judgment rendered for the State is not subject to review here, it not appearing that any Federal question was either raised and passed upon or necessarily involved.

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

The case is stated in the opinion of the court.

Mr. Charles H. Toll, Attorney-General of Colorado, and *Mr. Henry M. Teller* in support of the motion.

Mr. Charles Case and *Mr. James H. Brown* in opposition thereto.

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

This is a writ of error to reverse the judgment of the Supreme Court of Colorado, rendered in a suit in ejectment brought by the State against Brown, the plaintiff in error. It is not claimed that any question which can give us jurisdiction was directly raised by the pleadings, but on the trial in the District Court the State, to make out its title, offered in evidence a deed from him to the Territory of Colorado. To its introduction an objection was made, on the ground, among others, "that the Territory of Colorado had no right to take a conveyance of real estate at the time of making the deed without the consent of the government of the United States." This objection was overruled and an exception taken. When the case went to the Supreme Court, one of the assignments of error was to the effect that the court erred in receiving this deed in evidence. As the judgment was affirmed, this assignment of error must have been overruled. It is claimed that on account of this the judgment is reviewable here.

To give us jurisdiction under sect. 709 of the Revised Statutes, it must in some way appear from the return which is made to the writ of error that "the validity of a treaty or statute of, or an authority exercised under, the United States" has been drawn in question, and the decision is against their validity; or that "the validity of a statute of, or an authority exercised under, any State" has been drawn in question "on the ground of their being repugnant to the Constitution, treaties, or laws of the United States," and the decision is in favor of their validity; or that some "title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity" so claimed.

It certainly does not appear that in this case the court below

decided against the validity of any treaty, statute, or authority of the United States, or in favor of any statute or authority of a State claimed to be repugnant to the Constitution, treaties, or laws of the United States. All the plaintiff in error insisted upon below was that the Territory of Colorado could not take a conveyance of real property without the consent of the government of the United States; but whether this disability grew out of a statute of the United States, or of the Territory, is not stated. We know judicially, and so did the court below, that Congress, sect. 6 of the act of Feb. 28, 1861, c. 59, providing a temporary government for the Territory, granted to it legislative power over all rightful subjects of legislation consistent with the Constitution and that act, and that neither the Constitution nor that act contained, in express terms, any such limitation as is now contended for. The record furnishes no indication that any statute of the United States was brought to the attention of the court below, and a ruling asked upon it in connection with the objection which was made to the admissibility of the deed. No judge, in deciding upon the objection, as it was made and presented, would be likely to suppose that if he admitted the evidence he would deny the defendant any "right, title, privilege, or immunity" "set up or claimed" under a statute of the United States. Certainly, if the judgments of the courts of the States are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the court either knew or ought to have known that such a question was involved in the decision to be made. The rule was stated by Mr. Justice Miller in *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 143, thus: "The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." While Mr. Justice Story, in *Crowell* v. *Randell*, 10 Pet. 368, 398, said that it was not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it was sufficient if it appeared by clear and necessary intendment that the question must have been raised, and must have been decided in order to have

induced the judgment, he also said it was "not sufficient to show that a question might have arisen or been applicable to the case; unless it is further shown, on the record, that it did arise, and was applied by the State court to the case." Under this rule it is clear the admission of the deed did not necessarily involve any such error as will give us jurisdiction.

Neither does the record show that a decision was rendered below in favor of the validity of any law of Colorado impairing the obligation of a contract. No such question was presented by the pleadings, and the rulings do not indicate that anything of the kind was brought to the attention of the court; but if the point made here in the argument had been made below, it would not have altered the condition of the case in regard to our jurisdiction. The claim is, that the Territory of Colorado contracted with Brown to erect a capitol and other public buildings on the premises conveyed; but, if that were so, the Constitution of the State and the statutes relied on did not impair the obligation of such a contract. The most that can be said of them is, that in this way the contract was violated by the State. The question is not, whether the constitutional provisions and the statutes in question are valid, but whether, by the adoption of the Constitution by the people, and the passage of the statutes by the legislature, any condition attached to the conveyance has been broken which authorized him to revoke his deed and take possession of the property he conveyed. The decision of this question by the State court is not reviewable here. All the obligations of the original contract remain, and the State has not attempted to impair them. If the contract is all that he claims it to be, and the Constitution and statutes are just what he says they are, the most that can be contended for is that the State has refused to do what the Territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation. If we should declare the constitutional provisions and the statutes invalid as against the contract, it would not change the rights of the parties in this action. Whether valid or invalid, the plaintiff in error could not defend the action successfully, unless he was entitled to revoke his deed and re-enter upon his land, in case the Territory, or the State, delayed for an unrea-

sonable time to erect the buildings which were contemplated. If he could, the Constitution and the statutes would have no other effect than as evidence to show that the State had deliberately refused to perform.

It follows that the case presents no question which can be considered here, and the motion to dismiss is

Granted.

BACON *v.* RIVES.

1. Where the complainants are citizens of the State in a court whereof the suit was brought, and the defendant, who is the real party to the controversy, and against whom relief is sought, is a citizen of another State, his right to remove the suit to the Circuit Court of the United States cannnot be defeated upon the ground that the citizenship of another defendant who is a stranger to that controversy, and who occupies substantially the position of a mere garnishee, is the same as that of the complainants.
2. A suit upon a contract made and to be performed in another State or country, by a person who then resided there, cannot be maintained in Virginia, after the right of action thereon is barred by the laws of such State or country.
3. In the latter part of the year 1863, at the instance of A., then a resident of Texas, B., a resident of Virginia, forwarded to him money in trust to invest, pursuant to specific instructions. A., in 1865, reported that he had invested the fund in the transportation of cotton, but did not state what profits had accrued therefrom. No further report was made by him. In 1875, B., on discovering where A. was, filed a bill against him to compel a discovery and an accounting, which, upon demurrer, was dismissed upon the ground that the suit was barred by the Statute of Limitations of both States. *Held*, that in view of the case made by the bill, and of the subsisting trust, the existence of which is admitted by the demurrer, B. is entitled to a discovery of the disposition made of the money, and that the limitation does not commence running until the trust is closed, or until A., with the knowledge of B., disavowed the trust or held adversely to his claim.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

The case is stated in the opinion of the court.

Mr. William S. Royall and *Mr. Joseph Bryan* for the appellants.

Mr. Egbert R. Watson for the appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a suit in equity. The complainants are John L. Bacon and H. E. C. Baskerville, partners as Bacon & Baskerville; John Stewart, Robert Ould, Robert H. Maury, and Isaac H. Carrington, trustees for the benefit of the creditors of William H. Macfarland, deceased, by virtue of a deed dated Oct. 20, 1870; John W. Wright, sheriff of the city of Richmond, and, as such, administrator of said Macfarland, — all citizens of Virginia.

The defendants are George C. Rives, a citizen of Texas, in his own right and as administrator with the will annexed of George Rives, deceased; J. Henry Rives, a citizen of Virginia, executor of George Rives, deceased; and Alfred L. Rives, a citizen of Alabama, executor of William C. Rives, deceased.

The suit was commenced, on the 22d of July, 1875, in the Circuit Court of Albemarle County, Virginia, and was thence removed into the Circuit Court of the United States for the Western District of Virginia, upon the petition of George C. Rives, in which the defendant, Alfred L. Rives, executor of Williams C. Rives, united. In the latter court, a demurrer to the bill was interposed by George C. Rives, upon the ground that the suit was barred by the Statute of Limitations both of Texas and Virginia. The demurrer was sustained, and the bill dismissed. The complainants thereupon appealed.

The case made by the bill is, substantially, as follows: —

In the summer of the year 1863, Bacon & Baskerville, John Stewart, Robert H. Maury, William H. Macfarland, and William C. Rives, uncle of the defendant George C. Rives, sent $131,000 in "Confederate States treasury notes" — the currency, at that time, of Virginia, Louisiana, and Texas — to James H. Stevens, then in Monroe, La., with instructions to invest or expend the same in the purchase of cotton on plantations in Louisiana and Texas, to remain thereon until the civil war was ended. Of that sum Bacon & Baskerville owned $48,000, Stewart $48,000, Maury $10,000, Macfarland $5,000, and William C. Rives $20,000. Subsequently, however, Bacon & Baskerville became the owner of $80,000, and Stewart of $16,000, the interest of the other parties in the residue remaining the same as at the outset. The funds were

sent to Stevens by Bacon & Baskerville, by whom all instructions were given and negotiations conducted. The proceeds of the investment, it was understood, were to be divided among the parties in proportion to their respective interests.

About the 3d of September, 1863, Stevens died in Louisiana, *en route* to Texas, without having invested any of the funds. Shortly thereafter the complainants were notified by his widow that she held the $131,000 subject to their order. The defendant, George C. Rives, wrote to the same effect to his cousin, Alfred L. Rives, son and executor of William C. Rives. Moved by the advice and solicitation of William C. Rives, as well as by the encouraging character of certain letters written by George C. Rives to Alfred L. Rives, and exhibited to complainants, and influenced especially by the declaration of the former in his letter, that if the money was turned over to him he would act for the parties under their instructions, and save it by investing it in city property in Austin, Texas, or in property which he represented would pay well, and could be readily sold at any time, the complainants made and appointed George C. Rives their agent in the room and stead of Stevens. They consequently ordered and directed the funds in the hands of Mrs. Stevens to be paid to him, and towards the close of the year 1863, or early in 1864, he received them as agent and for the benefit of the complainants, to be invested in conformity with specific instructions given by Bacon & Baskerville, the managers and business negotiators of the enterprise, with the concurrence of the joint owners of the funds, viz.: 1. To invest them in cotton on plantations in Texas, to remain thereon until the war ended, that being the first and chief object of the whole venture. 2. If that could not be done, then to invest them in ranch property, meaning lands in Texas with cattle and horses thereon. 3. If that could not be done, then to invest them in town lots in Austin.

Nothing was heard from George C. Rives upon the subject of the proposed investment until, in response to a letter from Bacon & Baskerville, under date of Jan. 27, 1865, he wrote, under date of April 5, following, that he had invested the funds in the transportation of cotton under articles of partnership to continue during the war, and that the business was

under the management of an active partner, who gave his whole time and attention to it; but he did not state who the active partner was, nor how much of the funds he had so invested, nor what property he had purchased therewith, nor what proceeds, if any, had accrued from the investment. His departures from the instructions were not approved by the complainants, and they hoped, notwithstanding their orders had been disregarded, that a fair and honest return would be made by him. After the war ended, and after the expiration of eighteen months without any report or statement from him, Bacon & Baskerville, in November, 1866, wrote to him at Austin, Texas, asking an account of his agency, to which letter no reply was made. On the 26th of January, 1867, they again wrote to him at Austin, asking such account; but no reply to that letter was received. Complainants, consequently, "almost reached the conclusion that Rives had either died or left the country." But in March, 1875, learning accidentally that he was not only living, but for several years then past had visited Virginia each summer, they again wrote to him asking an account of his agency. No reply came to that letter. At the same time they wrote, as they had before done, to Alfred L. Rives, asking information as to George C. Rives; but no reply was received, nor were the letters written to the latter ever returned to the writers through the dead-letter office.

As soon as possible after learning the whereabouts of George C. Rives, the complainants instituted this suit, charging that his retention of the whole proceeds of the money intrusted to him, his silence for nearly ten years, and his failure to render any account, arose from an intention to defraud them out of it, or the proceeds of its investment.

The bill further shows that George Rives died in Virginia in 1874, possessed of a large estate, real and personal, in which, by his will, George C. Rives, his son, had a large interest, and that J. Henry Rives and Charles Edward Rives qualified as his executors. The complainants ask that the interest of George C. Rives in that estate, in whatever form, be attached in the hands of the executors to pay whatever may be shown to be due them. Attachments were served upon the executors, and levied upon that interest. It is also

averred that William C. Rives has died, and that Alfred L. Rives is his executor; that Macfarland died in 1873, having executed, on the 29th of October, 1870, a deed conveying all his property of every kind, in possession or in action, to Robert Ould and Isaac H. Carrington, trustees for the benefit of his creditors; and as no administration was had upon his estate, the same was committed to the defendant Wright, sheriff of the city of Richmond. It may be stated in this connection that, after the cause was removed from the State court, Charles Edward Rives, an original defendant, died, and George C. Rives became administrator *de bonis non* with the will annexed of George Rives.

The bill prays that the defendants be required to make, upon oath, full, true, and complete answers to all the allegations of the bill; and that George C. Rives be required to render a full and complete account of all his actings and doings as agent of complainants, and show what disposition or investment he made of the funds intrusted to him, and what were the proceeds of such investment; and if no investment was made according to instructions, nor any other investment of which complainants may choose to avail themselves, that he be required to pay the value of the funds intrusted to him as agent, with lawful interest thereon.

Without waiving a full answer under oath to the bill, the complainants ask that George C. Rives be required to answer the several special interrogatories embodied therein, the object of which is to obtain from him information as to whether he had received the $131,000 under an engagement, as agent, to invest it in the mode set out in the bill; whether he had so invested it or not, — if not, why not; if yes, in what kind of property he had invested, and what disposition had been made of it or of its proceeds; and whether, after the close of the war, he did not have in his possession property purchased, in whole or in part, with the proceeds of the investment; if so, of what did it consist, and what has been done with it.

There was also a prayer for such other and further relief as equity and justice required. Thus stood the suit when removed from the State court.

J. Henry Rives, a citizen of Virginia, having been made a defendant, in his capacity as one of the executors of George Rives, it is contended that the suit was not removable into the Circuit Court of the United States. This position cannot be successfully maintained. Without giving all of the reasons which may be assigned in support of the right of removal, it is sufficient to say that he and Charles Edward Rives, executors of George Rives, had no interest in the question whether the complainants have or not a cause of action against George C. Rives on account of the matters set out in the pleadings. They were neither necessary nor indispensable parties to the issue between the complainants and the principal defendant. It was of no moment to them whether the one or the other side in that controversy succeeded. It is true that the attachment which the complainants, before the removal of the suit, sued out against George C. Rives was served upon the executors, and levied upon his interest in the estate of his father. But they were made defendants, not because of any connection they had with the main controversy, but to the end that his interest in that estate might be reached and held, subject to such final decree as the complainants might obtain against him. Though made, formally, defendants, they occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties, on the respective sides of the controversy which is the foundation of the litigation, being citizens of different States, the relation of the executors to the suit was properly regarded as merely incidental, arising from the necessity of preserving the means whereby the complainants might, if successful in this suit, obtain satisfaction of their demands against George C. Rives.

The remaining question to be considered relates to the defence of the Statute of Limitations presented by the demurrer to the bill. The contention of the defendant is that the cause of action, if any, existed as far back as the close of the late civil war; that in Virginia and Texas the running of limitation was suspended by statute, in the former from some time in April, 1861, until Jan. 1, 1869, and in the latter from some time in 1861 until March 30, 1870; that by the laws of Texas two years was the limitation to suits on oral, and four years to

suits on written contracts, while the limitation in Virginia to such suits as the present one was five years; consequently, excluding from the computation of time the periods of the suspension of the statute in the respective States, the plaintiffs' cause of action was barred. The defendant further insists that the law of Texas governs by reason of that provision in the code of Virginia which declares that "upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country." Code of Va., edit. 1873, sect. 20, p. 1002.

In the view which the court takes of the case it is unnecessary now to determine whether reference must be had to the law of the State where the suit is pending, or to that of the State where the alleged contract was to be performed. We are not satisfied that the cause of action, as set out in the bill, was, at the commencement of the suit, barred by limitation as prescribed in either Texas or Virginia. The case, as now presented, discloses — not, perhaps, one of those technical trusts of which a court of equity has peculiar and exclusive jurisdiction, but yet — a trust, arising out of express agreement, under which the defendant, George C. Rives, received from the complainants certain funds, which he undertook to invest in particular kinds of property, in conformity with specific instructions given by those whom he represented. His duty, under the law, although the agreement did not in terms so declare, was, from time to time, as the circumstances required, to inform those whom he represented of his acts, and, upon completion of the trust, to render an account of all he had done in the premises; or, if he elected not to execute the trust, to surrender the property or its proceeds. He received the funds, as has been seen, in the latter part of the year 1863, or early in 1864. He undertook to invest them, if practicable, in cotton on plantations in Texas, to remain thereon until the civil war was concluded. Failing in that he was to invest in ranch property, or lands in Texas, with cattle and horses thereon; failing in the latter, he was to invest in town lots in Austin, in that State. He gave, so the bill avers, no informa-

tion whatever of his acts until the spring of 1865, when, in response to a letter from his principals, he wrote that he had invested the funds received by him in the transportation of cotton, under articles of copartnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it. Whether that arrangement involved a violation of the laws of the United States in reference to the shipment of cotton from the insurrectionary districts, does not now appear. But he withheld the name of that partner, and did not inform his principals of the result of that investment. From that time forward the defendant failed to communicate with the complainants, or any of them, as to what, if anything, had been accomplished in the execution of his trust. To letters making inquiries, and which, in the present attitude of the case, we may assume were received, no response was made.

Taking, then, the allegations of the bill to be true, as upon demurrer we must do, the existence of the trust is clearly established; it is still open, or not wholly executed; it has never been disclaimed by clear and unequivocal acts or words, brought to the notice or knowledge of the complainants or either of them; there has been no adverse holding of the original fund or of its proceeds; consequently, the possession by the defendant, George C. Rives, of the proceeds of the original fund, if invested at all, may be deemed the possession of those whom he undertook to represent. But it is suggested that while the agreement did not prescribe any period within which he was to make the investment, it was necessarily implied that it was to be performed within a reasonable time; consequently, it is argued, the statute would commence running after the lapse of such reasonable time, or from the moment when complainants were entitled to enforce an accounting. *Phillips* v. *Holman*, 26 Tex. 276. To this it may be replied that whether the trustee was derelict in duty in not making the investment within any particular period, depends upon the special facts of the case. Having regard to all the circumstances, particularly such as were connected with the disturbed condition of the country for many years after the war closed, we cannot, upon the case made by the bill, fix the date when the defendant

should, with reasonable diligence, have executed his trust, or say that there has been, upon the part of complainants, such delay as prevents them from applying to a court of equity for relief. Being called upon to execute what, consistently with the facts, as disclosed in the bill, appears to be a subsisting trust, or if it has been, in whole or in part, executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer, which relies simply upon the statutory limitation and confesses that he has kept his *cestuis que trust* in ignorance of what it was his duty to communicate. The complainants, it seems to the court, are entitled, upon well-established principles of equity, to a discovery as to the disposition, if any, which has been made of their property. Inquiry in that direction should not be cut off, since, upon the showing made, it does not clearly appear that the suit is barred by the Statute of Limitations. Unless otherwise distinctly declared by the statute prescribing fixed periods for the commencement of suits, the cause of action is not, ordinarily, deemed to have accrued against, nor limitation to commence running in favor of, the trustee of such a trust, as the bill describes, until the trust is closed, or until the trustee, with the knowledge of the *cestuis que trust*, disavows the trust, or holds adversely to their claim.

And such seems to be the doctrine of the Supreme Court of Texas, by the laws of which State, the defendants insist, this case is to be determined as to the question of limitation. *White* v. *Leavitt*, 20 Tex. 703; *Grumbles* v. *Grumbles*, 17 id. 472. In the first of these cases a recovery was sought by the plaintiff for the recovery of the value of certain goods consigned for sale to the defendants therein, and which had never been accounted for. The suit was not commenced until four years after the goods came to the hands of the consignees for sale. It was said by the court: "The proof shows that the goods were held and disposed of by White & Co. in trust for Leavitt, and there being no evidence that the trust was ever repudiated, the Statute of Limitations [two years] did not run upon the cause of action, as it has often been decided by this court."

It is also suggested that the bill concedes that the complainants were informed by defendant in the year 1865 that

he had invested the funds placed in his hands in a way not authorized by the instructions given him, and consequently, it is argued, the complainants had then a cause of action to recover such damages as they had sustained by reason of the disregard of their instructions. It may be that, upon final hearing, when the facts are fully disclosed, the court may be bound to hold the complainants estopped to complain of his departure from the instructions under which he received the funds in question. Even then, so far as can be now determined from the allegations in the bill, he would be liable to account for the proceeds, if any, of his investment "in the transportation of cotton under articles of partnership," in the same way that he would be required to account for the proceeds of investments made in conformity to his instructions. It does not appear from the bill that the defendant intended, by investing in the particular mode stated in his letter, to assume a position of hostility to his principals, or to hold the proceeds, if any, of that investment, in his own right.

As, therefore, it does not clearly or distinctly appear from the bill that the suit was barred by limitation, the demurrer should have been overruled. The facts, when fully developed, may present an altogether different case from that now disclosed. We can only consider the question of limitation in the light of the facts alleged in the bill.

Decree reversed, and cause remanded for further proceedings in conformity with this opinion.

This case was argued at the last term, before MR. JUSTICE BLATCHFORD came upon the bench, and he took no part in deciding it.

BAILEY *v.* RAILROAD COMPANY.

The court, in 22 Wall. 604, when this case was then before it, passed upon the character and effect of certain certificates therein described, which were issued by a railroad company pursuant to a resolution passed by the board of directors, Dec. 19, 1868, declaring that each stockholder was entitled to eighty per cent of his capital stock, the earnings which the company, with a view to increase its traffic, had thitherto expended in constructing and equipping its road and in purchasing property. The court adheres to its former ruling that the certificates were dividends in scrip, within the meaning of sect. 122 of the act of June 30, 1864, c. 173, as amended by the act of July 13, 1866, c. 184; but further holds that the company could show what were its earnings from Sept. 1, 1862, to Dec. 19, 1868, when the income-tax law was in force, as its earnings during any other period were not subject to the tax in question.

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

The facts are stated in the opinion of the court.

The Solicitor-General and *Mr. Richard Crowley* for the plaintiff in error.

Mr. Joseph H. Choate and *Mr. Sidney T. Fairchild* for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On Dec. 19, 1868, the New York Central Railroad Company, afterwards merged by consolidation into a new corporation, known as the New York Central and Hudson River Railroad Company, the defendant in error, adopted a preamble, resolutions, and certificate, of which the following is a copy: —

"Whereas this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company; and whereas the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period: Now, therefore, —

"*Resolved*, That a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, de-

claring that such stockholder is entitled to eighty per cent of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

"*Resolved*, That such certificates be delivered to the stockholders of this company at the Union Trust Company, in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be indorsed on the stock certificate."

The certificate issued under this authority is as follows: —

"Under a resolution of the board of directors of this company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that , being the holder of shares of the capital stock of said company, is entitled to dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof the said company has caused this certificate to be signed by its president and treasurer, this nineteenth day of December, 1868."

The resolution was carried into effect by an issue of the contemplated certificates to the amount of $23,036,000, — being eighty per cent of its authorized capital of $28,795,000; and the holders of them regularly received dividends equal to those declared and paid upon the capital stock, until the certificates were redeemed at par in the stock of the consolidated corporation, as then authorized by law. This consolidation took place in 1872.

On March 3, 1870, the proper officer of the internal revenue assessed a tax of five per cent upon the amount of these certifi-

cates, being $1,151,800, and added a penalty of $1,000, under sect. 122 of the act of June 30, 1864, c. 173. 13 Stat. 223, 284.

From this assessment the company appealed successively to the Commissioner of Internal Revenue and the Secretary of the Treasury. Upon the appeal, a decision was rendered reducing the assessment to the sum of $460,720.

This decision was based upon the ground that the issue of the certificates was a scrip dividend, within the meaning of sect. 122 of the act of 1864; but that as it had been made to appear that the earnings stated in the resolution to have been expended, accrued during the entire period of fifteen years, — from 1853 to 1868, — of which only six years were covered by the income-tax law, which first took effect in September, 1862, the tax should be apportioned *pro rata*, by remitting nine-fifteenths, and assessing it upon $9,214,400, which was assumed to be the amount of earnings during the period when they were subject to the tax. The assessment of $460,720, with a penalty of five per cent, being $23,036, and interest at the rate of one per cent per month, amounting to $64,153.48, were exacted by the collector, and paid under protest.

To recover back these sums as illegally exacted, the company brought this action against Bailey, the collector of internal revenue, who had collected them.

On the first trial of the case, the court charged that the assessment was wholly illegal and void, the certificates not being a scrip dividend within the meaning of the law, and furnishing no basis for the assessment of any tax whatever, and that consequently the verdict must be for the plaintiff. There was a verdict accordingly, and the judgment thereon was, upon a writ of error, reversed, and a new trial awarded by this court, in the decision reported in 22 Wall. 604. The second trial resulted in a verdict and judgment for the company, for $499,432.68. To reverse the judgment Bailey brought this writ of error.

The principal questions presented arise upon his exceptions to the charge to the jury, and to the refusal to give certain instructions as requested.

The substance of the charge upon the main point was, that

while the certificates constituted a scrip dividend, which justified the assessment and constituted a complete *prima facie* defence to the action, nevertheless it was competent for the plaintiff to show what amount of the earnings of the company, accruing from Sept. 1, 1862, to Dec. 19, 1868, was represented by, and included in, the certificates; and that this amount alone being subject to the tax, the plaintiff was entitled to recover all which in excess thereof had been exacted and paid. The opposing proposition of the defendant below, the request to give which as a charge to the jury was refused, was, that the certificates were conclusive upon the company of the amount of a scrip dividend subject to taxation without deduction.

The counsel for the plaintiff in error now contend that their position is established by the decision in 22 Wall. 604, to which we have already referred.

The actual and precise judgment upon the former writ of error is, however, completely satisfied by the charge of the Circuit Court now in question; for the ruling on the first trial, held to be erroneous, was that the certificates constituted no basis whatever for taxation as a scrip dividend, and were not to be admitted or considered even as a *prima facie* defence to the action. The reversal at that time did not and could not, upon the record then presented, anticipate and prejudge the question now raised, whether those certificates were conclusive as to the amount of the taxable earnings represented by them.

There is nothing in the opinion of the court then pronounced which, properly understood, requires any conclusion to the contrary.

In that opinion the nature of these certificates is described, and their character as scrip dividends defined. It is there stated that "interest certificates of the kind were issued as evidence to the stockholders that an equal amount of the earnings of the company beyond current expenses had been expended for the objects stated in the preamble of the certificates, and to show that the respective stockholders were entitled to reimbursement of such expenditure at some convenient future period, and also to show that the stockholders were entitled to dividends on the same whenever dividends were paid on the shares of the capital stock; and that the certificates were to

be paid out of the future earnings of the company, or to be converted, at the option of the company, into stock, if thereafter authorized to exercise that function.

"Such a paper, therefore, by whatever name it may be called, is, upon its face, evidence for each stockholder, to persons with whom he may have dealings, of the amount of the previous net earnings of the company; that such net earnings had been expended in constructing and equipping the railroad and in the purchase of real estate and other properties appertaining to the same, and that the holders of the certificates will be entitled to dividends whenever dividends are paid upon the capital stock."

These certificates were considered to be a dividend declared, as of profits which had been, at some previous time, earned and converted into capital by an investment in permanent improvements of the railroad, and it was as representing such earnings that they were considered the subject of a tax. Whether those profits had been earned since or before the passage of the act of Congress imposing such a tax does not appear from any recital in the certificates, and they were dealt with by the government itself upon the footing of not being taxable beyond the amount represented by them which had actually been earned after the taking effect of the law. The Treasury Department, as has already been stated, reduced the assessment to six-fifteenths of the face of the certificates, upon the hypothesis that an equal proportion of the whole amount had accrued during each of the fifteen years, since the organization of the company, in 1853; and in view of this reduction, Mr. Justice Clifford, in the opinion referred to, added: "Whether or not they are liable for the whole amount is not a question in this case."

The question having thus been left open, it is now contended by the counsel for the plaintiff in error that, by the reason and terms of the law, the certificates are taxable as a scrip dividend upon the full nominal amount thereof.

The one hundred and twenty-second section of the said act of 1864, under which the question arises, is as follows: —

"SECT. 122. *And be it further enacted*, That 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 interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends, or profits whenever the same shall be payable," &c.

It is now urged in argument that, upon the express terms of this section, the certificates in question being a declaration of a dividend as part of the earnings, profits, income, or gains of the company, are taxable upon the amount thereof without deduction; that the policy as well as the language of the act fixes the charge upon the declaration itself when made effectual as between the company and its stockholders, and, for the purposes of taxation, concludes both as to the amount subject to the tax; and that the rule is reasonable as furnishing an obvious standard and the only safe criterion for the assessment of the tax to prevent fraudulent evasions. And consequently that when such a dividend has once been declared, and ascertained to come within the description of the law as a subject of taxation, all the rest follows, and the amount declared is necessarily established as the amount to be taxed.

The soundness of this mode of interpretation, and its application to ordinary cases, may well be admitted; but it cannot be applied to every case without a careful regard to its necessary limitations.

It should be borne in mind, in the first place, that the tax provided for in this section is an annual income tax, and its subject is the interest paid and profits earned by the company for each year, and year by year; and that both by the express letter of the law, and its necessary implications, the tax is not laid on any of these funds which came into being before the time prescribed in the act. And in the ordinary execution of the law, it was contemplated that the funds to be taxed, and the tax imposed upon them, would be concurrent, as to each fiscal year; the scheme of the statute being to levy the tax upon the income for the year ending on the 31st of December next pre-

ceding the assessment; and while it would be altogether admissible to go back, for the purpose of assessing a tax upon a proper fund which had accrued during a previous year and escaped taxation, nevertheless the tax imposed would be for the omitted year. But no tax, in contemplation of the law, accrues upon the fund, except for the year in which the fund itself accrued.

It is also to be remembered that the subject-matter of the tax is the net earnings of the company for the year for which they are taxed, which have been actually realized by it, or which the law assumes to have been. We repeat here what was said by Mr. Justice Miller, speaking for the court in *Railroad Company* v. *Collector*, 100 U. S. 595, 598: "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."

It is true, indeed, that by the terms of the law the amount paid as interest on bonds is charged with a tax as part of the earnings, although there may have been no net earnings out of which to pay it; but the law proceeds upon a presumption which disregards what is merely exceptional. And we have no hesitation in saying, that in reference to a dividend declared as of earnings for the current year and paid as such to stockholders, whether in money or in scrip, no proof would be admissible, for the purpose of avoiding the tax, that no earn-

ings had in fact been made. The law conclusively assumes in such a case that a dividend declared and paid is a dividend earned.

It follows also from this view of the purpose of the law, that a fund taxed in one year, as the profits of a railroad company, used for construction or carried to the account of any fund, has been taxed once for all, and cannot, as part of the earnings of the company, be assessed a second time. The tax for the year is upon the whole amount of the net earnings, distributed and enumerated under the heads pointed out in the statute; and when the tax has been imposed and collected upon them, or any specific part of them, there is no authority to levy any further or additional tax. The profits that this year have been taxed as undivided, and invested in any corporate asset, if in the succeeding year they are embraced in a dividend declared and payable to stockholders, have already borne all the burden imposed by the law, and cannot again be subjected to an assessment for a new tax. There has been a difference of opinion upon the point whether the tax imposed by this section is upon the corporation, on account of its net profits, or upon the income of the stockholder or bondholder; although in the present case it is immaterial which of these alternatives is adopted. We are not aware, however, that it has ever been suggested until now that it might be both in succession, — one year a tax upon the income of the corporation, and the next, upon the same fund as the income of the individual. We do not think this an admissible construction.

It is necessary, in the application of these principles to the circumstances of the present case, to regard the special character of the certificates in question. It will be seen that they do not purport to be a declaration of a dividend as of the earnings of the company during the year in which the tax was assessed, or, indeed, for any particular year or series of years. The recital is that the company "has *hitherto* expended of its earnings, for the purpose of constructing and equipping its road and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company."

It was quite legitimate for the assessor to treat this as evi-

dence of an amount of earnings which had never been taxed, and make the assessment accordingly. It was equally legitimate for the Secretary of the Treasury, upon proof that the accumulation had been going on from the organization of the company, in 1853, to apportion the amount in equal proportions for each year, and to deduct nine-fifteenths thereof for the years which had elapsed before the taking effect of the act taxing incomes. And it is entirely consistent with the declaration itself to show in point of fact what was the amount of earnings accrued during the period while the income-tax act was in force which had not been assessed for taxation as profits carried to construction or other account. The declaration in the certificates could not be conclusive of anything not inconsistent with it, for an estoppel only prohibits contrary allegations. The proof admitted on the trial below did not contradict the certificates, but only served to rebut a presumption, which, as matter of law, was not conclusive. Its tendency and effect were to exact from the company the full tax upon every dollar of its earnings, which had not previously paid its proper assessment, and which, in any form, was subject to taxation, and to relieve it only to the extent to which otherwise it would have been subjected to the payment of a second tax upon the same fund. This result, and the process by which it was reached, seem to us strictly to conform both to the letter and spirit of the law governing the subject.

This conclusion disposes of the substance of the case, as it sustains the rulings of the Circuit Court upon the main question. There were other exceptions to the charge, and to the refusal of the court to give instructions asked for by the plaintiff in error; but they are either covered by what has already been said, or seem to us not necessary to be specially mentioned. A point was raised as to certain items claimed to be included in the sum for which these certificates were issued, which, in the view we have taken, becomes immaterial; for, as we have decided that the jury could only consider the earnings realized in fact during the operation of the law from 1862 to 1869, it was immaterial what items existing prior to that period were also included in the aggregate sum for which the certificates were issued. Some exception also was taken to some

comment on the part of the circuit judge as to the state of the evidence, but, in our opinion, the question which the jury had to decide was left to them fairly.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

STEAMSHIP COMPANY *v.* TUGMAN.

1. The members of a foreign corporation, when it sues or is sued in a court of the United States, are conclusively presumed to be citizens or subjects of the State or country which created it.
2. The citizenship of the parties, if it be shown by the record, need not be set out in the petition for the removal of a suit from the State court to the Circuit Court of the United States.
3. Upon the filing of the requisite petition and bond in a suit which is removable, the State court is absolutely divested of jurisdiction of such suit, and its subsequent orders are *coram non judice*, unless its jurisdiction be, in some form, actually restored.
4. A failure to file the transcript within the time prescribed by the statute does not restore that jurisdiction, and the Circuit Court must determine whether, in the absence of a complete transcript, or when one has not been filed in proper time, it will retain jurisdiction, or dismiss the suit, or remand it to the State court.
5. A party having filed his petition and bond for the removal of a suit pending in a State court, the court ruled that the suit was not removable, but should there proceed. He subsequently consented to an order requiring the issues to be heard and determined by a referee, and thenceforward, until final judgment, contested the case as well before the referee as in the courts of the State. *Held*, 1. That the jurisdiction of the State court was not thereby restored, and that his consent to the order of reference must be construed as merely denoting a preference for that mode of trial. 2. That his objection to the exercise of jurisdiction by the referee and the State court, after he had filed his petition and bond, added nothing to the legal strength of his position on the question of removal.

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

This action was commenced on the 23d of June, 1875, by Tugman, against the National Steamship Company, which his complaint alleges to be "a foreign corporation, having an office or general manager and place of business in the city of New York." The summons and complaint were served on the company's agent in New York on the succeeding day.

On the 14th of July, 1875, the company entered its appearance, and at the same time filed a petition and bond, in proper form, for the removal of the action into the proper Circuit Court of the United States. The petition alleges that the plaintiff, "at the commencement of the action, was, and ever since has been, and now is, a citizen of the State of Illinois;" that "the petitioner is a corporation created and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and has its principal offices for the transaction of its business at Liverpool, in said kingdom," where, it is further alleged, the meetings of its stockholders and directors were held, its records kept, its authorities acted, and from which the latter issued their orders. The petition also states that the company had not designated any person or persons residing in any county of New York on whom process might be served, as prescribed in the act of the legislature of that State of April 10, 1855.

The sufficiency of the bond was not questioned, but the motion that the court proceed no further in the cause was, after argument by counsel, overruled, July 21, 1875.

The company filed its answer Aug. 3, 1875. On the 17th of January, 1877, "on the consent of the parties," all the issues in the action were, by order of court, referred to Henry Nicoll, "to hear and determine the same." The parties appeared before the referee, when the company — presenting the petition, bonds, and papers, upon which the removal of the action was theretofore asked — contended that the State court was ousted of jurisdiction; that the referee had no power or authority to proceed therein; and that the action was in fact removed into, and was then pending in, the Circuit Court of the United States for the Eastern District of New York. The objection was overruled by the referee, who ordered the trial to proceed; to which decision and order the defendant's attorney duly excepted. The trial proceeded notwithstanding the company's objection.

On the 8th of June, 1877, the referee reported in favor of the plaintiff for the sum of $4,324.53. Exceptions were filed by the company; but they were overruled, and judgment entered in accordance with the report on the 27th of June, 1877.

The company appealed to the general term of the Supreme Court, where the judgment was affirmed on the nineteenth day of February, 1878. Upon appeal to the Court of Appeals of the State, the judgment of the Supreme Court was affirmed, the court saying: "In regard to the question raised upon the trial, that this court was ousted of jurisdiction by the proceedings instituted to remove the case into the United States Circuit Court, we think that the petition was defective in not showing that the defendant was an alien citizen or subject of a foreign power *at the time of the commencement* of the action, but only when the petition was signed and sworn to. The omission referred to brings the case directly within the decision in the case of *Pickner* v. *Phœnix Insurance Co.*, 65 N. Y. 195. It may also be remarked that since the order refusing to remove the case, the defendant consented to the appointment of a referee to determine the case, and submitted to his jurisdiction, by trying the action on the merits. It is at least questionable whether he has not thus waived his right to insist that a removal had been had."

The steamship company brought this writ of error.

Mr. B. C. Chetwood and *Mr. John Chetwood* for the plaintiff in error.

Mr. F. J. Fithian for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The underlying question in this case is whether, within the meaning of the Constitution and of the statutes determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from State courts, a corporation created by the laws of a foreign State may, for the purposes of suing and being sued in the courts of the Union, be treated as a "citizen" or "subject" of such foreign State.

In *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, the court, speaking by Mr. Chief Justice Taney, said, that in the previous case of *Louisville, Cincinnati, & Charleston Railroad Co.* v. *Letson*, 2 How. 497, it had been decided, upon full consideration, "that where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal

existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States." *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314; *Covington Drawbridge Co.* v. *Shepherd*, 20 id. 227; *Insurance Company* v. *Ritchie*, 5 Wall. 541; *Paul* v. *Virginia*, 8 id. 168; *Railroad Company* v. *Harris*, 12 id. 65.

To the rule, thus established by numerous decisions, the court adheres. Upon this branch of the case it is, therefore, only necessary to say that if the individual members of a corporation, created by the laws of one of the United States, are, for purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens of the State by whose laws that corporation is created and exists, it would seem to follow, logically, that the members of a corporation, created by the laws of a foreign State, should, for like purposes, be conclusively presumed to be citizens or subjects of such foreign State. Consequently, a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State.

But it is suggested that the petition for the removal of the action into the Circuit Court of the United States is radically defective in that it does not show that the National Steamship Company was a corporation of a foreign State at the commencement of the action; that the allegation, upon that point, refers only to the time when the removal was sought. If, in suits in which the jurisdiction of the courts of the United States depends upon the character of the parties, it is material, under the act of March 3, 1875, c. 137, to show the citizenship of the parties at the commencement of the action, it is sufficient to say that the averment in the original complaint, that the company is a foreign corporation, supplemented by the averment in the petition for removal, that it is a corporation created by, and existing under, the laws of the United Kingdom of Great Britain and Ireland, covers the whole period from the commencement of the action to the application for removal.

It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed is shown, affirmatively, by the record of the case. *Railway Company* v. *Ramsey*, 22 Wall. 322; *Robertson* v. *Cease*, 97 U. S. 646.

The only remaining question which need be considered is whether the jurisdiction of the State court was, in any form, restored, after the company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond, — the suit being removable under the statute, — the jurisdiction of the State court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the State court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the State court, to determine.

Nor was the jurisdiction of the State court restored when the company, subsequently, consented to the order requiring the issues to be heard and determined by a referee selected by the parties, or when it appeared and contested the case, as well before the referee as in the State courts, up to final judgment. The right of the company to have a trial in the Circuit Court of the United States became fixed upon the filing of the petition and bond. But the inferior State court having ruled that the right of removal did not exist, and that it had jurisdiction to proceed, the company was not bound to desert the case, and leave the opposite party to take judgment by default. It was

at liberty, its right to removal being ignored by the State court, to make defence in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing, in the slightest degree, its right to a trial in the court to which the action had been transferred, or without affecting, to any extent, the authority of the latter court to proceed. The consent, by the company, to a trial by referee was nothing more than an expression of its preference — being compelled to make defence in the State court — for that one of the several modes of trial permitted by the laws of the State. It is true that when the cause was taken up by the referee, as well as when heard in the Supreme Court of the State and in the Court of Appeals, the company protested that the Circuit Court of the United States alone had jurisdiction after the petition and bond for removal were filed. But no such protests were necessary, and they added nothing whatever to the legal strength of its position. When the State court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its exercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State court, after its ruling upon the point of jurisdiction had been made.

What we have said upon this subject is fully sustained by our former decisions, particularly *Railroad Company* v. *Koontz*, 104 U. S. 5; *Railroad Company* v. *Mississippi*, 102 id. 135; *Kern* v. *Huidekoper*, 103 id. 485; and *Insurance Company* v. *Dunn*, 19 Wall. 214.

The judgments herein of the Court of Appeals of New York and of the Supreme Court of New York will be reversed, and the cause remanded with directions that the latter court accept the bond, tendered by plaintiff in error, for the removal of the cause to the Circuit Court of the United States for the Eastern District of that State, and proceed no further in the cause; and it is

So ordered.

PRITCHARD *v.* NORTON.

A. and B. executed and delivered to C., in New York, a bond of indemnity, conditioned to hold harmless and fully indemnify him against all loss or damage arising from his liability on an appeal bond, which he had signed in Louisiana as surety on behalf of a certain railroad company, defendant in a judgment rendered against it in the courts of the latter State, and which, being affirmed, he was compelled to pay. By the law of New York, any written instrument, although under seal, was subject to impeachment for want of consideration; and a pre-existing liability, entered into without request, which was the sole consideration of that bond of indemnity, was insufficient. It was otherwise in Louisiana. A suit on the bond was brought in Louisiana. *Held*, 1. That the question of the validity of the bond, as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the *lex fori*, but belongs to the substance of the contract, and must be determined by the law of the seat of the obligation. 2. In every forum a contract is governed by the law with a view to which it is made, because, by the consent of the parties, that law becomes a part of their agreement; and it is, therefore, to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated. 3. The obligation of the bond of indemnity was either to place funds in the hands of the obligee, wherewith to discharge his liability when it became fixed by judgment, or to refund to him his necessary advances in discharging it, in the place where his liability was legally solvable; and as this obligation could only be fulfilled in Louisiana, it must be governed by the law of that State as the *lex loci solutionis*.

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

This action was brought by Eliza D. Pritchard, a citizen of Louisiana, executrix of Richard Pritchard, deceased, against Norton, a citizen of New York, in the court below, upon a writing obligatory, of which the following is a copy: —

"STATE OF NEW YORK,

"*County of New York.*

"Know all men by these presents, that we, Henry S. McComb, of Wilmington, State of Delaware, and Ex Norton, of the city of New York, State of New York, are held and firmly bound, jointly and severally, unto Richard Pritchard, of New Orleans, his executors, administrators, and assigns, in the sum of fifty-five thousand ($55,000) dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated

this thirtieth day of June, A.D. eighteen hundred and seventy-four.

"Whereas the aforesaid Richard Pritchard has signed an appeal bond as one of the sureties thereon, jointly and severally, on behalf of the defendant, appellant in the suit of J. P. Harrison, Jr. *v.* The New Orleans, Jackson, and Great Northern Railroad Co., No. 9261 on the docket of the Seventh District Court for the Parish of Orleans:

"Now, the condition of the above obligation is such that if the aforesaid obligors shall hold harmless and fully indemnify the said Richard Pritchard against all loss or damage arising from his liability as surety on the said appeal bond, then this obligation shall be null and void; otherwise, shall remain in full force and effect.

"H. S. MCCOMB. [L. S.]
"EX NORTON. [L. S.]"

The appeal bond mentioned in the bond was executed.

A judgment was rendered on that appeal in the Supreme Court of Louisiana, May 30, 1876, against the railroad company, in satisfaction of which Pritchard became liable to pay, and did pay, the amount, to recover which this action was brought against Norton. The condition of this appeal bond was that the company "shall prosecute its said appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said Pritchard *et al.*, sureties, shall be liable in its place."

The defendant set up, by way of defence, that the bond sued on was executed and delivered by him to Pritchard in the State of New York, and without any consideration therefor, and that by the laws of that State it was void, by reason thereof.

There was evidence on the trial tending to prove that the appeal bond was not signed by Pritchard at the instance or request of McComb or Norton, and that there was no consideration for their signing and executing the bond of indemnity passing at the time, and that the latter was executed and delivered in New York. There was also put in evidence the following provisions of the Revised Statutes of that State, 2 Rev. Stat. 406: —

"SECT. 77. In every action upon a sealed instrument, and when a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed.

"SECT. 78. The defence allowed by the last section shall not be made unless the defendant shall have pleaded the same, or shall have given notice thereof at the time of pleading the general issue, or some other plea denying the contract on which the action is brought."

At the request of the defendant the Circuit Court charged the jury that the indemnifying bond, in respect to its validity and the consideration requisite to support it, was to be governed by the law of New York, and not of Louisiana; and that if they believed from the evidence that the appeal bond signed by Richard Pritchard as surety was not signed by him at the instance or request of McComb and Norton, or either of them, and that no consideration passed between Pritchard and McComb and Norton for the signing and execution of the indemnifying bond by them, then that the bond was void for want and absence of any consideration valid in law to sustain it, and no recovery could be had upon it.

The plaintiff requested the court to charge the jury that if they found from the evidence that the consideration for the indemnifying bond was the obligation contracted by Pritchard as surety on the appeal bond, and that the object of the indemnifying bond was to hold harmless and indemnify Pritchard from loss or damage by reason of or growing out of said appeal bond, then that the consideration for said indemnifying bond was good and valid, and is competent to support the action upon the bond for the recovery of any such loss or damage sustained by Pritchard. This request the court refused. Exceptions were duly taken to these rulings, which the plaintiff now assigns for error, there having been a judgment for the defendant, which she seeks to reverse.

Mr. Cephas Brainerd and *Mr. George H. Bates* in support of the judgment below.

As the bond was executed and delivered in New York, by a resident of that State, and no place of payment is specified in

it, all questions which relate to its construction, validity, and effect must be determined by the law of New York. Story, Contracts, sect. 653; Parsons, Contracts (5th ed.), vol. ii. pp. 570, 571; Addison, Contracts, 861; Story, Conflict of Laws (4th ed.), sect. 242; Wharton, Conflict of Laws (2d ed.), sect. 454, and cases cited; Phill. Int. Law, vol. iv. p. 616; Savigny (Guthrie's 2d ed.), 205, 227, 229; *Scudder* v. *Union National Bank*, 91 U. S. 406; *King* v. *Harman's Heirs*, 6 La. 607.

Even when a contract is by its terms to be performed partly in one State and partly in another, it has been held proper to construe it according to the law of the place where it was made. *Morgan* v. *N. O., M., & T. Railroad Co.*, 2 Woods, 244.

Indeed, it is the undisputed rule that the domicile of the debtor supplies the local law applicable to a contract, except where it *definitely* fixes the place of performance; or where the obligation arises in connection with a continuous business; or where the debtor executes a contract at a place detached from his domicile, under such circumstances as lead to the inference that in such place it is to be performed. Wharton, Conflict of Laws (2d ed.), sect. 426.

None of these exceptions are applicable to the present case, and it therefore falls under the general rule.

The contention of the plaintiff rests upon the assumption that, because the contract was to indemnify Pritchard against loss as a surety upon a bond executed in Louisiana, where he lived, and where, by reason of the affirmance of the judgment mentioned in the bond, his liability was ultimately determined, that State is therefore the place of performance, to such an extent as that the obligations and rights of the respective parties to the instrument on which this action is brought are to be measured by her laws. No authority can, it is believed, be cited in conflict with the doctrine that, where no place of payment is nominated in a bond of indemnity, — a bond which is neither more nor less than a contract for the payment of a sum of money in a certain contingency, — the *lex loci contractus* applies, and not the law governing the contract of the person whom the obligor engages to indemnify.

Counsel then contended that, by the law of New York, the bond sued on is, in view of the undisputed facts of the case, void for want of consideration.

Mr. Henry C. Miller, contra.

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

It is claimed on behalf of the plaintiff that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, art. 1893–1960, and the decisions of the Supreme Court of that State. *Flood* v. *Thomas*, 5 Mart. N. S. (La.) 560; *N. O. Gas Co.* v. *Paulding*, 12 Rob. (La.) 378; *N. O. & Carrollton Railroad Co.* v. *Chapman*, 8 La. Ann. 97; *Keane* v. *Goldsmith, Haber, & Co.*, 12 id. 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee, when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

The single question presented by the record, therefore, is whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous.

The argument in support of the judgment is simple, and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*,

must apply to determine not only the form of the contract, but also its validity.

On the other hand, the application of the law of Louisiana may be considered in two aspects: as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws; and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

It will be convenient to consider the applicability of the law of Louisiana, first, as the *lex fori*, and then as the *lex loci solutionis*.

1. The *lex fori*.

The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as should a tribunal of the State of Louisiana according to her laws; so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement; and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory.

This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do; but, in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter the foreign law is rejected; but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the sub-

stance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract.

The rule deduced by Mr. Wharton, in his Conflict of Laws, as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by Mr. Justice Hunt in *Scudder* v. *Union National Bank*, 91 U. S. 406, is, that "Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws. And this conclusion is obviously just; for whatever cannot, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality.

Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims is valid at all, or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Wharton, Conflict of Laws, sects. 735, 736. Upon that point Judge Kent, in *Lodge* v. *Phelps*, 1 Johns. (N. Y.) Cas. 139, said: "If the defendant has any defence authorized by the law of Connecticut, let him show it, and he will be heard in one form of action as well as in the other."

It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance going to the merits, and therefore determinable by the law of the contract. That is illustrated in the application of the defence arising upon the Statute of Limitations. In the courts of England and America, that

defence is governed by the law of the forum, as being a matter of mere procedure; while in continental Europe the defence of prescription is regarded as going to the substance of the contract, and therefore as governed by the law of the seat of the obligation. "According to the true doctrine," says Savigny, "the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed, in the case of prescription, by the fact that the various grounds on which it rests stand in connection with the substance of the obligation itself." Private Inter. Law, by Guthrie, 201. In this view Westlake concurs. Private Inter. Law (ed. 1858), sect. 250. He puts it, together with the case of a merger in another cause of action, the occurrence of which will be determined by the law of the former cause, *Bryans* v. *Dunseth*, 1 Mart. N. S. (La.) 412, as equal instances of the liability to termination inherent by the *lex contractus*. But notwithstanding the contrary doctrine of the courts of England and this country, when the Statute of Limitations of a particular country not only bars the right of action, but extinguishes the claim or title itself, *ipso facto*, and declares it a nullity, after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held, as it was considered by Mr. Justice Story, to be an extinguishment of the debt, wherever an attempt might be made to enforce it. Conflict of Laws, sect. 582. That rule, as he says, has in its support the direct authority of this court in *Shelby* v. *Guy*, 11 Wheat. 361–371; its correctness was recognized by Chief Justice Tindal in *Huber* v. *Steiner*, 2 Bing. N. C. 202, 211; and it is spoken of by Lord Brougham in *Don* v. *Lippmann*, 5 Cl. & Fin. 1, 16, as "the excellent distinction taken by Mr. Justice Story." *Walworth* v. *Routh*, 14 La. Ann. 205. The same principle was applied by the Supreme Court of Ohio in the case of the *P. C. & St. L. Railway Co.* v. *Hine's Admx.*, 25 Ohio St. 629, where it was held, that under the act which requires compensation for causing death by wrongful act, neglect, or default, and gives a right of

action, provided such action shall be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy. *Bonte* v. *Taylor*, 24 id. 628.

The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a State of any law impairing the obligation of contracts. For it has been uniformly held that "any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." *McCracken* v. *Hayward*, 2 How. 608, 612; Cooley, Const. Lim. 285.

Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defence is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim. 362–369.

The general rule, as stated by Story, is that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated. Conflict of Laws, sect. 331. Thus infancy, if a valid defence by the *lex loci contractus*, will be a valid defence everywhere. *Thompson* v. *Ketcham*, 8 Johns. (N. Y.) 189; *Male* v. *Roberts*, 3 Esp. 163. A tender and refusal, good by the same law, either as a full discharge or as a present fulfilment of the contract, will be respected everywhere. *Warder* v. *Arell*, 2 Wash. (Va.) 282. Payment in paper-money bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere. 1 Brown, Ch. 376; *Searight* v. *Calbraith*,

4 Dall. 325; *Bartsch* v. *Atwater*, 1 Conn. 409. And, on the other hand, where a payment by negotiable bills or notes is, by the *lex loci*, held to be conditional payment only, it will be so held even in States where such payment under the domestic law would be held absolute. So, if by the law of the place of a contract equitable defences are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*. *Evans* v. *Gray*, 12 Mart. (La.) 475; *Ory* v. *Winter*, 4 Mart. N. S. (La.) 277; *Chartres* v. *Cairnes*, id. 1; Story, Conflict of Laws, sect. 332.

On the other hand, the law of the forum determines the form of the action, as whether it shall be assumpsit, covenant, or debt. *Warren* v. *Lynch*, 5 Johns. (N. Y.) 239; *Andrews* v. *Herriot*, 4 Cow. (N. Y.) 508; *Trasher* v. *Everhart*, 3 Gill & J. (Md.) 234; *Adams* v. *Kers*, 1 Bos. & Pul. 360; *Bank of the United States* v. *Donally*, 8 Pet. 361; *Douglas* v. *Oldham*, 6 N. H. 150. In *Le Roy* v. *Beard*, 8 How. 451, where it was held that assumpsit and not covenant was the proper form of action brought in New York upon a covenant executed and to be performed in Wisconsin, and by its laws sealed as a deed, but which in the former was not regarded as sealed, it was said by this court, that it was so decided "without impairing at all the principle, that in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern." It regulates all process, both mesne and final. *Ogden* v. *Saunders*, 12 Wheat. 213; *Mason* v. *Haile*, id. 370; *Beers* v. *Haughton*, 9 Pet. 329; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535. It also may admit, as a part of its domestic procedure, a set-off or compensation of distinct causes of action between the parties to the suit, though not admissible by the law of the place of the contract. Story, Conflict of Laws, sect. 574; *Gibbs* v. *Howard*, 2 N. H. 296; *Ruggles* v. *Keeler*, 3 Johns. (N. Y.) 263. But this is not to be confounded, as it was in the case of *Second National Bank of Cincinnati* v. *Hemingray*, 31 Ohio St. 168, with that of a limited negotiability, by which the right of set-off between the original parties is preserved as part of the law of the contract, notwithstanding an assignment. The rules of

evidence are also supplied by the law of the forum. *Wilcox* v. *Hunt*, 13 Pet. 378; *Yates* v. *Thomson*, 3 Cl. & Fin. 544; *Bain* v. *Whitehaven, &c. Railway Co.*, 3 H. of L. Cas. 1; *Don* v. *Lippmann*, 5 Cl. & Fin. 1. In *Yates* v. *Thomson*, *supra*, it was decided by the House of Lords that in a suit in a Scotch court, to adjudge the succession to personalty of a decedent domiciled in England, where it was admitted that the English law governed the title, nevertheless it was proper to receive in evidence, as against a will of the decedent, duly probated in England, a second will which had not been proved there, and was not receivable in English courts as competent evidence, because such a paper according to Scottish law was admissible. In *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304, it was held that if the law of the place, where a contract signed only by the carrier is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought. In a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement, different from that imputed by law, would be received in defence, although by the law of the latter State no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer* v. *Cheseborough*, 36 Conn. 39. And upon the same principle it has been held that a contract, valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the Statute of Frauds prevails, unless it is put in writing. *Leroux* v. *Brown*, 12 C. B. 801. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, as was the case of *Scudder* v. *Union National Bank*, 91 U. S. 406, because the *form* of the contract is regulated by the law of the place of its celebration, and the *evidence* of it by that of the forum.

Williams v. *Haines*, 27 Iowa, 251, was an action upon a note

executed in Maryland, and, so far as appears from the report, payable there, where the parties thereto then resided, and which was a sealed instrument, according to the laws of that State, in support of which those laws conclusively presumed a valid consideration. By the laws of Iowa, to such an instrument the want of consideration was allowed to be proved as a defence. It was held by the Supreme Court of that State, in an opinion delivered by Chief Justice Dillon, that the law of Iowa related to the remedy merely, without impairing the obligation of the contract, and, as the *lex fori*, must govern the case. He said: "Respecting what shall be good defences to actions in this State, its courts must administer its own laws and not those of other States. The common-law rules do not so inhere in the contract as to have the portable quality ascribed to them by the plaintiff's counsel, much less can they operate to override the plain declaration of the legislative will." The point of this decision is incorporated by Mr. Wharton into the text of his Treatise on the Conflict of Laws, sect. 788, and the case itself is referred to in support of it. He deduces the same conclusion from those cases, already referred to, which declare that assumpsit is the only form of action that can be brought upon an instrument which is not under seal, according to the laws of the forum, although by the law of the place where it was executed, or was to be performed, it would be regarded as under seal, in which debt or covenant would lie, on the ground that a plea of want or failure of consideration is recognized as a defence in all actions of assumpsit. Wharton, Conflict of Laws, sect. 747.

If the proposition be sound, its converse is equally so; and the law of the place where a suit may happen to be brought may forbid the impeachment of a contract, for want of a valid consideration, which, by the law of the place of the contract, might be declared invalid on that account.

We cannot, however, accept this conclusion. The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented

in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

On this point, what was said in *The Gaetano & Maria*, 7 P. D. 137, is pertinent. In that case the question was whether the English law, which was the law of the forum, or the Italian law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. Lord Justice Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as —

2. The *lex loci solutionis*.

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, — "The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr. 1077, 1078. "The law of the place," he said, "can never be the rule where the transaction is entered into with an *express* view to the law of another country, as the rule by which it is to be governed." And in *Lloyd* v. *Guibert*, Law Rep. 1 Q. B. 115, 120,

in the Court of Exchequer Chamber, it was said that "It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton* v. *Miles*, 8 Paige (N. Y.), 261.

It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

So, Phillimore says: "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfilment — whether that place be fixed by *express words* or by *tacit implication* — as the place to the jurisdiction of which the contracting parties elected to submit themselves." 4 Int. Law, 469.

The same author concludes his discussion of the particular topic as follows: "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements." 4 Int. Law, sect. DCLIV. pp. 470, 471.

This rule, if universally applicable, which perhaps it is not, though founded on the maxim, *ut res magis valeat, quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent.

It was expressly referred to as a decisive principle in *Bell* v. *Packard*, 69 Me. 105, although it cannot be regarded as the foundation of the judgment in that case. *Milliken* v. *Pratt*, 125 Mass. 374.

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that State, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was, that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In *Irvine* v. *Barrett*, 2 Grant's (Pa.) Cas. 73, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court

exercises its jurisdiction; and that a bond given in another State, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *Penobscot & Kennebec Railroad Co.* v. *Bartlett*, 12 Gray (Mass.), 244, the Supreme Judicial Court of Massachusetts decided that a contract made in that State to subscribe to shares in the capital stock of a railroad corporation established by the laws of another State, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that State. In *Lanusse* v. *Barker*, 3 Wheat. 101, 146, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox* v. *United States*, 6 Pet. 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that State. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which

it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan* v. *United States*, 7 Pet. 435.

These cases were relied on by the Supreme Court of New York in *Commonwealth of Kentucky* v. *Bassford*, 6 Hill (N. Y.), 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that State. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in that State.

Boyle v. *Zacharie*, 6 Pet. 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment. Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the Circuit Court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them, whether the promise of indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in *Bell* v. *Bruen*, 1 How. 169. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who, at the latter place, had made advances of a credit to Thorn. The operative language of the guaranty was, "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank of the United States* v. *Daniel*, 12 Pet. 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull* v. *Wagner*, Baldw. 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfilment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial.

New trial ordered.

WING *v.* ANTHONY.

Reissued letters-patent No. 1049, bearing date Sept. 25, 1860, granted to Albert S. Southworth for certain improvements in taking photographic impressions, and subsequently extended for seven years from April 10, 1869, are void, the claim therein made being for a different invention from that described in the original letters.

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

This was a bill in equity brought by Wing and others, to restrain Anthony and the other defendants from infringing reissued letters-patent No. 1049, granted Sept. 25, 1860, to Albert S. Southworth, for certain improvements in taking photographic impressions, and subsequently extended for seven years from April 10, 1869. The original letters-patent are dated April 10, 1855.

The answer denies as well the novelty and the utility of the invention, as the alleged infringement, and sets up that the invention described in the reissue is not the same as that for which the original letters were granted.

The Circuit Court upon final hearing dismissed the bill, and the complainants appealed to this court.

It appears from the evidence, and is a matter of general knowledge, that a camera is the principal instrument used in taking photographic pictures. It is a rectangular, oblong box, in one end of which is inserted a tube containing a double convex lens, while at the other end is a plate-holder, immediately in front of which is a sliding shield. A plate of glass receives in a dark room a chemical preparation which renders it sensitive to the action of light. It is then put into the plate-holder at the end of the camera opposite the lens, the shield in front of it withdrawn, and the rays of light passing through the lens from an object suitably placed in front of it fall upon the plate and produce there an image of the object. This is then perfected by certain other chemical processes, and is called a negative, and from it many copies may be printed. Thus photographic pictures are produced.

The camera should be so arranged with relation to the

object to be pictured that a right line drawn from the centre of the object will pass directly through the axis of the lens and fall upon the plate at right angles. In this manner the best pictures are obtained. If this method is not followed, the picture will be distorted and otherwise imperfect.

It is conceded that prior to the date of Southworth's invention this object was accomplished by tilting the camera itself into different positions with respect to the object to be pictured, and in this manner bringing the centre of the field of the lens upon different parts of the plate.

Complainants contend that prior to Southworth's invention only one correct picture could be taken on the same plate, except in the manner just stated. The object of the invention covered by his original letters was to provide efficient means by which several correct pictures could be taken on different parts of the same plate.

In the specification of his original letters he declares his invention to be "a new and useful plate-holder for cameras for taking photographic impressions," and adds: "The object of my invention is to bring in rapid succession different portions of the same plate, or different plates of whatsoever material prepared for photographic purposes, into the centre of the field of the lens, for the purpose of either timing them differently, that the most perfect may be selected, or of taking different views of the same object with the least delay possible, or of taking stereoscopic pictures upon the same or different plates with one camera." He then states: "My invention consists of a peculiarly arranged frame in which the plate-holder is permitted to slide, by which means I am enabled to take four daguerreotypes on one plate and at one sitting, different portions of the plate being brought successively opposite an opening in the frame, the opening remaining stationary in the axis of the camera while the plate-holder and plate are moved."

The specification describes minutely the frame-holder by which the object of the invention is accomplished.

The claim is as follows: —

"What I claim as my invention and desire to secure by letters-patent is the within-described plate-holder in combination with the frame in which it moves, constructed and operated in

the manner and for the purpose substantially as herein set forth."

The specification of the reissued letters contains the following passages which do not appear in the original specification: "I have invented certain improvements in taking photographic impressions." . . . "In taking daguerreotypes, photographs, &c., it has been customary to use a separate plate for each impression, the plate being removed from the camera and replaced by another when several impressions of the same object were to be taken, as in multiplying copies, or for the purpose of selecting the best-timed pictures. This caused considerable delay and trouble, to obviate which is the object of my present invention, which consists in bringing successively different portions of the same plate, or several smaller plates secured in one plate-holder, into the field of the lens of the camera.

"In carrying out my invention I have made use of a peculiarly arranged frame, in which the plate-holder is permitted to slide, and in which the position of the plate-holder is definitely indicated to the operator, so that he can quickly and accurately adjust the plate or plates, the accompanying drawings and description so explaining the same that others skilled in the art may understand and use my invention."

Then follows a description of the plate-holder, which is identical with the description contained in the original specification, and is illustrated by the same drawings.

The specification further declares: "In this case, however," that is, when it is desired to take more than four impressions on the same plate, "I use suitable grooves, stops, or indices, by which the operator adjusts the positions of the plate substantially on the same principle that he uses the corners of the opening K in the above-described apparatus. It is evident that my improvement may be embodied by causing the lens of the camera to be made adjustable in different positions with respect to the plate, while the plate remains stationary, so that different portions of the plate may be brought into the field of the lens. This I have tried, but do not consider it, practically, to be so good a plan as the foregoing, as it necessitates a change of position of the camera itself, or of the objects."

The claim of the reissue is then stated as follows:—

"What I claim as my invention, and desire to secure by letters-patent, is bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

Mr. Albert A. Abbott for the appellants.

Mr. Edmund Wetmore for the appellees.

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

It is manifest that the reissued patent was taken out for the purpose of embracing under its monopoly what was not included by the original patent. The original patent was not, in the language of the statute, "inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new."

The original claim was for a mechanism; namely, "a plate-holder in combination with the frame in which it moves, constructed and operating in the manner and for the purpose" set forth in the specification. The claim of the reissued patent is plainly for a process; namely, "the bringing of the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

This claim would cover any mechanism by which the different parts of the plate could be brought into the field of the lens. In fact, the specification of the reissued patent suggests a different contrivance; namely, the causing of the lens of the camera to be made adjustable in different positions with respect to the plate, while the plate remains stationary, so that different portions of the plate may be brought into the field of the lens.

It is quite clear that the original patent covers a mechanism to accomplish a specific result, and that the reissued patent covers the process by which that result is attained, without regard to the mechanism used to accomplish it. The reissue is, therefore, much broader than the original patent, and covers

every mechanism which can be contrived to carry on the process.

In the case of *Powder Company* v. *Powder Works*, 98 U. S. 126, it was held by this court that when original letters-patent were taken out for a process, the reissued patent would not cover a composition unless it were the result of the process, and the invention of one involved the invention of the other.

The converse of this proposition was decided by this court in *James* v. *Campbell*, 104 id. 356. In that case the court said that a patent for a process and a patent for an implement or a machine are very different things, and decided, in substance, that letters-patent for a machine or implement cannot be reissued for the purpose of claiming the process of operating that class of machines, because, if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention.

To the same effect precisely is the case of *Heald* v. *Rice*, id. 737. The present case falls within the rule laid down in the authorities cited.

Southworth's invention as described in his original patent must be limited to what is there set forth, namely, a mechanism for bringing successively different portions of the plate within the field of the lens. He did not discover the law that to get the best effect in taking pictures the plate, or part of the plate, on which the picture is to be taken, should be brought into the field of the lens, nor did he invent the method of doing this by tilting the camera itself into different positions with respect to the object to be pictured.

This law was known, and the practice mentioned was followed, long before Southworth's invention. His device was simply a new and specific means to take advantage of a well-known law of nature. In his reissue, by claiming as his invention the process of bringing different parts of the plate successively into the field of the lens, he seeks to put himself in as good a position as if he had been the first to discover the law referred to, and the first to invent the method of taking advantage of the law by tilting his camera into different positions. In claiming the process he excludes all other mech-

anisms contrived to accomplish the same object. This he could not rightfully do.

We are of opinion that the claim of the reissued patent is for a different invention from that described in the original patent, and that the reissue is therefore void. *Gill* v. *Wells*, 22 Wall. 1; *The Wood-Paper Patent*, 23 id. 566; *Powder Company* v. *Powder Works*, 98 U. S. 126; *Ball* v. *Langles*, 102 id. 128; *Miller* v. *Brass Company*, 104 id. 350; *James* v. *Campbell*, id. 356; *Heald* v. *Rice*, id. 737; *Johnson* v. *Railroad Company*, 105 id. 539; *Bantz* v. *Frantz*, id. 160.

Decree affirmed.

JESSUP *v.* UNITED STATES.

1. Section 161 of the act of June 30, 1864, c. 173, entitled "An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," does not require that when, pursuant to its provisions, adhesive and other stamps are furnished to the manufacturer on credit, the bond to secure the payment therefor shall be executed to the Treasurer of the United States.
2. Even if taken without the authority of a statute, a bond payable to the United States, with a condition that the manufacturer shall pay such sums as he shall owe the United States for adhesive stamps, would be binding at common law, and an action might be maintained thereon.
3. Under such a bond, any competent evidence to establish the manufacturer's indebtedness for stamps is admissible, whether they were from time to time furnished by the Commissioner of Internal Revenue or the Assistant Treasurer of the United States.

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

This was an action at law brought by the United States against William H. Jessup, as principal, and Jabez Howes and others, sureties on his bond, dated Nov. 3, 1869, payable to the United States, in the sum of $10,000, and conditioned as follows: —

"The condition of the foregoing obligation is such, that whereas the said William Henry Jessup is a manufacturer of friction or other matches, cigar-lights, or wax-tapers; and whereas, under the provisions of the 161st section of an act entitled 'An Act to provide

internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864, the Commissioner of Internal Revenue is authorized, from time to time, to furnish, supply, and deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the treasury of the United States within the time prescribed for such payment; and whereas adhesive stamps have been delivered, or hereafter may be delivered, to said William Henry Jessup by virtue of said authority: Now, therefore, if the said William Henry Jessup shall make a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of, whenever required so to do, and shall do and perform all other acts of him required to be done in the premises according to law and regulations, shall well and truly pay, or cause to be paid, to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as the said William Henry Jessup may owe to the United States for adhesive stamps which have been or shall be delivered to him, or which have been or shall be forwarded to him, according to his request or order, within the time prescribed for payment for the same according to law, and shall and will pay, or cause to be paid, to the said Treasurer, for the use aforesaid, each and every sum of money as shall become due or payable to the United States, at the time and on the days each sum shall respectively become due or payable, then the above obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

Section 161 of the act of June 30, 1864, c. 173, entitled "An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," provides as follows: "That the Commissioner of Internal Revenue may, from time to time, furnish, supply, and deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure pay-

ment therefor to the Treasurer of the United States within the time prescribed for such payment. And upon all bonds or other securities taken by said commissioner, under the provisions of this act, suits may be maintained by said Treasurer in the Circuit or District Court of the United States, in the several districts, where any persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

While these provisions of the law were in force, Jessup, a manufacturer of friction-matches in San Francisco, Cal., desiring to avail himself of the privilege of obtaining internal revenue stamps on a credit of sixty days, gave to the United States the bond in suit.

The breach of the bond assigned is that he had received from the United States adhesive stamps amounting to the sum of $8,000, which he had neither accounted for nor paid.

The answer admits the execution of the bond, but denies generally the other allegations of the complaint. It avers performance, and sets up, by way of separate defence, that under the law and regulations, and the condition of the bond, all stamps, of whatsoever kind or denomination, delivered to Jessup, were to be so delivered to him upon a credit not exceeding sixty days; that after the delivery and execution of the bond, and before the pretended liability mentioned in said complaint had accrued, to wit, on the 18th of April, 1870, the United States, or some of its officers, made a new contract with Jessup, without the knowledge or consent of the defendants, the sureties on said bond, or either of them, whereby the credits for stamps supplied and delivered to him were extended indefinitely, and beyond the term of sixty days. The answer further avers that if he became indebted to the United States for stamps furnished, supplied, or delivered to him, such indebtedness accrued since the making of and under said new contract, and not otherwise.

The parties waived a jury, and submitted the cause to the court for trial. The court found all the issues of fact for the plaintiff, and rendered judgment in its favor for the sum of $7,272, with interest thereon from March 1, 1876.

To reverse that judgment this writ of error was brought.

Mr. William W. Morrow and *Mr. John E. Ward* for the plaintiffs in error.

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

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

The answer of the defendants admits the execution of the bond which is the basis of the suit. The finding by the court below in favor of the United States of all the issues of fact raised by the pleadings establishes, beyond the reach of controversy, that Jessup did not perform the condition of his bond; that he did not pay for revenue stamps advanced to him; and that the United States, or some of its officers, did not, without the knowledge or consent of his sureties, make a new contract, whereby credits for stamps furnished him were extended indefinitely, and beyond the term of sixty days.

The finding of the court also shows that Jessup was indebted to the United States for stamps received by him, the payment of which was secured by his bond, in the sum for which judgment was rendered against his sureties.

The finding has eliminated from the case some of the questions discussed by the counsel for plaintiffs in error. The facts found by the Circuit Court are not open to review in this court, and we can only consider questions of law arising upon the trial, and duly presented by bill of exceptions, and errors of law apparent on the face of the pleadings. *Insurance Company* v. *Folsom*, 18 Wall. 237; *Cooper* v. *Omohundro*, 19 id. 65.

These questions we shall now consider. It appears from the bill of exceptions that the defendants moved to dismiss the action, on the ground that the bond in suit was given to the United States, and not to the Treasurer of the United States, and on the ground that the suit was not brought in his name, as provided by sect. 161 of the act of June 30, 1864, c. 173, as amended.

The first of these grounds is based on the assumption that the section referred to requires the bond to be given to the Treasurer of the United States and not to the United States, and, as the bond in suit is payable to the United States, that it

is absolutely void; the contention of the plaintiffs in error being that the United States cannot take a valid bond except when and in the terms directed by the statute. But the bond is not required to be made payable to the Treasurer. It may be payable directly to the United States, and conditioned that payment for stamps advanced shall be made to the Treasurer, and not depart from any express provision of the law.

But conceding the section to mean that the bond shall be payable to the Treasurer, still we are of opinion that a bond in which the United States is the obligee, and which is conditioned that payment for stamps advanced shall be made to the Treasurer, is a valid and binding obligation.

In *United States* v. *Tingey*, 5 Pet. 115, the question was made how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument, and binding upon the parties; in other words, whether the United States have in their political capacity a right to enter into a contract or to take a bond in cases not previously provided for by some law. And the court declared: "Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty, and the United States being a body politic may, within the sphere of the constitutional powers embodied in it, enter into contracts not prohibited by law, and appropriate to the just exercise of these powers."

To the same effect is *United States* v. *Bradley*, 10 id. 343.

In *United States* v. *Hodson*, 10 Wall. 395, it was held, in substance, that when a distiller's bond was given under sect. 53 of the act now in question, which required the bond to be conditioned for the performance of several particular acts which it specifically stated, and the agent of the government took the bond conditioned, not in the specific way directed by the statute, but for the parties' compliance with all the provisions of the act and such other acts as were then or might thereafter be in that behalf enacted, the bond was binding on the parties.

United States v. *Linn*, 15 Pet. 290, was an action against a receiver of public moneys and his sureties. The statute required him to give bond for the faithful discharge of his trust.

The instrument given and sued on was without seal, and, therefore, not the security required by the statute. The court, nevertheless, held it to be a valid and binding obligation.

These authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law.

The Circuit Court was, therefore, right in overruling the motion of the defendants to dismiss the suit on the ground that the bond was given to the United States and not to the Treasurer of the United States.

This conclusion disposes also of the second ground upon which the motion to dismiss was based. For if the United States can, without the authority of any statute, take a valid bond payable to the United States, they can maintain a suit upon it in their own name. It would be absurd to hold a bond to be valid on which a suit in the name of the obligee could not be maintained.

The objection to the admissibility of the bond in evidence, which the bill of exceptions shows was taken, on the ground that the condition of the bond did not conform strictly to the condition prescribed by the statute, falls for the same reasons and upon the same authorities.

It further appeared from the bill of exceptions that on the trial of the case the United States, to prove the breach of the condition of the bond by Jessup, offered in evidence the account kept by the Assistant Treasurer of the United States at San Francisco, from which it appeared that, on Jan. 1, 1876, for adhesive stamps advanced by him to Jessup there was due from the latter to the United States the sum of $8,000. The court admitted the account in evidence notwithstanding the objection of defendants, and this is now assigned for error.

The first ground of objection urged to the admissibility of this evidence was that the account appeared to be for stamps supplied by the Assistant Treasurer, and the law under which the bond was given contemplated that the stamps should be furnished by the Commissioner of Internal Revenue.

But the penalty of the bond was payable directly to the

United States, and its condition was that Jessup should pay, or cause to be paid, to the Treasurer of the United States, for the use of the United States, all and every such sum or sums as he might owe the United States for adhesive stamps. This being a valid bond, any evidence which tended to show that Jessup was indebted to the United States for adhesive stamps was competent, and it was quite immaterial whether the stamps were furnished by the Assistant Treasurer or by the Commissioner of Internal Revenue.

The account was objected to on the further ground that it appeared on its face that the credits were continuously for a greater period than sixty days, and, therefore, that the account was not within the statute, and was incompetent and irrelevant to the issue in the action. The contention of the plaintiffs in error is that the operation of the bond extended to but one credit of sixty days; that by the security for stamps advanced on credit required by sect. 161, is meant a new security for each and every advance of stamps, and that manufacturers needing stamps from time to time must give security as often as a lot of stamps is advanced, and consequently that the bond in suit was security only for the first advance of stamps, and that all subsequent advances were made entirely without security. But the language of the condition of the bond clearly excludes any such construction. The condition is that Jessup shall pay such sum or sums of money as he may owe to the United States for adhesive stamps which have been or shall be delivered to him, or which have been or shall be forwarded to him, according to his request or order, within the time prescribed for payment for the same, and shall and will pay, or cause to be paid, to the said Treasurer, for the use aforesaid, each and every such sum of money as shall become due or payable to the United States at the time and on the days such sums shall respectively become due and payable. The idea that the bond secured the payment of but one sum of money due for stamps purchased at one time on a single credit of sixty days, finds no support in the language of the bond. The payment of sums due at different times, for stamps purchased at different times, is expressly secured in the condition of the bond.

The bond in this respect conforms to the statute, which

authorizes the Commissioner of Internal Revenue from time to time to supply and deliver to any manufacturer of friction-matches a suitable quantity of adhesive or other stamps, without prepayment therefor, on a credit not exceeding sixty days. What we have said covers all the errors assigned.

We find no error in the record.

Judgment affirmed.

THE "NEVADA."

1. An ocean steamer starting from a crowded slip, the motion of her propeller caused a canal-boat to break her fastenings and swing around against the propeller, whereby she was sunk. The steamer had no lookout at her stern, by whom the peril of the canal-boat might have been seen in time to stop the propeller and prevent the collision. *Held,* that the steamer was in fault.
2. Towage should be employed, when necessary to enable a large steamer to leave a crowded slip or harbor without damaging other vessels.
3. Steamers and locomotives should be so managed and operated as to do the least possible injury consistent with their substantial usefulness.
4. Those in charge of the canal-boat, in this case, having done all that reasonable prudence required of them, by properly fastening their boat, were held free from blame.

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

The case is stated in the opinion of the court.

Mr. Stephen P. Nash for the appellant.

Mr. Eugene H. Lewis and *Mr. Robert D. Benedict* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a libel filed in the District Court for the Southern District of New York by S. J. Quick, master and owner of the canal-boat "Kate Green," for himself and for F. A. McKnight, against the steamship "Nevada," in a cause of collision. The libel alleges that McKnight was invested by subrogation, or otherwise, with the interest of the Western Insurance Company of Buffalo, who were insurers of 8,100 bushels of corn, the cargo of the "Kate Green" at the time of the collision; that on the 27th of September, 1871, whilst the

boat was lying securely fastened in a slip in New York City, between piers No. 46 and No. 47 on the North River, the "Nevada," which had been moored in the same slip on the north side of pier No. 46, proceeded on her way to sea, and carelessly and negligently ran into and struck the "Kate Green" with her propeller, causing her to sink, whereby she was greatly injured and her cargo destroyed, resulting in a total damage of $12,000.

The Liverpool and Great Western Steam Company appeared as claimants of the "Nevada," and answered the libel, setting up that the collision was occasioned solely by the carelessness and negligence of the master and crew of the "Kate Green."

McKnight filed a petition for leave to intervene, setting forth his interest in the cargo, to wit, that it had been insured by the Western Insurance Company, which became liable for and paid the full value thereof to the owners, and afterwards became bankrupt, and at the sale of its assets, he, McKnight, became the purchaser of its claims arising from the loss and destruction of said cargo. He was allowed to intervene accordingly.

Proofs being taken, a decree was made by the District Court that the libellants recover their damages and costs against the "Nevada," and it was referred to a commissioner to ascertain the amount of damage.

The commissioner reported that the damage done to the "Kate Green," her furniture, loss of freight, and interest, amounted to $4,289.72; and that the damage to the cargo, with interest, was $8,109.64. A decree was made for these sums, with costs.

Upon appeal to the Circuit Court this decree was affirmed, and a new decree was entered (including interest to the date of the decree) in favor of Quick for the sum of $4,577.65, besides costs; and in favor of McKnight for the sum of $8,653.98, besides his costs.

The owners of the "Nevada" have appealed from this decree. So far as relates to Quick, the owner of the "Kate Green," under the recent ruling of this court in *Ex parte Baltimore & Ohio Railroad Co.*, *ante*, p. 5, the appeal must be dismissed; as to McKnight, it is necessary to examine the case at large.

The Circuit Court found the facts in detail, of which it is sufficient to state, that about 3 o'clock P. M., Sept. 27, 1871, the propeller steamship "Nevada," belonging to one of the regular lines between New York and Liverpool, was lying alongside of pier No. 46 in the slip between that pier and pier No. 47 on the North River, New York, about to start on her voyage to Liverpool. She had been advertised to start at that hour, had rung her bells and blown her whistle several times, and her signals for starting were flying at mast-head. At that instant, before her screw was put in motion, a steam-tug entered the slip with the canal-boat "Kate Green" in tow, and placed her alongside of another canal-boat, the "C. H. Hart," lying fastened to a grain elevator, which was in turn fastened to the steamship "Scotia," lying alongside pier No. 47, on the north side of the slip. The master and steersman of the "Kate Green," which lay about sixty feet from the "Nevada," instantly made her fast to the "C. H. Hart," and at that moment the propeller of the "Nevada" began to revolve, and produced a suction and commotion of the water which caused the "C. H. Hart" to break her fastenings, and the "Kate Green" to swing around under the stern of the "Nevada," where she was struck by the propeller and sunk, and much injured, and her cargo was lost. She was not seen from the "Nevada" when she came in, and no special notice was given to her that the "Nevada" was about to leave, and those in charge of her had no actual knowledge of the fact until the propeller of the "Nevada" began to move. As soon as she began to swing around her master called loudly to the "Nevada" to stop her propeller, but he was not heard, or, if heard, not heeded.

The court further found as follows: —

"10. No one on board of the 'Nevada' knew of the parting of the 'Hart's' lines, or of the swinging of the 'Green,' or of the accident, until after they arrived in Liverpool. If a man had looked from her deck over her side into the slip, he could not have failed to see what was going on all the time, from the first movement of the propeller, and before, until she got out.

"11. There was an abundance of time after the breaking of the fastenings of the 'Hart,' and after the 'Green' began to

swing, and after the hail of her master, to have stopped the propeller, before the collision.

"12. The report of the commissioner as to the damages is warranted by the evidence, and the libellant, McKnight, was the owner of the claim for damages when the libel was filed."

The conclusions of law found by the Circuit Court were as follows: —

"1. The 'Nevada' was in fault for not keeping a sufficient lookout aft and on the side next the slip, and in not seeing the 'Kate Green' when she came in, or as she swung over, and in not stopping the propeller in time to avoid the collision.

"2. The 'Kate Green,' under the peculiar circumstances in which she was placed, was not in fault.

"3. The libellants are entitled to recover the damages reported by the commissioner."

It seems hardly necessary to do more than to state the case as the facts are found by the court in order to decide it. The "Kate Green" came into the slip, it is true, at the time the "Nevada" was about to leave; and those in charge of her ought to have known this fact from the ringing of the "Nevada's" bells and her visible signals for starting. But supposing they did know it, what more could they do than they did do? They immediately made fast to the "C. H. Hart," which was also made fast to the ship lying at the North Pier. It was reasonable for them to suppose that the fastening of the "C. H. Hart" was secure. They could not know that it would break. It was that break which set them adrift, subject to the suction caused by the motion of the "Nevada's" propeller. Their own fastenings were sufficient. We do not see how the court could find otherwise than that they were free from fault or negligence. Perhaps they might have done something else which would have been better. The event is always a great teacher. They might have stayed out in the river and not entered the slip; or, having entered, they might have gone back to the bulkhead, and stayed there till the "Nevada" left. But these possibilities are not the criteria by which they are to be judged. The question is, Did they do all that reasonable prudence required them to do under the circumstances? And this question, we think, must be answered in the affirmative.

Then, how is it with the "Nevada?" Did those on board of her do all that was reasonably required of them? It is significantly asked by her counsel, whether a steamship is to be precluded from the use of her own means of locomotion? Must she be subjected to the inconvenience and expense of employing a tug to tow her out into open water? That does not necessarily follow. If, indeed, the action of her propellers is such as to cause unavoidable injury to other craft in a crowded harbor, or in a confined space like that of a slip or dock used by vessels of every kind, she might be justly required to find other means of moving in a position involving so much peril. This is no more than is required in analogous cases. Railroad companies are compelled to slacken the speed of their trains in passing through cities, and are often either prohibited from using ordinary locomotive engines in the more public streets, or required to guard their tracks by means of gates, bars, or fences, in order to prevent accidents and collisions. Incidental inconveniences, it is true, attach to the use of many of the great improvements of the age; inconveniences which must be submitted to in order that the public may have the benefit of those improvements. Almost every new machine inflicts loss of employment upon some portion of the laboring class, which are thus obliged to seek other fields of industry. Steamboats have taken the place of sailing-vessels; railroads have interfered with steamboats, and have rendered useless thousands of stage-coaches, and the appliances connected with them. The vast power and speed of the modern locomotive engine, carrying its thousand passengers, or its hundreds of tons of merchandise, require the private carriage and the country team to await its passage and give it the right of way. The large steamer which navigates our rivers creates an agitation of the waters which cannot be prevented without staying its speed and crippling its usefulness, and which requires from smaller vessels in its neighborhood increased attention and care to avoid being foundered or injured. Horse railroads in cities incumber the streets with their iron tracks, and render the passage of private vehicles more difficult and dangerous. But whilst these incidental and unavoidable inconveniences must be submitted to in order that the greater benefit derived from

the new improvements may be enjoyed, there still remains the duty of so managing and operating them as to do the least possible injury consistent with the fair attainment of their substantial benefits. The ocean steamer is one of the great inventions of the century, and one of the advanced instrumentalities of modern civilization ; but whilst it may freely exercise its powerful propeller and sport its leviathan proportions on the ocean or in deep and open waters, it is justly required to observe extraordinary care and watchfulness when surrounded by feebler craft in a crowded harbor. Under some circumstances, and within a limited space, it may even be required to dispense with the use of its ordinary means of locomotion, and resort to the employment of towage or other safe and quiet means of changing its position and effecting its necessary movements. Such a modification of the use of its power, when absolutely required for the safety of other vessels rightfully located in its vicinity, would produce no material diminution of its efficiency in the accomplishment of its principal design.

However, we do not mean to say that, in the application of these principles to the present case, it was the duty of the "Nevada" to remit the use of her propeller in leaving her place in the slip where she lay. The court does not find her in fault for using it, but for not having a lookout at her stern, and on the side next to the slip, who could have seen the breaking away of the "Hart" and the "Kate Green" from their fastenings, and, by giving timely alarm, could have averted the disaster by a momentary stopping of the "Nevada's" engine. In such a place, and in the midst of such a crowd of vessels as then filled the slip, since she did put her propeller in motion, she was bound to use the utmost caution and circumspection in order to avoid doing injury. The least that could be expected of her was a constant lookout at every part. But the court finds that "no one on board of the 'Nevada' knew of the parting of the 'Hart's' lines, or of the swinging of the 'Green,' or of the accident, until after they arrived at Liverpool. If a man had looked from her deck over her side into the slip, he could not have failed to see what was going on all the time, from the first movement of the propeller, and before, until she got out." And the court further finds that "there

was abundant time after the breaking of the fastenings of the 'Hart,' and after the 'Green' began to swing, and after the hail of her master, to have stopped the propeller before the collision."

This, as it seems to us, settles the case, and amply justifies the conclusion of law made by the court below, that "the 'Nevada' was in fault for not keeping a sufficient lookout aft and on the side next the slip, and in not seeing the 'Kate Green' when she came in, or as she swung over, and in not stopping the propeller in time to avoid the collision." In view of the principles to which we have adverted, and which ought to control this case, no other conclusion could have been reached.

We see no error in the decree of the Circuit Court, and it is therefore, with interest and costs,

Affirmed.

UNITED STATES *v.* ABATOIR PLACE.

Where an information against a distillery for an alleged violation of the revenue laws was filed, and the District Court, after rendering judgment in favor of the claimant, denied the motion of the United States that a certificate of reasonable cause of seizure be entered of record, — *Held*, that the action on the motion cannot be reviewed here or in the Circuit Court.

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

This was an information filed in the District Court of the United States for the Southern District of New York against a distillery, claiming that it was forfeited to the United States for violation of the revenue laws.

Frederick Frerichs appeared as the claimant, and denied the forfeiture. Upon the trial the District Court, being of opinion that there was no evidence of any violation of the revenue laws, for which the seizure had been made, directed a verdict for him, and judgment was rendered thereon in his favor.

Thereupon the United States moved the court to enter of

record a certificate that there was a reasonable cause of seizure. The motion was denied. The case was then carried, by writ of error, to the Circuit Court, which adjudged that there was no error in the record. To reverse this latter judgment this writ of error is prosecuted. The only question raised in this court is whether the District Court erred in refusing to enter the certificate of reasonable cause.

The following sections of the Revised Statutes of the United States are pertinent to the case: —

"SECT. 909. In suits, or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, that probable cause is shown for such prosecution, to be judged of by the court."

"SECT. 970. When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not in such case be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

The Solicitor-General for the United States.
Mr. Edward Salamon, contra.

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

We are of opinion that the refusal of the District Court to grant a certificate of reasonable cause is not a matter which can be reviewed in the Circuit Court or in this court. It is only from final judgments that a writ of error lies from the District to the Circuit Court, or from the latter court to the Supreme Court.

The granting or the refusal to grant the certificate is not a final judgment in the sense of the statute which allows writs of

error. The certificate, when granted, is no part of the original case. It is a collateral matter which arises after final judgment.

It is granted to protect the person at whose instance the seizure was made, should an action of trespass be brought against him by the claimant for the wrongful seizure of the latter's property. The granting of the certificate of reasonable cause is, therefore, only antecedent and ancillary to another suit, and is not a final judgment in the case in which it is given. It is not final or effectual for any purpose unless certain facts subsequent to the judgment are shown, namely, the immediate return to the claimant or his agent of the property seized in the original suit.

This court has decided that a refusal to enter an *exoneretur* on a bail bond, that judgments awarding, or refusing to award, or setting aside writs of restitution in actions of ejectment, that a judgment on a writ of error *coram nobis*, that a judgment refusing a writ of *venditioni exponas*, that a refusal to quash an execution or to quash a forthcoming bond, were not final judgments, to which a writ of error would lie. *Boyle* v. *Zacharie*, 6 Pet. 635; *Pickett's Heirs* v. *Legerwood*, 7 id. 144; *Smith* v. *Trabue*, 9 id. 4; *Evans* v. *Gee*, 14 id. 1; *Amis* v. *Smith*, 16 id. 303; *Morsell* v. *Hall*, 13 How. 212; *McCargo* v. *Chapman*, 20 id. 555; *Gregg* v. *Forsyth*, 2 Wall. 56; *Barton* v. *Forsyth*, 5 id. 190. See also *Barker* v. *Hollier*, 8 Mee. & W. 513.

These authorities lead to the opinion we have expressed in this case.

Judgment affirmed.

MASON *v.* NORTHWESTERN INSURANCE COMPANY.

1. Where the Circuit Court adjudged the sale of mortgaged lands in Illinois, and foreclosed the defendant's right to redeem them, from and after such sale, he waives no error by omitting to tender the money within the statutory period allowed for redeeming them, he having within two years after the date of the decree appealed therefrom.
2. *Brine* v. *Insurance Company*, 96 U. S. 627; *Burley* v. *Flint*, 105 id. 247; and *Suiterlin* v. *Connecticut Mutual Insurance Co.*, 90 Ill. 483, commented upon.

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

The Northwestern Mutual Life Insurance Company filed, Dec. 10, 1875, a bill in the court below to foreclose a mortgage given May 7, 1874, by Murphy and wife, to secure his bond to the company for $40,000. The mortgage covers certain land situated in the city of Chicago, which they subsequently conveyed to Mason in trust for the benefit of Murphy's creditors. The bill prays for a decree ordering that payment of the amount due be made, and in default thereof that the land be sold by and under the direction of the court, in satisfaction of the decree, and that all persons claiming by, through, or under the defendants, or any or either of them, be forever barred and foreclosed of and from all title, interest, claim, demand, and all right and equity of redemption whatsoever in or against the land or any part thereof. Mason was made a party defendant, and he filed an answer setting up, *inter alia*, that the complainant ought not to have the relief prayed for in the bill, inasmuch as the statutes of Illinois provide that land sold by virtue of a decree of foreclosure may, in the manner which they prescribe, be redeemed within fifteen months of such sale; and he prayed the same advantage of the answer as if he had pleaded or demurred to the bill of complaint. The court, Jan. 2, 1877, entered a decree for the amount due upon the mortgage, and directing the master to make a sale of the land in question according to the course and practice of the court. He reported, July 24, 1877, a sale of the land to the complainant May 8, 1877, and a decree was entered, July 31, 1877, confirming the sale, ordering him to execute to the complainant a deed of the land, adjudging the defendants to be forever barred and

foreclosed from all equity of redemption and other claim, legal or equitable, of, in, and to the land and every part thereof.

Mason appealed from both decrees, and assigns for error that the court below erred, — *First*, In denying to him, by the decree entered Jan. 2, 1877, the right to redeem from the sale thereby ordered, as prayed for by his answer, and in ordering the sale to be made in accordance with the course and practice of the court, without making provision for the redemption after sale. *Secondly*, In confirming, by the decree entered July 31, 1877, the master's sale made without redemption; in ordering him to execute a deed of the land before the time of redemption allowed by the statutes of the State had expired; and adjudging that the defendant should be forever barred and foreclosed from all equity of redemption and other claim in and to the land.

Mr. Edward G. Mason for the appellant.
Mr. Thomas Hoyne for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The error relied on to reverse the decree is the absolute foreclosure of the equity of redemption, without allowing the time for that purpose which the statute of Illinois provides. The case comes directly within *Brine* v. *Insurance Company*, 96 U. S. 627. Indeed, it is stronger, for while in that case we took the admission of counsel on both sides that "a sale in accordance with the course and practice of the court" meant a sale which did not admit of any equity of redemption, we have in this case a decree of confirmation of the sale which expressly and in the strongest terms cuts off all such right. In accordance with the principle settled by this court in the case of *Brine* v. *Insurance Company*, both these decrees are erroneous.

It is, however, urged as a reason for not applying that principle in the present case, that the appeal was not taken until after the period had elapsed within which the appellant could by the statute have exercised the right of redemption, and that he has neither paid nor tendered the sum necessary to redeem. *Burley* v. *Flint*, 105 id. 247, and *Suitterlin* v. *Connecticut Mutual Insurance Co.*, 90 Ill. 483, are relied on in support of this view.

The last of these cases was a suit in a local court of Illinois to obtain the benefit of the right of redemption from a sale under a foreclosure decree in the Circuit Court of the United States. The Supreme Court of that State refused the relief asked because no effort had been made to redeem within the statutory period, — a ruling which, in *Burley* v. *Flint*, we held to be sound.

The reason for this is that, while not seeking to reverse the decree, nor to set aside the sale made thereunder, the proceeding recognized both as valid, and asserted the right of the party to redeem, as though the sale had been made in accordance with the statute of Illinois. This right, of course, could only be secured by a strict compliance with that statute, and having permitted the period to elapse within which he had a right to redeem, he came too late. The court very properly dismissed the bill.

In *Burley* v. *Flint* this court approved and adopted the views of the Illinois court, and applied the principle to the case of a bill of review which sought the same end. The bill was filed after the expiration of the period of statutory redemption, and the amount necessary to redeem had not been tendered within that time.

Both cases differ from the present in that they were attempts to enforce the right of redemption outside of, and against the terms of the decree, while the present case seeks by an appeal to reverse and set aside the decree. In the former cases equity required that, before coming to the court for the relief which the plaintiffs asked, they should have complied with the requirements of the law, or at least offered, within proper time, to pay the redemption money. Not having done this, the court very properly refused to permit them to exercise this right after that time had passed, and with it the right to redeem. In the present case the appellant has exercised his right of appeal from the decree within the time allowed to him by the laws of the United States for that purpose. He has, therefore, rightfully brought this case before us for review. His right to do this does not depend upon any offer to redeem within the fifteen months allowed by the Illinois statute, but is an absolute right, which we cannot refuse or deny. As it is

apparent from the face of the decree and from what we have said in *Brine* v. *Insurance Company*, that both the original decree of sale and the subsequent decree of confirmation are erroneous in refusing to allow the right of redemption under the statute, they must be reversed. If anything were necessary to add force to this reasoning it would be found in the fact that the appellant Mason, in his answer to the original foreclosure bill, expressly referred to the statute of Illinois, and asked that any decree made in the case should make provision for redemption within fifteen months after the sale.

Decrees reversed, and cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE HARLAN, having been absent during the argument, took no part in the decision of this case.

CLOUGH *v.* BARKER.

1. The claims of letters-patent No. 104,271, granted to Theodore Clough, June 14, 1870, for an "improvement in gas-burners," *infra*, p. 168, are valid, and they are infringed by a burner constructed in accordance with the description contained in letters-patent No. 105,768, granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners."
2. A burner set up as anticipating Clough's invention, if used now in a way in which it was never designed to be used, and was not shown to have ever been used before his invention, might be made to furnish a supplementary supply of gas. It was not, however, designed for the same purpose as his burner, and no person looking at it or using it would understand that it was to be used in the way that his was used, and it was not shown to have been really used and operated in that way. *Held*, that it does not amount to his invention.
3. The combination of the first claim of Clough's is new, and he, having first applied a valve regulation of any kind thereto, is entitled to hold as infringements of the second claim all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation.

APPEAL from 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. Edward N. Dickerson and *Mr. Roger H. Lyon* for the appellant.

Mr. William Stanley and *Mr. Stephen G. Clarke* for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought by Theodore Clough against John F. Barker and others, to recover for the infringement of letters-patent No. 104,271, granted to him, June 14, 1870, for an "improvement in gas-burners." The Circuit Court dismissed the bill. The specification of the patent says: —

"My invention relates more particularly to the burners for burning illuminating gas made by saturating air with vapors of gasoline, commonly called air-gas. It has been found that common bat-wing or fish-tail burners are not adapted to burning this gas as ordinarily made, owing to the variable density of the gas coming from the generating apparatus. The object of my improvement is to adapt the slitted or bat-wing burner to the burning of air-gas. Said improvements consist, — *First*, in perforating the base of the burner-tube with small holes or passages for gas to escape at the base of the burner and surrounding the burner with a tube open at the top but closed at the bottom, and united to the burner below the perforations in the burner-tube. It is more convenient to screw the tube to the burner, but it may be attached in any suitable manner. *Second*, in regulating the escape of the gas from the perforations at the base of the burner by a sliding tubular valve or cut-off introduced into the burner-tube at the base and extending upward within it, the position of the tubular valve being regulated by a screw. These improvements, by furnishing a regulated supply of gas outside of the burner, but directed to the tip of the burner by the surrounding-tube, give steadiness and increased illuminating power to the flame of the bat-wing burner and make it a desirable burner for burning air-gas. The drawings represent a bat-wing burner as improved by me. Figure 1 represents an elevation of my improved burner attached to a short piece of gas-pipe. Figure 2, a view showing the surrounding tube in section and the burner therein. Figure 3, a vertical section through the burner and tube. Figure 4, a transverse section through the base of the burner-tube. Letter *a* represents the burner-tip; *b*, the burner-tube; *c*, perforations at the base of the burner-tube; *d*, the surrounding-tube screwed to the base of

the burner-tube; *e*, the tubular valve extending up in the burner-tube, and operated by an annular screw, *f*, attached to the lower end. Said annular screw, besides having a screw to work in the base of the burner, has an internal screw by which it and the burner is attached to the gas-pipe, as clearly shown in Fig. 3 and the other drawings, the gas-way being through the annular screw and tubular valve to the burner. As the burner is connected to the gas-pipe, *g*, by means of the annular screw, the adjustment of the gas escaping through the perforations of the burner-tube is easily made by turning the burner upon the annular screw. I claim as my invention and improvement in air-gas burners, the bat-wing burner, perforated at the base, in combination with the surrounding-tube, substantially as described. Also, in combination with the bat-wing burner, perforated at the base, and surrounding-tube, the tubular valve for regulating the supply of external gas to the burner, substantially as described."

The defendants, in their answer, set up that they have not infringed the patent, and that it is void for want of novelty. At the request of both parties a trial at law was had in the court below, of two questions: "*First*, Whether or not the complainant is the first and original inventor of the improvement in gas-burners for which the first above-named patent has been granted to him. *Second*, Whether or not the gas-burners manufactured by the defendants are substantially identical with those described in the complainant's patent and schedule thereto annexed, in their construction and mode of operation." The issues were tried before the court and a jury, and the jury answered both of the questions in the affirmative. Afterwards, on a case made, the defendants moved, before the judge who tried the issues, for a new trial, on the ground that the verdict was against the weight of the evidence. He denied the motion in a written opinion, in which he stated that the weight of the evidence on the question of infringement was not such as to justify him in granting a new trial, and that he was satisfied with the conclusion of the jury on the question of priority. He afterwards signed and filed a certificate that in his opinion the verdict on both questions was sustained by the evidence given.

The burners made by the defendants were made in accordance with the description of the first form of burner described

in the specification of letters-patent granted to John F. Barker, one of the defendants, July 26, 1870, for an "improvement in gas-burners." The drawings of that patent consist of ten figures, which are thus referred to in the specification: —

"Figure 1 is a side view of one modification of my invention; Figure 2 is a side view of the shell; Figure 3 is a side view of the burner; Figure 4 is a vertical longitudinal section of the shell through line A B of Fig. 2; Figure 5 is a vertical longitudinal section of the burner through line C D of Fig. 3; Figure 6 is a side view of another modification of my invention; Figure 7 is a side view of the shell; Figure 8 is a side view of the burner; Figure 9 is a vertical longitudinal section of the shell through line E F of Fig. 7; and Figure 10 is a vertical section through line G H of Fig. 8."

The specification goes on to say: —

"My invention relates to a device for regulating the flow of carburetted air or gas from the burner to its point of combustion, and it consists of a burner having a screw-thread made upon its lower part, upon which is fitted, to turn freely thereon, a shell or tube, also having a screw-thread upon its interior lower part; and the bore of said tube or shell is somewhat larger in diameter than the diameter of the upper part of the burner upon which it turns. A series of perforations is made in the lower part of the burner, so that, when the burner is made or set for the combustion of carburetted air or gas of any certain quality, the flame may be increased or diminished by turning the shell either up or down, as the case may be, the shell, in its movements up or down, either closing or opening the holes or perforations, and letting out or stopping the flow of the gas through the said holes, as it is moved up or down. In the use of carburetted air for illuminating purposes it is almost always the case that, when the gasoline is first placed within the generator, it gives off a much greater amount of vapor, and the air, in passing through the generator, absorbs a greater amount of the carbon, and consequently becomes more thoroughly charged with, and is much richer in the illuminating qualities of, the gasoline, than when the generator has been charged for a greater length of time; and, as a result, the carburetted air is sometimes too rich to make a desirable light, with the same amount passing out of the burner, and at other times, as when the generator has been charged a longer time, the carburetted air flowing through the burner is deficient in illuminating power, and the light or flame produced is

not uniform in its power or steadiness, and is sometimes liable to produce a smell or smoke when too rich in carbon. My invention is designed to obviate all difficulty in this respect, as the burner is set or made to let out at the tip the minimum quantity of gas that will produce a good flame, and, as the gasoline remains longer in the generator and becomes weaker in its illuminating qualities, the outer tube or shell may be turned so as to let out more gas and increase the flame without liability to smoke. That others skilled in the art may be enabled to make and use my invention, I will now proceed to describe its construction and mode of operation: In the drawing, L represents the main part of the burner, which is made similar to the common burner, except that the lower part has a screw-thread made upon the outside and inside. Figs. 1, 2, 3, 4, and 5, represent one modification, in which L is the burner, having the usual screw-thread made upon the lower interior part by which to secure it to the pipe. At *a'* is a conical shoulder or seat upon the exterior, shown in Figs. 3 and 5, and a screw-thread, *d*, made upon the exterior of the lower end, and the small holes *c* are made either at the seat *a'* or just below it. I is a shell or tube, the inside diameter of its upper part being somewhat greater than the outside diameter of the part L, and upon the interior of the tube, at *a*, is a conical-shaped seat, made to fit upon the exterior seat *a'* upon the burner L. A screw-thread *d'* is made upon the interior of the lower part of the tube I, which fits the thread *d* upon the exterior of the burner L. The operation of this modification is as follows: When the tube I is turned entirely on to the burner L, the inner seat *a* fits down upon the shoulder *a'* of the burner L, and the only place of egress for the gas is through the slot at the tip. When the gasoline is fresh or new this slot will be quite sufficient to supply the flame, but, as the gasoline becomes more exhausted of carbon, the tube or shell I may be turned up a little, so that the seat *a* shall be raised slightly from the shoulder *a'*, and more or less of the gas will pass out through the holes *c* and pass up between the tube I and the burner L as the tube I is turned up or down, and, when the gas which escapes through the holes *c* and passes up between the tube and burner reaches the top, it unites with that passing out of the slot at the tip, increasing the volume and flame. In this device the gas, after passing out through the holes *c*, is prevented from passing down between the tube and burner by the screw-threads *d'* and *d* upon the inside of the tube and outside of the burner. In the modification shown in Figs. 6, 7, 8, 9, and 10, both the burners and regulating tube are similar to that already described, except

that the thread *d* upon the outside of the burner L is carried up higher, and the holes *c* are made below the top of the outer thread but above the top of the inside thread. The thread upon the inside of the tube I is not so long as the outside thread upon the burner L, but is considerably less, so that, when the tube I is turned entirely down on the burner the holes will be above the thread on the inside of the tube; and there is no inside seat in the tube I to operate upon a bevelled or conical exterior shoulder upon the burner L, as in the other modification. The operation of this modification is as follows: If the flame be too weak, the tube I is turned down upon the burner L until the top of the inside thread of the tube begins to pass below the holes *c*, when the gas will escape and pass up between the tube and burner and increase the flame as before. If it should be desirable to stop the escape of gas through the holes *c*, it is only necessary to turn up the tube upon the burner, and, when the thread inside the tube covers the holes *c*, then there will be no escape of gas. It will be seen that the principles of the operation of both modifications are very much alike, and are intended to accomplish the same object, although the tube turns up in the first case to let out more gas while it turns down in the second case, both being equivalent, however, in their operation and accomplishing the same result. I am aware that gas-burners have been heretofore made to give an additional supply of gas to the flame, but in those that I have seen they consisted of more pieces and were considerably more expensive to manufacture, and in their operation the burner revolved with the tube, thus causing the flame to revolve also. This is very objectionable, as it is often desirable to have the flame stand in one particular direction. In this device the flame does not turn in the least, while the whole burner may consist of only two pieces, and is cheaply made, and its operation and effect are perfect."

The claim of that patent is, "An improved gas-burner, consisting of the burner or pillar L, having holes *c c* therein, and provided with the movable or adjustable shell or tube I, all constructed and operating substantially as and for the purposes herein described and specified."

After such certificate was signed and filed, the Gilbert and Barker Manufacturing Company, one of the defendants in this suit, brought a suit in equity in the court below, as owner of the said patent granted to John F. Barker, for the infringement of the same, against Clough, the plaintiff in this suit,

alleging as the infringement the making and selling of burners constructed exactly like the two forms described in the patent to said Barker. The only testimony taken directly in the present suit was that taken on the trial before the jury and embodied in the case made, on which the motion for a new trial was made. But considerable testimony was taken, for final hearing, in the suit against Clough, and that testimony is contained in the record in this case, and it is understood that such testimony was considered and used, by agreement of parties in the court below, as part of the proofs in this case.

The first claim of the Clough patent is a claim to "the bat-wing burner, perforated at the base, in combination with the surrounding-tube, substantially as described." The elements of this claim are, a bat-wing burner, with a burner-tube; the burner-tube perforated at its base with small holes or passages for gas to escape at the base of such burner-tube; and another tube, surrounding the burner-tube, open at the top, and closed at the bottom, and united to the burner-tube below the perforations in it. The method of regulating the escape of gas from the perforations is no part of the first claim. The office of the combination in the first claim is, as the specification states, to enable the surrounding-tube to direct to the tip of the burner the gas which comes through the perforations, such surrounding-tube being open at the top and closed at the bottom, and united to the burner-tube below the perforations.

Two forms of burner are presented as infringements of the first claim. They are both of them substantially like the first form of burner described in the patent of Barker, the outside tube, in both of them, turning up to let out more gas. Each of these burners contains the combination of the first claim of the Clough patent.

It was held by the court below that the combination covered by the first claim of the Clough patent was found in a burner called the Horace R. Barker burner, the existence of which, prior to Clough's invention, was held to have been satisfactorily proved. Of the Horace R. Barker burners it was said by the court: "In those burners the burner was a bat-wing burner, perforated at the base. The perforations did not consist of small holes, but the stem of the burner was slitted all the way

down to the base, allowing the gas to escape through the whole length of the slit. There was a surrounding-tube united to the burner below the lower end of the slit. The burner-stem had a cone near its top, and, when the surrounding-tube was screwed so as to be in a certain position with reference to such cone, the effect was to direct to the tip of the burner the supply of gas coming through the slit below, the surrounding-tube being open at the top and closed at the bottom, and the flame was thickened, and a ring of flame was formed. The structure and mode of operation of the combination were the same as those of the combination covered by the first claim of the plaintiff's patent. The fact that the perforations in the Horace R. Barker burner existed not only at the base, but were continued in the form of a slit all the way up, makes no difference. Nor does it make any difference that the Horace R. Barker burner had a cone near its top. The first claim of the plaintiff's patent is broad enough to cover the Horace R. Barker burner, and that claim must be held to be invalid for want of novelty."

On the trial before the jury the existence and operation of the Horace R. Barker burners were testified to by Horace R. Barker himself and by John F. Barker, and a copy of the rejected application of Horace R. Barker for a patent was put in evidence. The question was submitted to the jury by the court as to whether the effect produced by Clough's invention had been produced in the Horace R. Barker burner by a combination or mode of operation substantially the same as in the burner of Clough; and the attention of the jury was called by the court, in its charge, to the contention of Clough, that the object of the Horace R. Barker burner was to control the size of the slit in the burner by a clamp; that, if some gas escaped through an orifice at the top of the surrounding-tube, and was projected upon the burner-tip, the escape was accidental and not desired; and that in a well-made burner it was not intended to escape, and did not escape. The jury found for Clough on the question of novelty, as against the Horace R. Barker burner. When the motion for a new trial was made before the judge who presided at the jury trial, he said, in his opinion denying the motion: "The device mainly relied upon by the defendants upon the question of priority was a burner of Horace R.

Barker, for which he made an unsuccessful application for a patent prior to the date of the plaintiff's invention. It consisted of a bat-wing burner, slitted nearly to the base, and a surrounding-tube smaller at the top than at the bottom. There was a screw upon the inside of the lower part of the tube. When the tube was screwed down upon the burner, the top of the tube pressed against a conical and enlarged part of the burner, near its top, and the slit was closed. When the tube was screwed up the slit was enlarged. The defendants claimed that the top of the tube in connection with the protuberant part of the burner formed a valve, and that the gas passed to the tip, not only through the burner, but through the ring near the tip at the end of the surrounding-tube, in a double current, and that the device was substantially like the burner of the complainant. The complainant claimed that the object and the effect of this invention was to provide a burner in which the bat-wing slit could be enlarged or diminished at pleasure, and to consume but a single current of gas; that the top of the tube, in connection with the conical part of the burner, was not a valve but a clamp; that, when the burner was new or well made, this clamp prevented the escape of gas; and that there was no appreciable delivery of gas in a well-made burner, except through the tip. I am of opinion that the jury, upon this question of fact, did not misconceive the weight of the evidence." In the proofs taken in the suit against Clough, and used in this case by agreement, John F. Barker gave further testimony as to the prior use of the Horace R. Barker burners, and such testimony seems to have been understood by the court below as showing that the Horace R. Barker burner was used with the surrounding-tube raised to such a height that the horizontal line of its upper end was raised from its seat at the cone on the burner-pillar, and an additional supply of gas passed out of the top of the surrounding-tube and mingled with the gas which escaped from the burner-tip; that, by screwing down the surrounding-tube so that it would impinge sufficiently against the cone, the slit would be closed; that the effect of the operation of thus raising or lowering the surrounding-tube was to increase or diminish the supply of gas; and that the surrounding-tube, considered in connection with the cone on the pillar

of the burner, operated as a valve to control the flow of gas. In this view the structure and its mode of operation were held to be such as to anticipate the first claim of the Clough patent. But we are all of opinion that an erroneous view was taken of the purport of the additional testimony of John F. Barker. He was testifying in February, 1875. The question was as to what the Horace R. Barker burner was, and as to what was its mode of operation in use. In the specification of the patent of John F. Barker, issued in July, 1870, he said: "I am aware that gas-burners have been heretofore made to give an additional supply of gas to the flame, but in those that I have seen they consisted of more pieces, and were considerably more expensive to manufacture, and in their operation the burner revolved with the tube, thus causing the flame to revolve also." The expression "more pieces" means more pieces than in the burner he was patenting. His burner consisted of two pieces only. The Clough burner consisted of three pieces, and in it the burner revolved with the tube. In the John F. Barker patent the burner did not revolve with the tube. The Horace R. Barker burner consisted of two pieces only, and the burner did not revolve with the tube. Therefore, the reference by John F. Barker, in his patent, to the burners which he had seen which would give an additional supply of gas was to the Clough burners, which it is proved he had seen; and it is impossible that he could have then understood that the Horace R. Barker burners, which also he had seen, were burners which had been used to give an additional supply of gas to the flame.

The testimony as to any additional or supplementary supply of gas in the Horace R. Barker burner amounts really to this only, — that if that burner is used now in a way in which it was never designed to be used, and is not shown to have ever been used before Clough's invention, it may be made to furnish a supplementary supply of gas. Its structure was such that, to give full effect to its mode of operation, the surrounding-tube did not require ever to be raised so high as not to be in contact with the cone. As it was raised from its lowest position the slit opened, and, when the slit was opened to its full extent, the tube was still in contact with the cone, and there was no orifice between them. Any further raising

of the tube was accidental, and not a part of the law of the structure. The object of raising and lowering the tube was, by less or greater pressure on the cone, to open or close the slit in the burner. The specification of Horace R. Barker, in his rejected application, shows that the only object of his burner was to control the flow of gas through the slit in the burner, instead of controlling the flow at the cock or farther back. The spring of the two parts of the burner was intended to carry them away from each other and open the slit when the pressure of the tube against the cone was relieved, while the increased pressure of the tube against the cone closed the slit. Any raising of the tube unnecessarily high, so as to admit of a flow of gas through an orifice between the tube and the cone to the flame, cannot be regarded as amounting to an invention of what Clough invented. The structure was not designed for the same purpose as Clough's, no person looking at it or using it would understand that it was to be used in the way Clough's is used, and it is not shown to have been really used and operated in that way.

The foregoing remarks apply equally to the Coolidge burner, which was like the Horace R. Barker burner in structure, except that in the Coolidge burner the raising of the ring against an inverted conical projection closed the slip. The Solliday burner and the Lunkenheimer burner did not contain Clough's invention. We are, therefore, brought to the conclusion that the first claim of the Clough patent is valid.

The second claim of the Clough patent is for a combination of the bat-wing burner, perforated at the base, the surrounding-tube, and the tubular valve for regulating the supply of external gas to the burner, substantially as described. The specification describes the tubular valve as extending upward into the burner-tube. The view taken by the court below as to this second claim was, that there was in the Horace R. Barker burner a regulation of a supplementary flow of gas, and by a valve-arrangement, the raising of the tube above the cone allowing the gas to flow out of the tube, and the lowering of the tube to bear against the cone closing the orifice. The court said: "In view of the existence of that burner, which contained the combination of a bat-wing burner, a perforated

tube in substance like that of the plaintiff's patent, and a tubular valve for regulating the supply of external gas to the burner, the construction of the second claim of the plaintiff's patent must be such as to limit that claim to the form of tubular valve which he describes, namely, one in the interior of the burner-tube and not forming part of the surrounding-tube. Under this construction, the second claim of the plaintiff's patent is not infringed." The defendants' burners had no tubular valve extending up into the burner-tube. In them the tubular valve formed part of the surrounding-tube, and reached or left its seat by screwing up or down the surrounding-tube. The surrounding-tube could not be permanently attached to the burner, because it carried the movable valve. In the Clough burner the surrounding-tube may be permanently attached to the burner, because the tubular valve is not carried by the surrounding-tube, but is a third and separate instrument, carried by an adjustable cylinder inserted within the burner-tube from below.

The combination of the first claim of the Clough patent being new, and, consequently, there never having been any valve-arrangement applied to regulate the flow of gas in such a combination, the premises on which the decision of the court below proceeded fail. Clough is entitled to the benefit of the doctrine of equivalents as applied to the combination of the burner, surrounding-tube, and regulating-tube, covered by the second claim of his patent. The regulation in the defendants' burners was by a tubular valve on the outside of the perforations instead of on the inside, and performing its work by being screwed up or down, as in Clough's. Although in the Clough structure the burner and surrounding-tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although in the Clough structure the flame revolves by the revolution of the burner, and although in the defendants' burners the revolution of the surrounding-tube regulated the supply of gas through such perforations, and neither the burner nor the flame revolved, the defendants' valve-arrangement must be held to have been an equivalent for that of Clough to the full extent to which that of Clough

goes, involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough. It is true that that patent describes the tubular valve as being inside of the burner-tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination, and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. The record shows that prior to the existence of the appellant's burner it was common in gas-burners to check the flow of gas out of the burner by applying an obstruction operated by a screw indifferently outside or inside of the burner. It follows, from these considerations, that the defendants infringed the second claim of the Clough patent.

The decree of the Circuit Court will be reversed, with costs, and the cause remanded with directions to enter a decree for the appellant for an account and an injunction, as prayed in the bill, with costs, and to take such further proceedings therein as shall be in conformity with law and with the opinion of this court; and it is

So ordered.

CLOUGH *v.* MANUFACTURING COMPANY.

1. The claim of letters-patent No. 105,768, granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners," is valid.
2. Although, in its method of supplying additional gas and in its valve-arrangement for regulating the supply, a gas-burner made according to the description of those letters infringes both of the claims of letters-patent 104,271, granted to Theodore Clough, June 14, 1870, for an "improvement in gas-burners," yet, as it dispenses with the interior tubular valve of Clough, and is made in two pieces instead of three, and is less expensive to make, and as, in regulating the supply, the shell alone revolves, and the flame always remains in one position, the modifications are new and useful, and therefore patentable.

APPEAL from 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. Edward N. Dickerson and *Mr. Roger H. Lyon* for the appellant.

Mr. William Stanley and *Mr. Stephen G. Clarke* for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought by the Gilbert & Barker Manufacturing Company against Theodore Clough to recover for the infringement of letters-patent granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners." The specification of that patent and its claim are set forth at length in the opinion in *Clough* v. *Barker*, *ante*, p. 166. The answer of the defendant admits that he has made and sold gas-burners substantially like those described in the Barker patent. The principal defence he sets up in the answer is, that he invented the improvement patented to Barker, and obtained letters-patent therefor from the United States on the 14th of June, 1870, being the same patent on which the other suit in the case just cited was founded, and the specification of which is set forth at length in the opinion therein; that the burners which he has made and sold were made under and according to that patent; that he made and used said improvement in December, 1869, and applied for a patent for it Dec. 4, 1869, which was granted, being the said patent of June 14, 1870; that after he had invented and perfected said improvement, and had filed such application for a patent for it, he showed a sample of it to Barker, in May, 1870; and that Barker, thereupon, fraudulently intending to deprive him of the benefits of his invention, obtained a patent for it, being the said patent of July 26, 1870, the gas-burner patented by him being substantially like that previously patented by the defendant, in construction, mode of operation, and result, and being a mere mechanical equivalent therefor. No other anticipation of Barker's invention is set up in the answer. The decree of the court below was in favor of the plaintiff.

The claim of the Barker patent covers a gas-burner having these features: a pillar with holes therein around the circumference at its bottom, and an adjustable or movable surrounding

shell or tube, such shell, by being moved up or down, either closing or opening the holes, and thus stopping or permitting the flow of gas through the holes. The general principle of the burner, so far as regards supplying additional gas to the burner, through the holes and the surrounding tube, as the illuminating qualities of the gas become weaker, and as regards having a method of increasing or diminishing such supply by a valve-arrangement covering or uncovering the holes as required, is the same as that of the prior patent to Clough, the appellant, and which was the prior invention. It has been held by this court, in the other suit between the same parties, that a gas-burner made according to the description in the Barker patent infringes both of the claims of the Clough patent, — the claim for the method of supplying the additional gas, and the claim for the application of a valve-arrangement to regulate the supply. But the point of the invention and patent of Barker is, that the surrounding shell or tube is so arranged that the screwing of such shell up or down causes it to act as a valve, on the outside of the pillar, to close or open the holes. As a consequence, the interior tubular valve of Clough is dispensed with, the burner is made in two pieces instead of three, is less expensive to make, and, moreover, in regulating the supply of gas, the shell alone revolves, and not the burner with it, as in Clough's burner, and so the flame always remains in one position. We think, from the evidence, that these modifications were new and useful, and sufficient in character to sustain a patent. The burner in the form patented by Barker appears to have superseded the burner in the form patented by Clough, and, after Barker had introduced his burner into use, Clough commenced making for market burners in the same form patented by Barker.

As to the claim that Clough made prior to Barker the form of burner covered by Barker's patent, the Circuit Court held that, the burden of proof being on the defendant to make out that allegation satisfactorily, the evidence fell short of showing clearly that Clough anticipated Barker as to that form of burner. Without discussing the evidence in detail, it is sufficient to say that we concur in that view. The burner of Clough which Barker saw before he made his burner was the

Clough burner which had the tubular valve in the inside of the burner-tube.

If the evidence as to the existence prior to the invention of Barker of other burners than that of Clough be considered, on the question of the novelty of the arrangement claimed by the Barker patent, it must be held that none of the prior forms of burner introduced in evidence anticipate the arrangement covered by the claim of the Barker patent.

Decree affirmed.

OSBORNE *v.* COUNTY OF ADAMS.

A steam grist-mill is not a work of internal improvement, within the meaning of the act of Nebraska of Feb. 15, 1869, entitled "An Act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose."

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

This was an action brought by Osborne against the county of Adams, Nebraska, to recover the amount of certain coupons detached from bonds of Juniata Precinct, a legal subdivision of that county. Pursuant to a vote of the qualified electors of the precinct, to aid in the construction of a steam grist-mill therein, the bonds were issued by the county commissioners under the authority supposed to be conferred by the act of that State of Feb. 15, 1869, the first and seventh sections of which are as follows: —

"SECT. 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement to an amount to be determined by the county commissioners of such county, or city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city: *Provided*, the county commissioners or city council shall first submit the question of the issuing said bonds to a vote of the legal voters of said

county or city in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money."

"SECT. 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such cases the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall contain a statement showing the special nature of such bonds."

The court sustained a demurrer to the declaration, and Osborne brought this writ of error.

Mr. Adna H. Bowen and *Mr. John H. Ames* for the plaintiff in error.

Mr. John Doniphan for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

A steam grist-mill is not, in our opinion, a work of internal improvement, within the meaning of the act of Nebraska approved Feb. 15, 1869, which authorizes counties, cities, and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement."

Township of Burlington v. *Beasley*, 94 U. S. 310, is not, as supposed by counsel, an authority for a different conclusion. That case arose under a statute of Kansas, which empowered municipal townships in that State to issue bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement." The bonds there in suit were issued to aid in the construction and completion of, and to furnish the motive power for, a steam custom grist-mill. It was held that the statute, reasonably interpreted, embraced a grist-mill operated by steam, as well as one run by water-power; that, since municipal aid was authorized for "the construction of

. . . water-power," the phrase "other works of internal improvement," in the Kansas statute, might be fairly construed as embracing works of the same class, and consequently as embracing a steam grist-mill. The court was somewhat influenced, as plainly appears from its opinion, by decisions of the Supreme Court of Kansas, particularly that of *Commissioners of Leavenworth County* v. *Miller*, 7 Kan. 479.

The present case is different. The only work of internal improvement specially described in the Nebraska statute is a railroad, and we are not justified by anything in *Township of Burlington* v. *Beasley*, or in the decisions of the courts of Nebraska, in holding that a steam or other kind of grist-mill is of the class of internal improvements which municipal townships in that State are empowered, by the statute in question, to aid by an issue of bonds.

For these reasons we adjudge that the bonds issued by the county commissioners in behalf of Juniata Precinct, in Adams County, Nebraska, in aid of the construction of a steam grist-mill in that precinct, are unauthorized by the act of Feb. 15, 1869; and as authority for their issue is not claimed to exist under any other statute, they must be held to be without binding force against the precinct.

Judgment affirmed.

SCHOOL DISTRICT *v.* STONE.

Bonds issued in the name of an independent school district, in the State of Iowa, contain these recitals: "This bond is issued by the board of school directors by authority of an election of the voters of said school district held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of acts 12th General Assembly of the State of Iowa." *Held*, 1. That the recitals imply as well that the bonds were issued by authority of the election, as that the election was lawfully held, but do not, necessarily or clearly, import a compliance with those provisions which, following substantially the words of the State Constitution, prohibit such a district from incurring indebtedness "to an amount in the aggregate exceeding five per centum on the value of its taxable property, to be ascertained by the last State and county tax lists previous to the incurring of such indebtedness." 2. That, in a suit on the bonds, the district is not estopped by the recitals from showing that the indebtedness of which the bonds are evidence exceeds the amount limited by the Constitution and laws of the State.

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

The facts are stated in the opinion of the court.

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

Mr. C. C. Nourse and *Mr. B. F. Kauffman* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the first day of July, 1870, the Board of School Directors of Independent School District of Steamboat Rock, Hardin County, Iowa, issued, in its name, thirty bonds, each for $500, and bearing interest at the rate of ten per cent per annum. Each bond recites that it "is issued by the board of school directors by authority of an election of the voters of said school district held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of acts 12th General Assembly of the State of Iowa." The statute referred to authorizes independent school districts to borrow money, within a prescribed limit as to amount, for the purpose of erecting and completing school-houses, by issuing negotiable bonds, — provided the loan was previously sanctioned by a majority of all the votes cast at an annual or a special meeting of the electors, of which meeting the same notice should be given as required by law in case of the election of officers of such districts, and which notice should state the amount proposed to be raised by a sale of bonds.

When the bonds were issued the assessed value of the property of the district, as shown by the last assessment immediately preceding the issue of the bonds, was $47,986. The indebtedness of the district was $425, and there was no money in its treasury. Upon a portion of the bonds, Stone, at their maturity, brought suit in the court below against the district, and judgment was rendered in his favor. The district thereupon brought this writ of error.

The Constitution of Iowa declares that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be as-

certained by the last State and county tax lists, previous to the incurring of such indebtedness." The largest indebtedness, therefore, which the district, consistently with the fundamental law of the State, could have contracted, when these bonds were issued, was five per cent on $47,986. Consequently, those here in suit, constituting one issue, and aggregating $15,000, must be held to have been made without authority of law, and, upon well-established principles, are not enforceable obligations against the district, unless it is estopped by their recitals from showing, against a *bona fide* purchaser, the value of its taxable property as disclosed by the last State and county tax lists previous to the creation of the debt.

The argument on behalf of defendants in error, briefly stated, is this: That the law invested the school board with authority to execute bonds for the purposes for which those in suit were issued, within the limit, as to amount, prescribed by the Constitution and the statute passed in conformity therewith; that that board, when issuing the bonds, were under a duty to determine, and necessarily did determine, whether the aggregate indebtedness of the district, thus increased, was in excess of five per cent upon the value of the taxable property of the district, as shown by the last State and county tax lists; consequently, it is contended, their recitals should be regarded as a declaration by the board, upon which *bona fide* purchasers could rely, of its determination that the taxable property of the district, as thus ascertained, was of value sufficient to justify the proposed indebtedness of $15,000.

Waiving any discussion of the question, whether the constitutional requirement that the amount of the taxable property should be "ascertained by the last State and county tax lists," did not compel every purchaser, at his peril, to obtain from that source the necessary information, and did not preclude him from relying upon the representations of district officers as to what those lists disclosed, we are of opinion that the recitals in the bonds do not, necessarily nor distinctly, import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them. Had the bonds recited that they were issued by authority of the election of July 31, 1869, *and* in conformity with the provisions of the

statute referred to, there would, in view of the decisions of this court, be more force in the argument in behalf of the defendant in error. *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Town of Venice* v. *Murdock*, id. 494; *Converse* v. *City of Fort Scott*, id. 503; *Marcy* v. *Township of Oswego*, id. 637; *Commissioners of Douglass County* v. *Bolles*, 94 id. 104; *Commissioners of Johnson County* v. *January*, id. 202; *Buchanan* v. *Litchfield*, 102 id. 278. And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the school board as to the value of the taxable property, would conclude the district as between it and a *bona fide* purchaser for value; for, in such case, since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the State Constitution for county, or other political or municipal corporations, a distinct recital that the bonds were issued, in conformity with the statute, would fairly import a compliance with the Constitution. But the recitals do not, as we have said, necessarily import a compliance with the statute or the fundamental law of the State upon that subject. They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent on the value of the taxable property of the district, as shown by the State and county tax lists.

This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too narrow and technical. It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the Constitution and of the

statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute, have been held, in favor of *bona fide* purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law.

For the reasons given, we are of opinion that, in the present action on the bonds, judgment should have been entered upon the special verdict for the district. To what extent, if any, the district may be held responsible, in some other form of proceeding, is a question not now before us, and as to which we express no opinion.

Judgment reversed with directions to render judgment, upon the special verdict, for the defendant below.

SCHWED *v.* SMITH.

Certain creditors, who severally recovered judgments against A. amounting in the aggregate to more than $5,000, but none of which exceed that sum, filed their bill against him and B. in the Circuit Court. A decree was passed, subjecting to the payment of the complainants goods seized by virtue of an execution sued out upon an older judgment confessed by A. in favor of B. The amount of that judgment and the value of the goods are each more than $5,000. A. and B. appealed. *Held*, that the value of the matter in dispute between them and the respective appellees is not sufficient to give this court jurisdiction.

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

On the 26th of January, 1880, Schwed & Newhouse confessed a judgment in the Circuit Court of Jackson County, Missouri, against themselves, and in favor of Henry Heller, for $9,512.50. Execution was at once issued on this judgment, and levied by Bailey, sheriff of the county, on a stock of goods.

On the 12th of February, 1880, William Smith & Co. had a suit pending in the same court, in their favor, against Schwed & Newhouse for the recovery of $3,829.71, and William C. Greene & Co. another suit for the recovery of $1,012.93. In both the suits attachments were issued and levied on the same goods taken under the execution in favor of Heller, and then in the hands of the sheriff. Smith & Co. and Greene & Co. thereupon brought suit in the same court against Schwed, Newhouse, Heller, and the sheriff, to set aside the judgment in favor of Heller on the ground that it was confessed without any consideration, and for the purpose of covering up the property of Schwed & Newhouse, and hindering and delaying creditors in the collection of their debts. This suit was afterwards removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri. Afterwards judgments were rendered in the attachment suits; that in favor of Smith & Co. being for $4,174.38, and that in favor of Greene & Co. for $1,104.09. In the mean time other creditors of Schwed & Newhouse sued out attachments against

them and recovered judgments; to wit, The Seth Thomas Clock Company for $1,518.49, The E. N. Welch Manufacturing Company for $455.58, and F. Quayle for $356. The attachments in these cases were also levied on the goods in the hands of the sheriff. All the later attaching creditors were admitted as parties to the original suit begun by Smith & Co. and Greene & Co. to set aside the judgment in favor of Heller, and in proper time a supplemental bill was filed in which all the attaching creditors appeared as complainants, setting up the recovery of their respective judgments. Pending the suit the property levied upon was sold, and the proceeds, being $7,405.55, paid into the registry of the court. At the final hearing a decree was rendered declaring the judgment confessed in favor of Heller void as against the attaching creditors. From this decree Schwed, Newhouse, Heller, and Bailey, the sheriff, took an appeal, which the appellees now move to dismiss on the ground that the value of the matter in dispute between the appellants and the several appellees is not greater than $5,000.

Mr. Enoch Totten and *Mr. James Botsford* in support of the motion.

Mr. Mayer Sulzberger and *Mr. James K. Waddill, contra.*

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

It is impossible to distinguish this case in principle from *Seaver* v. *Bigelows*, 5 Wall. 208, where an appeal by creditors who had joined in a suit to set aside a fraudulent conveyance by their debtor was dismissed because the amounts found due the appellants, respectively, were less than our jurisdictional limit. In delivering the opinion of the court, Mr. Justice Nelson said: "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment. . . . The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." In the present case, the judgment creditors

did succeed, and, in effect, each recovered a decree against Heller, setting aside his judgment so far as it affected them individually. Had they been defeated they could not have appealed, because, although allowed in equity to join in their suit, they had "separate and distinct interests depending on separate and distinct judgments," as well as separate and distinct attachments. But if the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action.

The appeal in *Seaver* v. *Bigelows* was from a decree against the creditors, but, in deciding the case, the court, in express terms, adopted the analogous practice in admiralty, where, under certain circumstances, separate and distinct causes of action may be united in one suit, and in that practice it has always been held that the ship-owner cannot unite the separate decrees against him in a suit to make up the amount necessary for our jurisdiction on appeal. That question was fully considered in *Ex parte Baltimore and Ohio Railroad Company*, *ante*, p. 5. Although the effect of the decree is to deprive Heller in the aggregate of more than $5,000, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense.

Motion granted.

FRASER *v.* JENNISON.

A paper writing purporting to be the last will and testament of A., wherein certain persons are named as executors, was by them offered for probate. They were citizens of Michigan, as were the contestants, with the exception of two, who, by reason of their citizenship, prayed for the removal of the cause to the Circuit Court. *Held*, that the cause was not removable, as it involves no controversy wholly between citizens of different States.

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

The case is stated in the opinion of the court.

Mr. Henry M. Duffield and *Mr. Edwards Pierrepont* for the plaintiffs in error.

Mr. William Jennison, *contra.*

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

William Jennison, William A. Moore, William Adair, and John Pettie, filed in the Probate Court of Wayne County, Michigan, a paper purporting to be the will of Alexander D. Fraser, and appointing them his executors, and asked that it be admitted to probate. The court appointed a time and place for the hearing, and gave the general notice required by law to all persons interested. In due time Ellis Fraser, Alexander Fraser, Elizabeth Calvin, Sophia Redden, Mary Calvin, Francis P. Fraser, and John Fraser, his heirs-at-law, appeared and jointly gave notice of their intention to contest the probate, "on the grounds that the said Alexander D. Fraser was not, at the date of the alleged execution thereof, of sound mind and memory; that he, at that time, did not have mental capacity to make a will; that the said paper was procured to be executed by undue influence, and that the same was not executed and attested in the manner required by said statute." Alexander Fraser was a citizen of Illinois, and Francis P. Fraser a citizen of Iowa. All the other contestants were citizens of Michigan, as were the persons named as executors. At the time and place appointed the proponents and contestants appeared, and, after a hearing, the will was admitted to probate

and letters-testamentary granted to the former. By the laws of Michigan the order for the probate of a will, as long as it remains unreversed, is conclusive evidence of the due execution of the will. Comp. Laws Mich. 1871, p. 1374, sect. 4341. Any person aggrieved by such an order may, however, appeal to the Circuit Court of the county, by filing in time a notice to that effect with the judge of probate, with his reasons therefor, and also an appeal bond. Id., p. 1562, sect. 5216. Notice of the appeal must be given to the adverse party, and copies of the proceedings in the Probate Court filed in the Circuit Court. Sect. 5218. The latter court, after the case gets there, is required to "proceed to the trial and determination of the question according to the rules of law, and if there shall be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by a jury." Sect. 5220. The Circuit Court may make such order or decree as the judge of probate ought to have made, and remit the case to the Probate Court for further proceedings. Sect. 5226.

After the order admitting this will to probate was entered, Alexander Fraser and Francis P. Fraser, who were not citizens of Michigan, appealed to the Circuit Court, as did also the other contestants. The two appeals were in form separate, but they were taken at the same time and on the same grounds. They were filed in the Circuit Court together, and the same order was entered in both for allegations of objections to the will and for notice to the proponents. Under this order the same issues were joined at the same time in both appeals, and the appellants in both demanded jury trials. The papers filed in the two appeals were substantially copies of each other, except as to the names of the appellants.

As soon as the issues were joined, Alexander Fraser and Francis P. Fraser, citizens of States other than Michigan, filed their petition for a removal of the cause to the Circuit Court of the United States for the proper district. In their petition for removal they made no reference to any other contestants than themselves, nor to any other appeal than their own. The State court refused the removal, and thereupon the petitioning appellants filed in the Circuit Court of the United States a copy of

the record of the Circuit Court of the State, so far as it related to them, but which failed to show that any persons except themselves had united in the contest. The cause having been docketed in the Circuit Court of the United States, the proponents of the will appeared and moved to remand, filing with their motion an affidavit showing that the record presented by the petitioners was defective. The court thereupon issued a *certiorari* to bring in the whole record, "including the record of all the appeals taken from the order of the Probate Court . . . admitting the will to probate, by whomsoever instituted." In obedience to the command of this *certiorari*, a copy of the whole record was certified to the Circuit Court of the United States, and the foregoing facts appearing therefrom, the order to remand was granted. From that order Alexander Fraser and Francis P. Fraser brought this writ of error.

The objections to the removal insisted on here are: —

1. That a proceeding in a State court for the probate of a will is not removable;

2. That if such a proceeding is removable, the application in the present case should have been made to the Probate Court prior to the hearing there, and that it comes too late after the appeal from that court to the Circuit Court of the State; and,

3. That the requisite citizenship of the parties does not exist.

In the view we take of the case it is necessary to consider only the last of these objections.

In Michigan, on an appeal from the order of a Probate Court admitting a will to probate, there is but one main issue, to wit, "whether the paper propounded is or is not a will. There may be more or less minor issues included, but they all belong to the same inquiry, and cannot be presented separately." *Fraser* v. *Wayne Circuit Judge*, 39 Mich. 198; *Hathaway's Appeal*, 46 id. 326. The only thing the Appellate Court can do is to determine the main issue, and certify its judgment to the Probate Court.

The contest in this case was begun by citizens of Michigan jointly with citizens of Illinois and Iowa against other citizens of Michigan. There was but a single proceeding, and that between all the contestants on one side, and all the proponents

on the other. There was but one judgment, and that against all the contestants. From the very nature of the proceeding there could have been no other. The contestants must either all succeed or all fail. They were all heirs-at-law, and whether the will was established or set aside, it would affect them all alike and in the same right.

Neither was the position of the parties or the nature of the contest changed because two appeals were taken by the contestants instead of one. By the operation of the two appeals the controversy was transferred from the Probate to the Circuit Court, and it stood in the Circuit Court just as it did in the Probate Court, with all the contestants actively participating in the contest on one side, and all the proponents on the other. It is unnecessary to consider what would have been the effect of an appeal by the citizens of Illinois and Iowa alone, for the citizens of Michigan were not content to leave the case in that position, but followed it to the Circuit Court themselves in the character of appellants. Unless, therefore, there was in the proceeding, as it stood in the Circuit Court of the State, a separate controversy which was wholly between citizens of different States, and which could be fully determined between them, there could not, according to the rule established in *Removal Cases*, 100 U. S. 457, and *Blake* v. *McKim*, 103 id. 336, be any removal to the Circuit Court of the United States under the act of March 3, 1875, c. 137.

But the plaintiffs in error insist there was such a separate controversy, and that they were entitled to a removal under the rulings in *Barney* v. *Latham*, id. 205. To this we cannot agree. As has already been seen, the contest when begun was joint, and presented but one issue for trial. To entitle a party to a removal under the second clause of the second section of the act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. *Hyde* v. *Ruble*, 104 id. 407. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or

more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun. Such is not this case. As was said by the Supreme Court of Michigan in this very contest, when an application was made for a *mandamus* to compel the Circuit Court to set aside an order consolidating the two appeals, "The probate of every will, whether in the original or appellate tribunal, must always be single and complete in one hearing. It would be absurd to have such proceedings severed, so that the will might be held good as to one class of contestants, and bad as to another. No matter how many different persons may appeal, they can only raise one issue, and there can be but one trial of that issue which is to determine the question of will or no will. . . . There can be no such thing as a determination of testacy or intestacy, which binds one appellant and does not bind the rest. The controversy includes all interests that the law recognizes for any purpose, and binds all." For these reasons it was held that all of the several claims of appeal were merely appearances in a single and indivisible proceeding, which could not be severed for any purpose. The *mandamus* asked for was refused, the court remarking that the order for consolidation was entirely unnecessary, and undoubtedly made out of abundant caution. This seems to be conclusive of the question now under consideration. The contest was joint when it was begun. It was joint after the two appeals were taken, and is not separable for any purpose. Although, in form, separate issues were joined in the appeals, in reality they were but one, and were capable of but one trial.

The order remanding the cause is

Affirmed.

UNITED STATES *v.* LEE.

KAUFMAN *v.* LEE.

1. The doctrine that, except where Congress has provided, the United States cannot be sued, examined and reaffirmed.
2. That doctrine has no application to officers and agents of the United States who, when as such holding for public uses possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of inquiry, and adjudged accordingly.
3. The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, nor private property taken for public use without just compensation, relate to those rights whose protection is peculiarly within the province of the judicial branch of the government. Cases examined which show that the courts extend protection when the rights of property are unlawfully invaded by public officers.
4. In ejectment, the title relied on by the defence was a certificate of sale of the demanded premises to the United States by the commissioners under the act of Congress for the collection of direct taxes. The certificate was impeached on the ground of the refusal of the commissioners to permit the owner to pay the tax, with interest and costs, before the day of sale, by an agent, or in any other way than by payment in person. *Held*, that when the commissioners had established a uniform rule that they would receive such taxes from no one but the owner in person, it avoids such sale, and a tender is unnecessary, since it would be of no avail.
5. *Bennett* v. *Hunter*, 9 Wall. 324, *Tacey* v. *Irwin*, 18 id. 549, and *Atwood* v. *Weems*, 99 U. S. 183, re-examined, and the principle they establish held to apply to a purchase at such a tax sale by the United States as well as by a private person.

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

The facts are stated in the opinion of the court.

The cases were argued by the *Solicitor-General* and *Mr. Westell Willoughby* for the plaintiffs in error, and by *Mr. William D. Shipman*, *Mr. A. Ferguson Beach*, and *Mr. William J. Robertson*, with whom were *Mr. Legh R. Page* and *Mr. Francis L. Smith*, for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

These are two writs of error to the same judgment: one prosecuted by the United States, *eo nomine;* and the other by the

Attorney-General of the United States, in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the Circuit Court.

The action was originally commenced in the Circuit Court for the county of Alexandria, in the State of Virginia, by George W. P. C. Lee, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant.

As soon as the declaration was filed the case was, by writ of *certiorari*, removed into the Circuit Court of the United States, where all the subsequent proceedings took place. It was tried by a jury, and during its progress an order was made at the request of the plaintiff dismissing the suit as to all of the defendants except Kaufman and Strong. Against each of these a judgment was rendered for separate parcels of the land in controversy; namely, against Kaufman for about two hundred acres of it, constituting the National Cemetery and included within its walls, and against Strong for the remainder of the tract, except seventeen acres in the possession of Maria Syphax.

As the United States was not a party to the suit below, and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, under which all the questions are raised which could be raised under the other, their writ being prosecuted in the interest of the United States, and argued here by the Solicitor-General, the point is immaterial, and the question has not been mooted.

The first step taken in the case after it came into the Circuit Court of the United States was the filing in the clerk's office of that court of the following paper by the Attorney-General: —

"GEORGE W. P. C. LEE
v.
FREDERICK KAUFMAN, R. P. STRONG, AND OTHERS. } In ejectment.

"And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years and now is held, occupied, and possessed by the United States, through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

"Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

"CHAS. DEVENS,
"*Att'y-Gen'l U. S.*"

The plaintiff demurred to this suggestion, and on hearing the demurrer was sustained.

The case was thereupon tried before a jury on the general issue pleaded by Kaufman and Strong, in the course of which the question raised by this suggestion of the Attorney-General was again presented to the court by prayers for instruction, which were rejected, and exceptions taken.

The plaintiff offered evidence establishing title in himself by the will of his grandfather, George Washington Parke Custis, who devised the Arlington estate to his daughter, the wife of General Robert E. Lee, for life, and after her death to the

plaintiff. This, with the long possession under that title, made a *prima facie* right of recovery in the plaintiff.

The title relied on by the defendants is a tax-sale certificate made by the commissioners appointed under the act of Congress of June 7, 1862, c. 98, entitled "An Act for the collection of direct taxes in the insurrectionary districts within the United States," as amended by the act of Feb. 6, 1863, c. 21. At this sale the land was bid in for the United States by the commissioners, who gave a certificate of that fact, which was introduced on the trial as evidence by the defendants.

If this sale was valid and the certificate conveyed a valid title, then the title of the plaintiff was thereby divested, and he could not recover. If the proceedings evidenced by the tax sale did not transfer the title, then it remained in him, and, so far as the question of title was concerned, his recovery was rightful.

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record: —

1. Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff?

2. If such an action could be maintained, was the *prima facie* title of the plaintiff divested by the tax sale and the certificate given by the commissioners?

It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law under which the latter question was submitted by the court to the jury was sound, and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property.

For this reason we will consider first the assignment of errors on that subject.

No substantial objection is seen on the face of the certificate to its validity, and none has been seriously urged. It was admitted in evidence by the court, and, unless impeached by

extrinsic evidence offered by the plaintiff, it defeated his title.

When this tax sale was made, the act of Feb. 6, 1863, which substitutes a new section seven for that of the original act of June 7, 1862, was in force. It declares that the certificate of the commissioners given to the purchaser at such sale "shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same;" and that it "shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

It is in reference to the clause which permits the certificate to be impeached by showing that the taxes had been paid previous to sale that the plaintiff in the present case introduced evidence.

This court has in a series of cases established the proposition that where the commissioners refused to receive such taxes, their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale. *Bennett* v. *Hunter*, 9 Wall. 326; *Tacey* v. *Irwin*, 18 id. 549; *Atwood* v. *Weems*, 99 U. S. 183.

There are exceptions to the ruling of the court on the admission of evidence, and instructions to the jury given and refused on this subject, which are made the foundation of several assignments of error.

All that is necessary to be considered in this matter is presented in the instructions granted and refused. The point in issue is fairly raised by the following, given at the request of the plaintiff and against the objection of the defendants: —

"If the jury believe from the evidence that the commissioners, prior to January 11, 1864, established, announced, and uniformly followed a general rule under which they refused to receive on property which had been advertised for sale from any one but the owner, or a party in interest, in person, when offered, the amount chargeable upon said property by virtue of the said acts of Congress, then said rule dispensed with the

necessity of a tender, and in the absence of proof to the contrary the law presumes that said amount would have been paid, and the court instructs the jury that, upon such a state of facts the sale of the property in controversy made on the eleventh day of January, 1864, was unauthorized, and conferred no title on the purchaser;" and by instructions 6 and 7, given at the request of the defendants, in the following language:—

"6th, The burden of proof is upon the plaintiff to establish the fact that the tax commissioners before the sale of this property made a general rule not to receive taxes except from the owner in person after the advertisement and before the sale; and if the jury believe that only two such instances occurred before the sale of this property, and if there is no evidence that the other two commissioners or either of them ever acted under such rule or practice except Commissioner Hawxhurst, or that they or either of them ever concurred in such action before the sale of this property, then the said two instances in which Mr. Hawxhurst alone acted do not establish the said practice by the board of commissioners before the sale of this property in a sufficient manner to render the certificate of sale of this property invalid.

"7th, In order to establish a general practice or rule of the board of commissioners not to receive taxes except from the owner in person, after advertisement and before sale; before the date of the sale of the property in controversy, the jury must find from evidence produced on this trial that a majority of such board adopted such practice, or rule, or concurred therein, before the date of the sale of this property, and in the absence of proof to the contrary the law presumes that a majority of such board did not adopt such practice or rule, or concur therein before such date."

We think these presented correctly to the jury the principle established by the cases in this court above referred to. That is, that the commissioners themselves having established and acted upon a rule that payment of the taxes after advertisement would be received from no one but the owner of the land appearing in person to pay them, that if offered by his tenant, his agent, or his attorney in fact duly appointed, it would be rejected, it would be an idle ceremony for any of these to make

the offer, and an actual tender by such persons, as it would certainly not be accepted, need not be made. That the commissioners, having in the execution of the law acted upon a rule which deprived the owner of the land of an important right, a right which went to the root of the matter, a right which has in no instance known to us or cited by counsel been refused to a tax-payer, the sale made under such circumstances is invalid, as much so as if the tax had been actually paid or tendered. The proposition is thus expressed by this court at its last term in *Hills* v. *Exchange Bank*, 105 U. S. 319, as the result of the cases above cited: "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

The application of these decisions to the case before us is denied by counsel on two grounds. The first of these is that *Bennett* v. *Hunter* was decided on the language of the act of 1862, and that due attention was not given to the peculiar language of the substituted section seven of the act of 1863, which says that where the owner of the land "shall not, on or before the day of sale, appear in person before the said Board of Commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof." It is argued from this that no right to pay the tax under *this* statute existed except by the owner in person.

The reply to this is that in *Bennett* v. *Hunter* and *Tacey* v. *Irwin* the sales that were under consideration are clearly shown by the reports to have been made after the act of 1863, and it is believed that no sale for taxes was made under the original tax law until after that amendment was passed, and that all the officers charged with the duty of collecting that tax were aware of the language of the new seventh section. It is quite apparent from the opinion of Mr. Chief Justice

Chase, who spoke for the court in *Bennett* v. *Hunter*, and who was Secretary of the Treasury when both statutes were enacted, that he understood well that he was deciding the very question raised by the requirement to appear in person in the latter act, and intended to decide that, notwithstanding this, the owner had a right to pay the tax before sale by an agent or a friend.

Besides, there was no other provision of either the act of 1862 or the amendment of 1863 which gave the owner the right to pay at all between the advertisement and the sale. The third section of the original act gave the right to pay for sixty days after the tax commissioners had fixed the amount of the tax, and no longer; and the seventh section of that act, as well as its substitute of 1863, gave the right to redeem after the sale was made.

It is clear, therefore, that *Bennett* v. *Hunter*, *Tacey* v. *Irwin*, and *Atwood* v. *Weems* were decisions construing the substituted seventh section of 1863.

In *Turner* v. *Smith*, 14 Wall. 553, this court, in construing the change in the language of the seventh section, held that its object was to authorize the United States, by its commissioners, to bid more than the tax and costs, which they could not do before, and to limit them to two-thirds of the assessed value of the land, and that after the amount of costs and tax had been bid, the United States should not bid against a purchaser named by the owner. It was probably in reference to this that the act required the personal presence of the owner before the commissioners to name a purchaser, against whom the United States should not compete after it was secured by a bid which covered the tax, interest, and costs.

The other point raised is, that the right to pay the taxes between the advertisement and day of sale in any other mode than by personal appearance of the owner before the commissioners, did not exist in cases where the United States became the purchaser. As it could never be known until the day of sale whether the United States would become the purchaser or not, it would seem that the duty of the commissioners to receive the taxes was to be exercised without reference to the possibility of the land being struck off to the United States.

In *Cooley* v. *O'Connor*, 12 Wall. 391, it was held that the act contemplated that a certificate of sale should be given when the United States became the purchaser as in other cases, and no reason is shown why that certificate should have any greater effect as evidence of title than in the case of a private purchaser, nor why it should not be subject to the same rules in determining its validity, nor why the payment or tender of the tax, interest, and costs, should not be made by an agent in the one case as in the other.

It is proper to observe that there was evidence, uncontradicted, to show that Fendall appeared before the commissioners in due time, and on the part of Mrs. Lee, in whom the title then was, offered to pay the taxes, interest, and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person.

In all this matter we do not see any error in the rulings of the court, nor any reason to doubt that the jury were justified in finding that the United States acquired no title under the tax-sale proceedings.

In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is.

The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government.

The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were. We have the authority of Chief Baron Comyns, 1 Digest, 132, Action, C. 1, and 6 Digest, 67, Prerogative; and of the Mirror of Justices, chap. 1, sect. 3, and chap. 5, sect. 1, that such was the law; and of Bracton and Lord Holt, that the King never was suable of common right. It is certain, however, that after the establishment of the petition of right about that time as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King, no attempt has been made to sue the King in any court except as allowed on such petition.

It is believed that this petition of right, as it has been practised and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." *United States* v. *O'Keefe*, 11 Wall. 178.

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis*, 10 Wall. 15. Congress has created a court in which it

has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President, and may be served on the Attorney-General, as was done in *Chisholm* v. *Georgia*, 2 Dall. 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs & Another* v. *Light Boats*, 11 Allen (Mass.), 157. As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that in our system of jurisprudence the principle is as applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State

of the Union may be sued in this court. *Railroad Company* v. *Tennessee*, 101 U. S. 337; *Railroad Company* v. *Alabama*, id. 832.

That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of *Chisholm* v. *Georgia*, where Mr. Justice Wilson, a member of the convention which framed the Constitution, after a learned examination of the laws of England and other states and kingdoms, sums up the result by saying: "We see nothing against, but much in favor of, the jurisdiction of this court over the State of Georgia, a party to this cause." Mr. Chief Justice Jay also considered the question as affected by the difference between a republican State like ours and a personal sovereign, and held that there is no reason why a state should not be sued, though doubting whether the United States would be subject to the same rule.

The first recognition of the general doctrine by this court is to be found in the case of *Cohens* v. *Virginia*, 6 Wheat. 264.

The terms in which Mr. Chief Justice Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign independent State is not suable except by its own consent." This general proposition, he adds, will not be controverted.

And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. *United States* v. *Clarke*, 8 Pet. 436; *United States* v. *McLemore*, 4 How. 286; *Hill* v. *United States*, 9 id. 386; *Nations* v. *Johnson*, 24 id. 195; *The Siren*, 7 Wall. 152; *The Davis*, 10 id. 15.

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial

enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

But little weight can be given to the decisions of the English courts on this branch of the subject, for two reasons: —

1. In all cases where the title to property came into controversy between the crown and a subject, whether held in right of the person who was king or as representative of the nation, the petition of right presented a judicial remedy, — a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the King who held possession of such property, when the issue could be made with the King himself as defendant.

2. Another reason of much greater weight is found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power.

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property,

there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Another class of cases in the English courts, in which attempts have been made to subject the public ships and other property of foreign and independent nations found within English territory to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange* v. *McFaddon*, 7 Cranch, 116; *Luther* v. *Borden*, 7 How. 1; *State of Georgia* v. *Stanton*, 6 Wall. 50.

The earliest case in this court in which the true rule is laid down, and which, bearing a close analogy to the one before us, seems decisive of it, is *United States* v. *Peters*, 5 Cranch, 115. In an admiralty proceeding commenced before the formation of the Constitution, and which afterwards came into the District Court of the United States for Pennsylvania, that court, after full hearing, had decided that the libellants were entited to the proceeds of the sale of a vessel condemned as prize of war, which had come to the possession of David Rittenhouse as treasurer of Pennsylvania. The district judge had declined to issue any process to enforce his decree against the representatives of Rittenhouse, on the ground that the funds were held as the property of that State, and that as she could not be subjected to judicial process, neither could the officer who held the money in her right. The analogy to the case before us will be seen when it is further stated that this claim of the State to the money had been fully presented, and that the court had decided that the libellants and not the State were legally entitled to it. In that case, as in this, it was argued that the suit was in reality against the State. But, on an application therefor, a writ

of *mandamus* to compel the judge of the District Court to proceed in the execution of his decree was granted. In delivering the opinion, Mr. Chief Justice Marshall says: "The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, when a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.*"

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.

It may be said — in fact it is said — that the present case differs from the one in 5 Cranch, because the officers who are sued assert no personal possession, but are holding as the mere agents of the United States, while the executors of Rittenhouse held the money until a better right was established. But the very next case in this court of a similar character, *Meigs* v. *McClung's Lessee*, 9 Cranch, 11, shows that this distinction was not recognized as sound. The property sued for in that case was land on which the United States had a garrison erected at a cost of

$30,000, and the defendants were the military officers in possession; and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, "because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction." They further insisted, says the bill of exceptions, that the United States had a right by the Constitution to appropriate the property of the individual citizen. The court below overruled these objections, and held that the title being in plaintiff he might recover, and that "if the land was private property the United States could not have intended to deprive the individual of it without making him compensation therefor."

Although the judgment of the Circuit Court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, Mr. Chief Justice Marshall concludes his opinion in this emphatic language: "This court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, *and that the plaintiff below might sustain his action.*"

We are unable to discover any difference whatever in regard to the objection we are now considering between this case and the one before us.

Impressed by the force of this argument, counsel say that the question of the objection arising out of the possession of the United States was not considered in that case, because it was not urged in argument by counsel. But it is manifest that it was so set out in the bill of exceptions, and so much relied on in the court below that it could not have escaped the attention of the court and of the eminent man who had only six years before delivered the opinion in the case of *United States* v. *Peters*. Nor could the case have been decided as it was if the doctrine now contended for be sound, since the United States was dispossessed of an occupied garrison by the effect of the judgment against the officers in charge of it.

In *Wilcox* v. *Jackson*, 13 Pet. 498, the contest was over a fort of the United States which had been in its continued pos-

session for over thirty years, and was so occupied when the suit was brought against its officers to dispossess them. The case came from the Supreme Court of Illinois to this court on a writ of error, and the judgment in favor of the plaintiff was reversed. The question now under consideration was not passed upon directly by this court. But a long examination of the question whether the plaintiff had proved title in himself, and a decision that while the State courts of Illinois held a certificate of purchase from the United States to be a legal title under her statute, that statute was invalid, might all have been avoided by the simple declaration that the United States, being in possession of the property as a fort, no action at law against its officers could be maintained. But no such proposition was advanced by counsel on either side or considered by the court.

There is a very satisfactory reason for this. *United States* v. *Peters*, *Meigs* v. *McClung*, and *Osborn* v. *Bank of United States*, had all involved the same question, and in the first and last of these cases the principle was fully discussed, and in the other necessarily decided in the negative. And in *The Governor of Georgia* v. *Madrazo*, 1 Pet. 110, the court had referred to these cases, and again asserted the principle, quoting the language of them. Counsel were not justified in asking the court to reconsider it while most of the judges were still on the bench, including the Chief Justice, who had made those decisions.

Osborn v. *Bank of United States*, 9 Wheat. 738, is a leading case, remarkable in many respects, and in none more than in those resembling the one before us.

It was this: The State of Ohio having levied a tax upon the branch of the Bank of the United States located in that State, which the bank refused to pay, Osborn, auditor of the State, was about to proceed to collect said tax by a seizure of the money of the bank in its vaults, and an amended bill alleged that he had so seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the treasurer of the State, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants as well as Osborn and his assistant, Harper.

One of the objections pressed with pertinacity all through the case to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a defendant to the bill, was the real party in interest. That all the parties sued were her officers, — her auditor, her treasurer, and their agents, — concerning acts done in their official character, and in obedience to her laws. It was conceded that the State could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that while the State could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction, and that the bill must be dismissed.

A few citations from the opinion of Mr. Chief Justice Marshall will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case he says: —

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

In another place he says: "The process is substantially, though not in form, against the State, . . . and the direct interest of the State in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of

the bank, . . . and the very difficult question is to be decided, whether, in such a case, the court may act upon agents employed by the State and on the property in their hands." In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States." Again: "The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record." Again: "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

The decree of the Circuit Court ordering a restitution of the money was affirmed.

Grisar v. *McDowell*, 6 Wall. 363, was an action in the Circuit Court against General McDowell to recover possession of property held by him as an officer of the United States which had been set apart and reserved for military purposes. Though this was set up by him as part of his defence, it does not appear that in the argument of counsel for the government, or in the opinion of the court, any importance was attached to this circumstance; but the opinion of Mr. Justice Field in this court examines the case elaborately on the question whether

plaintiff or the government had the title to the land. If the doctrine now contended for is sound, the case should have proceeded no further on the suggestion, not denied, that the property was held for public use by a military officer under orders from the President.

Brown v. *Huger*, 21 How. 305, is of a precisely similar character, for the possession of the military arsenal at Harper's Ferry, in which, while the fact of its possession by the United States was set out in the bill of exceptions, no attention is given to that fact in the opinion of this court, which consists of an elaborate examination of plaintiff's title, held to be insufficient.

These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray*, 16 Wall. 203, the case of *Osborn* v. *Bank of United States* is cited with approval as establishing these among other propositions: "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

Though not prepared to say now that the court can proceed against the officer in "all respects" as if the State were a party, this may be taken as intimating in a general way the views of the court at that time.

The Siren, 7 Wall. 152, and *The Davis*, 10 id. 15, are instances where the court has held that property of the United States may be dealt with by subjecting it to maritime liens, where this can be done without making the United States a party.

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is

sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grisar* v. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions.

It is true that there are expressions in the opinion of the court in the case of *Carr* v. *United States*, 98 U. S. 433, which are relied on by counsel with much confidence as asserting a different doctrine.

That was a case in which the United States had filed a bill in the Circuit Court for the District of California to quiet title to the land on which a marine hospital had been built. To rebut the evidence of title offered by the plaintiffs, the defendant had relied on certain judgments rendered in the State courts, in which the unsuccessful parties set up title in the United States, under which they claimed. It appeared that the person who was district attorney of the United States had defended these actions, and the question under discussion was whether the United States was estopped by the proceedings so as to be unable to sustain the suit to quiet title. After stating the general doctrine that the United States cannot be sued without her consent, and the further proposition that no such consent can be given except by Congress, which is a sufficient reason why they cannot be concluded by an action to which they are not parties, the learned justice who delivered the opinion proceeded to make some remarks as to cases in which actions would or would not lie against officers of the govern-

ment in relation to property of the United States in their possession. As these remarks were not necessary to the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the court which decided the case.

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided.

The fact that the property which is the subject of this controversy is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, and invasions of forts and arsenals of the United States. Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

The cases already cited of *Meigs* v. *McClung*, *Wilcox* v. *Jackson*, *Georgia* v. *Madrazo*, *Grisar* v. *McDowell*, *Brown* v. *Huger*, and *Osborn* v. *Bank of United States*, necessarily involved this question, for the property recovered by the plaintiff in the case of *Meigs* v. *McClung* was a garrison and barracks then in use for such purposes by the officers of the United States who were sued. In *Wilcox* v. *Jackson*, an action was brought to recover, among other things, a fort which had been in the occupation of the United States for thirty years, and which was then occupied by an officer of the army of the United States and his command. In *Osborn* v. *Bank of United States*, the

money sued for and recovered by the final decree of this court was claimed by the State of Ohio as part of her public funds, and devoted by her laws to public uses in all the exigencies of the public service; so that the authorities we have examined, if they are worth anything, meet this objection as they meet the others which we have considered.

The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States, whose language is: "That no person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 4 Wall. 2.

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government,

must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court, — a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative

body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte Milligan*, 4 Wall. 2; *Kilbourn* v. *Thompson*, 103 U. S. 168.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the

courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

One of these, of no little significance, is, that during the existence of the government for now nearly a century under the present Constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the government, have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom

known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority necessary to put down the rebellion; yet no improper interference with the exercise of that authority was permitted or attempted by the courts. *State of Mississippi* v. *Johnson*, 4 Wall. 475; *State of Georgia* v. *Stanton*, 6 id. 50; *State of Georgia* v. *Grant*, id. 241; *Ex parte Tarble*, 13 id. 397.

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights, or the authority of the Federal government may come in question, which cannot be removed into a court of the United States

under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal government.

The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands.

While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all.

Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.

From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is

Affirmed.

MR. JUSTICE GRAY, with whom concurred MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE WOODS, dissenting.

MR. JUSTICE GRAY. The Chief Justice, Mr. Justice Bradley, Mr. Justice Woods, and myself are unable to concur in the judgment of the majority of the court. The case so deeply affects the sovereignty of the United States, and its relations to the citizen, that it is fit to announce the grounds of our dissent.

The action is ejectment, originally brought by George W. P. C. Lee against Frederick Kaufman and Richard P. Strong in a court of the State of Virginia, to recover possession of a tract of land known as Arlington, of which the plaintiff alleged that he was seized in fee.

The whole tract, having been advertised for sale for non-payment of direct taxes lawfully assessed upon it, and having been selected for government use for war, military, charitable, and educational purposes by the President of the United States under the power conferred on him by the act of Congress of Feb. 6, 1863, c. 21, was accordingly, in 1864, bid off to the United States at the tax sale; and for many years has been, and now is, held and occupied by the United States, through Kaufman and Strong in charge thereof, under the certificate of sale of the tax commissioners, and for the purposes aforesaid, and also under orders of the Secretary of War, part of it for a military station, and the rest as a national cemetery for the burial of deceased soldiers and sailors. These facts were made to appear at three stages of the case.

First, They were stated in a petition filed by Kaufman and Strong in the State court, for the removal of the case into the Circuit Court of the United States under sect. 643 of the Revised Statutes, on the ground that the defendants were officers of the United States, and holding the land by title derived from officers of the United States, acting under a revenue law of the United States, the validity of which was affected. That petition was granted and the case removed accordingly.

Second, They were stated in a suggestion and motion, filed by the Attorney-General in the Circuit Court of the United States before trial, protesting against the jurisdiction of the court and moving for a stay of proceedings; which was demurred to by the plaintiff, and overruled by the court.

Third, They were proved by the evidence produced by each party at the trial, and were assumed in the instructions given as well as in those requested. One of the instructions requested by the defendants was as follows: "If the jury believe from the evidence that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants

occupy the same only as such officers and agents, in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession thereof, except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming the title thereto under the certificate of sale proved in this cause; then the verdict must be for the defendants." The court refused this instruction, and gave the following: "If the jury believe from the evidence that at the institution of this suit the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kaufman, or either of them, under the direction of the government of the United States, or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively for the premises so occupied or possessed by them respectively."

The court submitted the case to the jury under further instructions, which permitted them to find for the plaintiff upon the ground that the certificate of sale for taxes was invalid as against him, and had vested no legal title in the United States. The jury returned a verdict, upon which judgment was rendered, that the plaintiff recover possession of the premises, partly against Kaufman and partly against Strong. Writs of error were sued out by the United States, and by Kaufman and Strong, and the case has been argued upon both these writs of error.

This is not an action of trespass to recover damages only. Nor is it an action to recover property violently and suddenly wrested from the owner by officers of the government without its directions and without color of title in the government. But it is brought to recover possession of land which the United States have for years held, and still hold, for military and other public purposes, claiming title under a certificate of sale for direct taxes, which is declared by the act of Congress of June 7, 1862, c. 98, sect. 7, to be *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser, and which has been defined by this court as a "public act which is

the equivalent of office found." *Bennett* v. *Hunter*, 9 Wall. 326, 336.

The principles upon which we are of opinion that the court below had no authority to try the question of the validity of the title of the United States in this action, and that this court has therefore no authority to pass upon that question, may be briefly stated.

The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued.

That maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defence and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country.

These principles appear to us to be axioms of public law, which would need no reference to authorities in their support, were it not for the exceeding importance and interest of the case, the great ability with which it has been argued, and the difference of opinion that has been manifested as to the extent and application of the precedents.

The exemption of the United States from being impleaded without their consent is, as has often been affirmed by this court, as absolute as that of the Crown of England or any other sovereign. In *Cohens* v. *Virginia*, 6 Wheat. 264, 411, Mr. Chief Justice Marshall said: "The universally received opinion is, that

no suit can be commenced or prosecuted against the United States." In *Beers* v. *Arkansas*, 20 How. 527, 529, Mr. Chief Justice Taney said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State; and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." In the same spirit, Mr. Justice Davis, delivering the judgment of the court in *Nichols* v. *United States*, 7 Wall. 122, 126, said: "Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created." See also *United States* v. *Clarke*, 8 Pet. 436, 444; *Cary* v. *Curtis*, 3 How. 236, 245, 256; *United States* v. *McLemore*, 4 id. 286, 289; *Hill* v. *United States*, 9 id. 386, 389; *Reeside* v. *Walker*, 11 id. 272, 290; *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 id. 484, 488; *The Siren*, 7 id. 152, 154; *The Davis*, 10 id. 15, 20; *United States* v. *O'Keefe*, 11 id. 178; *Case* v. *Terrell*, id. 199, 201; *Carr* v. *United States*, 98 U. S. 433, 437; *United States* v. *Thompson*, id. 486, 489; *Railroad Company* v. *Tennessee*, 101 id. 337; *Railroad Company* v. *Alabama*, id. 832.

The English authorities from the earliest to the latest times show that no action can be maintained to recover the title or possession of land held by the crown by its officers or servants, and leave no doubt that in a case like the one before us the proceedings would be stayed at the suggestion of the Attorney-General in behalf of the crown.

Our citations will be confined to the time since Magna Charta declared that no man should be taken or imprisoned,

or be disseized of his freehold or liberties or free customs, or be outlawed or exiled or in any way destroyed, or be passed upon or condemned, but by the lawful judgment of his peers, or by the law of the land, — which is the origin of the provision, embodied in the Fifth Amendment of the Constitution of the United States, that no man shall be deprived of life, liberty, or property without due process of law.

The earliest authority to be referred to is Bracton, who wrote in the reign of Henry III., and who, in the famous passage of his first book, affirms that the King ought not to be subject to man, but to God and to the law, because the law makes the King; and therefore the King should ascribe to the law what the law ascribes to him, namely, dominion and power, for there is no King where reigns will and not law. *Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet, dominium et potestatem, non est enim rex, ubi dominatur voluntas et non lex.* Bract. 5 *b.*

Yet no one states more strongly than Bracton the exemption of the King from being sued without his consent in such a case as this; for he says that one who has been disseized by the King, or by his bailiffs in his name, *per dominum regem vel ballivos suos nomine suo*, or, as he elsewhere says, whom the King, or any one in his behalf or in his name, *aliquis pro eo vel nomine suo*, has ejected, cannot, even if the disseisin be manifest, prosecute an assise to recover possession of the land without the King's consent, but must await his pleasure whether the assise shall proceed or not, *expectanda erit voluntas domini regis quod procedat assisa vel non procedat.* Bract. 168 *b*, 171 *b*, 212 *a.*

Lord Coke tells us that before the Statute of Westminster I. (3 Edw. I.), c. 24, if an officer of the King, by mere color of his office, and not by the King's command, disseized a man of his freehold, the only remedy was by petition to the King; and that it was to relieve against this evil that the statute enacted that no escheator, sheriff, or other bailiff of the King, "by color of his office, without special warrant or commandment, or authority certain pertaining to his office," should disseize any man of his freehold, and that, if he should do so,

the disseizee might at his election proceed either by petition to the King, or by assise of novel disseisin at the common law, and the officer should pay double damages to the plaintiff, and a heavy fine to the King, for doing injury in his name to the subject. 2 Inst. 206, 207. But when the entry of the officer was by the King's command, though without authority of law, that statute had no application.

Accordingly in Staunford's Exposition of the King's Prerogative, c. 22, it is laid down: "Petition is all the remedy the subject hath when the King seizeth his land, or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition; for other remedy hath he not." Staunf. Prerog., fol. 72 *b*. "Also whereas the King doth enter upon me, having no title by matter of record or otherwise, and put me out, and detains the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by petition. But if I be suffered to enter, my entry is lawful, and no intrusion. Or if the King grant over the lands to a stranger, then is my petition determined, and I may now enter or have my assise by order of the common law against the said stranger, being the King's patentee." "When his Highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it but by petition, for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is my assise revived, for now the patentee entereth by his own wrong and intrusion, and not by any title that the King giveth him, for the King had never title nor possession to give in that case." Fol. 74 *b*.

In the reign of Elizabeth, it was resolved by all the judges of England, that "when the King was seized of any estate of inheritance or freehold by any matter of record, be his title by matter of record judicial or ministerial, or by conveyance of record, or by matter in fact and found by office of record, he who has right could not by the common law have any traverse upon which he was to have *amoveas manum*, but was put to his petition of right (in nature of his real action which he could

not have against the King, because the King by his writ cannot command himself) to be restored to his freehold and inheritance;" unless, indeed, the right of the party aggrieved appeared by the same record, in which case he might by *monstrans de droit* obtain an *amoveas manum*. *Sadlers's Case*, 4 Rep. 54 *b*, 55 *a*.

Lord Hale enumerates, among the relative prerogatives of the crown, the prerogative "of his possessions, — that no man can enter upon him, but is driven to his suit by petition." Hale's Analysis of the Law, sect. 9.

The law laid down in the early authorities is stated in the same way in the Digest of Chief Baron Comyns, written in the first half of the last century, and in Chitty on the Prerogative of the Crown, published in 1820; and Mr. Chitty treats the action of ejectment as equivalent in this aspect to the ancient form of proceeding by assise. Com. Dig. Prerogative, D. 78; Chit. Prerog. 339–343, and note *c*.

In *The Queen* v. *Powell*, 1 Q. B. 352; s. c. 4 Per. & Dav. 719, a writ of *mandamus* to admit to a copyhold tenement of a manor belonging to the crown having been directed to the steward alone, it was contended for the prosecutor that a previous decision, requiring the writ to be directed to the lord of the manor as well as to the steward, applied only to cases where the lord of the manor was a subject, and that, inasmuch as there could be no *mandamus* to the sovereign, the writ must go against the steward alone. But Lord Denman, with the concurrence of Justices Littledale, Williams, and Coleridge, quashed the writ of *mandamus;* and, after observing that doubtless there could be no *mandamus* to the sovereign, but that the interests of the crown were to be as much guarded as those of the subject, said: "And if the interests of the crown cannot so effectually be protected by a writ against the steward alone, it is a very strong reason to show that such a writ cannot be sustained. Indeed, if it were allowed, it is not certain of being effectual; for if the advisers of the crown were of opinion that its interests might be affected, and were to advise the sovereign either to order the steward not to admit the prosecutor of the *mandamus*, or to revoke the appointment of the steward, this court could not grant an attachment against

the steward, and then the party does not get admitted. And, indeed, if we were to allow a *mandamus* to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the sovereign a party to the *mandamus*." "But in the case where there is a complaint on the part of a subject against the crown in any matter whatever, the course is to proceed by petition of right, or else by *monstrans de droit*, or traverse of office, as the case may require. These proceedings have been recognized and acknowledged for many centuries. Such proceedings are now very much out of use; and few instances in modern times have occurred where they have been resorted to; but still they are what must be resorted to if any dispute arises. They are probably expensive and tedious; but these considerations are not sufficient for our dispensing with them; we have no more authority, for the sake of convenience, to lay them aside and introduce writs or other proceedings which are usually adopted between subject and subject, amongst which these writs of *mandamus* are to be reckoned, than to introduce writs and other proceedings, now solely used in cases of prerogative, in causes between subject and subject."

In *The Queen* v. *Commissioners of the Treasury*, Law Rep. 7 Q. B. 387, 394, in which the court refused to grant a writ of *mandamus* to the Lords Commissioners of the Treasury to pay over money in their hands as servants of the crown, Lord Chief Justice Cockburn said that it did not follow, because the prosecutor had no remedy except that of applying by petition to the crown, or by petition to Parliament, that the court could issue a writ of *mandamus;* and added: "I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the crown, this court cannot claim, even in appearance, to have any power to command the crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the crown, and are amenable to the crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

In *Doe* v. *Roe*, 8 Mee. & W. 579 ; s. c. Hurlst. & W. 159, which was an action of ejectment for a house and lands adjoining Hurst Castle, the declaration had been served upon one Watson and upon the Board of Ordnance. On motion of the Attorney-General in behalf of the crown, supported by affidavits that the castle was an hereditary possession of the crown of England, and that the premises sought to be recovered were in possession of the crown, by Watson, who had been placed, by authority of the Board of Ordnance, as master gunner in charge of the defences of the castle, which commanded the passage of the Needles, the Court of Exchequer ordered the declaration to be set aside and all further proceedings stayed. It was contended for the plaintiff that technically the action was trespass against Roe; and that the argument on the other side would go the length of showing that in any case where the defendant in ejectment made an affidavit that the title of the crown came into question the plaintiff would have no resource but in his petition of right. Whereupon the court made these observations: "Lord Abinger, C. B. The real question is, Can an ejectment be tried, the effect of which may be to turn the crown out of possession? Alderson, B. The declaration is served on a person occupying as the servant of the crown; this case is not like the case put of lands held under the Woods and Forests; the present difficulty only arises when, supposing the plaintiff to succeed, the crown would be turned out of possession." Hurlst. & W. 160. At the close of the argument, Lord Abinger said: "It is quite clear the court could not issue any process to turn the crown out of possession ; and the only doubt I had was, whether this property was not, by the operation of the act of Parliament, in the possession, not of the crown, but of the Board of Ordnance. But on looking more fully into the act, my doubt is entirely removed." Baron Alderson said: "I am of the same opinion. No ejectment can be maintained against the crown, to turn the crown out of possession by the authority of the crown itself." And Baron Rolfe (afterwards Lord Chancellor Cranworth) added: "The question may be tested thus: suppose there were no trial, but judgment went against the casual ejector; then there would

only be a writ to turn the crown out of possession, which clearly cannot be." 8 Mee. & W. 582, 583.

The same rule, as well as the essential distinction in actions brought against a servant of the crown holding possession in behalf of the crown, between an action of trespass to recover damages, which might be suffered to proceed (although the crown might have it removed for that purpose into the Court of Exchequer), and an action of ejectment to recover possession of the land itself, which must be absolutely stayed on motion of the Attorney-General, is clearly recognized in two cases of trespass to recover damages against officers of the crown, removed upon application of the Attorney-General into the Office of Pleas of the Exchequer for trial. *Cawthorne* v. *Campbell*, 1 Anstr. 205, 215; *Attorney-General* v. *Hallett*, 15 Mee. & W. 97.

In *Cawthorne* v. *Campbell*, Chief Baron Eyre, speaking of a case, decided in 1710, of an ejectment brought in the Court of Queen's Bench for lands which were part of the Queen's estate, said: "There was an application to this court to stay the proceedings, and the parties were heard upon it. The Attorney-General attended, and after the hearing it was put off for a day or two. At length the entry is, that an injunction issued *pro domina regina*. So that the action was not removed, but simply an injunction went to stay the proceedings. And I think I can see why that was: if the action had been removed, the question could not have been tried, even in the Office of Pleas, because you cannot try the Queen's title in an ejectment. The Queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it was fruitless to think of removing it, and it remained under an injunction."

So in *Attorney-General* v. *Hallett*, a case of trespass *quare clausum fregit*, in which the defendant pleaded that the Queen was seized in right of her crown of the *locus in quo*, Chief Baron Pollock said: "The action of ejectment is *prima facie* an action merely between subject and subject, and relates to land; yet the prerogative of the crown applies to that; and if the interest of the crown is concerned, an action of ejectment may be removed into this court. It may be said, how-

ever, that that does not amount to an authority, because the action does not go on; the reason of that is, that in this court an action of ejectment will not lie against the crown. The party must proceed by a petition of right. In an action of ejectment, we remove it, although we thereby actually extinguish the action; and therefore that is rather an *a fortiori* argument for removing this cause, which is sought to be removed for the express purpose of going on with it." Barons Parke, Alderson, and Platt concurred; and Baron Platt clearly distinguished the case of a defendant holding possession in behalf of the crown from that of a defendant claiming a right in himself only, though under a grant from the crown, saying: "If the Queen herself is in possession, no subject can maintain ejectment against her; the only mode of proceeding is by petition of right. If the subject is in possession, claiming a right under the crown, then the ejectment may be maintained; but, at the suggestion of the Attorney-General, the proceeding would be brought into this court."

There is a close analogy between these cases and the case at bar. Any action, personal or real, against officers of the sovereign, who justify under a revenue law, may be removed in England into the Court of Exchequer, and under the acts of Congress into the Circuit Court of the United States. If it is an action of tort to recover damages only, it may there proceed to trial. But if it is an action to recover possession of land, which is in fact held by the sovereign through its officers and agents, and that fact is in due form made known to the court, the proceedings must be stayed.

An action of ejectment brought, as this was, under the Code of Virginia of 1873, c. 131, affects the title to land more than the action of ejectment in England. By that code, the action may not only be brought as before, but it is also made a substitute for the writ of right and all other real actions. Sects. 1, 2, 38. It must be brought by and in the name of a person having a subsisting interest in the premises, and a right to recover the premises or the possession thereof; and against the person actually occupying the premises, or, if they are not occupied, against some person exercising acts of ownership therein, or claiming title thereto or some interest therein.

Sects. 4–6. The only plea allowed is the general issue, that the defendant is not guilty of unlawfully withholding the premises claimed. Sect. 13. The declaration must describe the premises with such certainty that from the description possession can be delivered; and it must state, and the verdict must find, whether the plaintiff's estate is in fee, or for life and whose life, or for years and the duration of the term. Sects. 8, 9, 27. Judgment for the plaintiff is that he recover the possession of the premises according to the verdict, if there is one, or, if on default or demurrer, according to the description in the declaration. Sect. 29. Several judgments may be recovered against several defendants occupying distinct parcels of the land. Sect. 17. And the judgment is conclusive as to the title or right of possession, established in the action, upon the party against whom it is rendered, and all persons claiming under him by title accruing after the commencement of the action. Sect. 35.

The principle that no sovereign can be sued without its consent applies equally to foreign sovereigns and to the sovereign of the country in which the suit is brought. The exemption of the sovereign is not less regarded by its own courts than by the courts of other sovereigns. To repeat the words of Chief Justice Taney, already quoted: "It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."

In the leading case of *The Exchange*, 7 Cranch, 116, the exemption of a foreign sovereign from being sued in our courts was held to protect one of his public armed vessels from being libelled here in a court of admiralty by citizens of the United States, to whom she had belonged, and from whom she had been forcibly taken in a foreign port by his order. The district attorney of the United States having filed a suggestion, verified by affidavit, that she was a public armed vessel of the Emperor of the French, and actually employed in his service at the time of entering our ports, the Circuit Court, disregarding the suggestion, entered a decree for the libellants. But upon an appeal taken by the attorney of the United States, this court, without any inquiry into the title, reversed the decree

and dismissed the libel; and Mr. Chief Justice Marshall in delivering judgment said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

In *Vavasseur* v. *Krupp*, 9 Ch. D. 351, the Mikado of Japan, a sovereign prince, bought in Germany shells, made there, but said to be infringements of an English patent. They were brought to England, in order to be put on board a ship of war belonging to the Mikado, and the patentee obtained an injunction against the agents of the Mikado and the persons in whose custody the shells were, restraining them from removing the shells. The Mikado then applied to be, and was, made a defendant in the suit. An order was made by Sir George Jessel, Master of the Rolls, and affirmed by the Court of Appeal, that notwithstanding the injunction, the Mikado should be at liberty to remove the shells. Lord Justice James said: "I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I have ever heard of as made in any court in this country." And, after stating the contention of the plaintiff that the shells were in the possession of persons in England who were minded to make, and did make, a use of them inconsistent with his patent, he further said: "If they were doing so, then they are liable in an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the right of the sovereign of Japan, who now asks to be allowed to take his property." Lord Justice Brett said: "The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here." "If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue." "The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country."

In the case of *The Parlement Belge*, 5 P. D. 197, the Court

of Appeal held that an unarmed packet, belonging to the King of the Belgians, and in the hands of officers commissioned by him, and employed in carrying mails, and also in carrying merchandise and passengers for hire, was not liable to be seized in a suit *in rem* to recover damages for a collision. Lord Justice Brett, in a considered judgment, stated the real question to be "whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign;" and, after reviewing many American as well as English cases, announced the conclusion of the court thus: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction. This proposition would determine the first question in the present case in favor of the protest, even if an action *in rem* were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded." After stating the mode of procedure in courts of admiralty, he continued: "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."

It was argued at the bar that the petition of right in England

was in effect a suit against the crown. But the petition of right could never be maintained except after an application to the King and his consent granted. The sovereign thus retained the power of determining in advance in every case whether it was consistent with the public interests to allow the suit to be brought and tried in the ordinary courts of justice. The petition might be presented either to the King in person, or in Parliament; and if sued in Parliament, it might be enacted and pass as an act of Parliament. Staunf. Prerog. 72 *b*; Chit. Prerog. 346. The old form of proceeding by petition of right to the King was so tedious and expensive that it fell into disuse; and there is hardly an instance in which it was resorted to in England between the settlement of the colonies and the Declaration of Independence, or for half a century afterwards. *Clayton* v. *Attorney-General*, 1 Coop. *temp.* Cottenham, 97, 120; *The Queen* v. *Powell*, 1 Q. B. 353, 363, and 4 Per. & Dav. 719, 723, above quoted; *Canterbury* v. *Attorney-General*, 1 Phillips, 306, 327; *De Bode's Case*, 8 Q. B. 208, 273. The granting of the royal consent as a matter of course is but of very modern introduction in England. *Eastern Archipelago Co.* v. *The Queen*, 2 El. & Bl. 856, 914. And the statute of 23 & 24 Vict., c. 34, simplifying and regulating the proceedings, makes it the duty of the Secretary of State for the Home Department to lay the petition before the Queen for her consideration, and to give her his advice upon it; and if upon his advice she refuses to grant her fiat, the suppliant is without remedy. *Irwin* v. *Grey*, 3 F. & F. 635, 637; *Tobin* v. *The Queen*, 14 C. B. N. S. 505, 521, and 16 id. 310, 368. In *United States* v. *O'Keefe*, 11 Wall. 178, 184, in which it was held that British subjects were included in the act of Congress of July 27, 1868, c. 276, allowing suits for the proceeds of captured and abandoned property to be brought in the Court of Claims "by aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts," this court, speaking of the English petition of right, said: "It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the sovereign to withhold his permission."

The English remedies of petition of right *monstrans de droit*,

and traverse of office, were never introduced into this country as part of our common law; but in the American Colonies and States claims upon the government were commonly made by petition to the legislature. The inadequacy or the want of those remedies is no reason for maintaining a suit against the sovereign, in a form which is usual between private citizens, but which has not been expressly granted to them as against the sovereign. *The Queen* v. *Powell*, above quoted; *Gibbons* v. *United States*, 8 Wall. 269.

In particular classes of cases, indeed, Congress has authorized suits in equity to be brought against the United States; as, for instance, in cases of delinquent receivers of public money against whom a warrant of distress has been issued, in cases of proprietors of land taken and sold to make certain improvements in the city of Washington (in which the bill is spoken of as "in the nature of a petition of right"), and in claims to share in the money received from Mexico under the treaty of Guadalupe Hidalgo. See *United States* v. *Nourse*, 6 Pet. 470, and 9 id. 8; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 284; *Van Ness* v. *Washington*, 4 Pet. 232, 276, 277; *Clark* v. *Clark*, 17 How. 315, 320. So it has often authorized suits to be brought against the United States to confirm claims, under grants from foreign governments, to lands since ceded to the United States. But in such a suit Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." *United States* v. *Clarke*, 8 Pet. 436, 444.

For more than sixty years after the adoption of the Constitution, no general provision was made by law for determining claims against the United States; and in every act concerning the Court of Claims Congress has defined the classes of claims which might be made, the conditions on which they might be presented, the forms of proceeding, and the effect to be given to the awards. The act of Feb. 24, 1855, c. 122, which first established that court, required an act of Congress to carry out each award. The act of March 3, 1863, c. 92, which dispensed with that requirement, authorized the sums due by the judgments of the Court of Claims, after presentation of a copy

thereof to the Secretary of the Treasury and his estimate of an appropriation therefor, to be paid out of any general appropriation made by law for the satisfaction of private claims. Even under this act the Court of Claims had so little of the nature of a judicial tribunal, that this court declined to entertain appeals from its decisions, although the statute expressly gave such an appeal. *Gordon* v. *United States*, 2 Wall. 561; S. C. 5 Am. Law Reg. N. S. 111. It is only since the act of March 17, 1866, c. 19, has repealed the provision which by necessary implication authorized the Secretary of the Treasury to revise the decisions of the Court of Claims, and of this court on appeal, that this court has considered and determined such appeals.

Under the existing statutes, the principal classes of demands submitted to the determination of the Court of Claims are claims founded on laws of Congress, on regulations of the executive departments, and on contracts, expressed or implied, and claims referred to the court by Congress. Rev. Stat., sect. 1059. The proceeding by petition to Congress and reference by Congress to the Court of Claims presents the nearest analogy that our law affords to the petition of right. No act of Congress has conferred upon that court, or upon any other tribunal, general jurisdiction of suits against the United States to recover possession of real property, or to redress a tort. And the act of Congress of June 11, 1864, c. 117 (re-enacted in sect. 3753 of the Revised Statutes), authorizing the Secretary of the Treasury to direct a stipulation, to the extent of the value of the interest of the United States, to be entered into for the discharge of any property owned or held by the United States, or in which the United States have or claim an interest, which has been seized or attached in any judicial proceeding under the laws of a State, expressly provides "that nothing herein contained shall be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

In *Gibbons* v. *United States*, 8 Wall. 269, which was an attempt to maintain in the Court of Claims a suit against the government as upon an implied contract, for unauthorized acts of its officers which were in themselves torts, the court said: "The supposition that the government will not pay its debts, or will not do justice, is not to be indulged;" and, after stating the reasons against the maintenance of the suit, concluded: "These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the general government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination." In *Langford* v. *United States*, 101 U. S. 341, the remarks just quoted were repeated, and were applied to the case of a suit for the use and occupation of land which the United States, under a claim of title, had, through its Indian agents, taken possession of and since held by force and against the will of the rightful owner.

If it is proper that the United States should allow themselves to be sued in such a case as this, public policy requires that it should rest with Congress to define the mode of proceeding, the conditions on which it may be maintained, and the manner in which the decision shall be enforced, — none of which can be done if the citizen has an absolute right to maintain the action.

If the plaintiff is entitled to judgment, it can only be upon the ground that the United States are not a party to the record, and have no such relation to the action that their possession of the land demanded will prevent judgment against the defendants of record. If those defendants alone are to be held to be parties or interested, the plaintiff is entitled, as of right, to immediate execution as well as to judgment; and the court has no discretion to stay an execution between private parties on considerations of the interests of the public.

To maintain this action, independently of any legislation by Congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace

lands held by a disputed title; to defeat the exemption from judicial process in the very cases in which it is of the utmost importance to the public that it should be upheld; and to compel the United States to submit to the determination of courts and juries the validity of their title to any land held and used for military, naval, commercial, revenue, or police purposes.

The decision of this court and the reasoning of the several judges in the case of *Chisholm* v. *Georgia*, 2 Dall. 419, in which a majority of the court held that under the Constitution, as originally adopted, a suit could be maintained in this court against a State by a citizen of another State, do not appear to us to furnish much aid in the determination of this case, for several reasons: 1st, Each of the judges who mentioned the subject declined to affirm that the United States could be sued. 2 Dall. 430, 469, 478. 2d, The decision was based on a construction of the words of the Constitution conferring jurisdiction of suits between "a State and citizens of another State." 3d, That construction was set aside by the Eleventh Amendment of the Constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 2 Dall. 480, note; *Hollingsworth* v. *Virginia*, 3 Dall. 378.

In those cases in which judgments have since been rendered by this court against individuals concerning money or property in which a State had an interest, either the money was in the personal possession of the defendants and not in the possession of the State, or the suit was to restrain the defendants by injunction from doing acts in violation of the Constitution of the United States. Within one or both of these classes fall the cases of *United States* v. *Peters*, 5 Cranch, 115; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; and *Board of Liquidation* v. *McComb*, 92 U. S. 531.

In *United States* v. *Peters*, 5 Cranch, 115, in which a writ of *mandamus* was ordered to a District Court of the United States sitting in admiralty to issue an attachment against the executrixes of David Rittenhouse to enforce obedience to a de-

cree of that court for the payment of money (although Rittenhouse had been treasurer of the State of Pennsylvania, and the legislature of that State had directed its Attorney-General to sue the executrixes for the recovery of the money, and the Governor to protect them against any process of the Federal courts), the judgment of this court, as stated by Mr. Chief Justice Marshall, went upon the ground that it was apparent that Rittenhouse held the money in his own right, and that "the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." The Chief Justice stated the conclusion of the court as follows: "Since, then, the State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the Constitution which has been cited; and, consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

The Chief Justice thus carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the State, or "the actual property of the State, however wrongfully acquired;" and his remark upon the effect of a mere suggestion of title in the State in a suit to recover "property in possession of an individual," as well as his similar remark in *Osborn* v. *Bank of United States*, 9 Wheat. 738, 870, as to the effect of a suggestion of title in a foreign sovereign under like circumstances, can have no application where it is in due form pleaded or suggested, and satisfactorily

proved or admitted, that the property is in the possession of the State or the sovereign, under claim and color of title, though that possession is necessarily held in its behalf by its officers or servants, as appears by his own judgment in the case of *The Exchange*, as well as by the cases in the Court of Exchequer, before cited.

In *Osborn* v. *Bank of United States*, 9 Wheat. 738, the bill was originally filed by the Bank of the United States against the auditor of the State of Ohio and a collector employed by him, to prevent them from levying a tax imposed by the legislature of that State in violation of the Constitution of the United States upon the property of the bank; and they, after the service of the subpœna, forcibly took from the plaintiff's office the amount of the tax in money, and paid it over to the treasurer of the State, who received it with notice of these facts, and kept it apart from other money belonging to the State, so that, in the view taken by the court, it had never come into the possession of the State, but could have been recovered from the treasurer in an action of detinue. 9 Wheat. 833–836, 854, 858. By an amendment of the bill the treasurer was made a defendant. Such were the facts upon which the court, by one of Mr. Chief Justice Marshall's most elaborate judgments, in which the case was admitted to be one of great difficulty, ordered the defendants to restore the money, and held that the fact that the State was not, and could not be, without its consent, made a defendant, afforded no objection to granting such relief.

The dictum of the learned justice who delivered the opinion in *Davis* v. *Gray*, 16 Wall. 203, 220, that in *Osborn* v. *Bank of United States* it was decided that, in cases in which a State is concerned, "that it cannot be made a party is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record," overstates the decision in Osborn's case; goes beyond what was required for the decision of *Davis* v. *Gray*, in which the object of the suit and the whole effect of the decree were to prevent the Governor and the Commissioner of the General Land-Office of the State of Texas from signing patents for lands of which the plaintiff had the

title under a previous grant from the State; and, as the State cannot hold money or property otherwise than by its officers and agents, would, if understood as laying down a universal rule, practically nullify the Eleventh Amendment of the Constitution.

In *Board of Liquidation* v. *McComb*, 92 U. S. 531, in which an injunction was granted to restrain the Board of Liquidation, consisting of the Governor and other officers, of the State of Louisiana from issuing or using, in violation of a previous contract of the State with the plaintiff, bonds of the State in their hands, the court said that the objections to proceeding by injunction were, "first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter." And the ground upon which the bill in that case, as well as in the previous cases of *Osborn* v. *Bank of United States* and *Davis* v. *Gray*, was sustained, was defined to be, that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional, and therefore void, law for the violation of his duty.

The case of *The Governor of Georgia* v. *Madrazo*, 1 Pet. 110, does not appear to us to have any important bearing, except as tending to illustrate the distinction between the possession of the State by its agents, and the possession of the agents in their own right. The decision was, that where negro slaves were illegally taken from the owner on the high seas, and afterwards sold to a stranger, who, without the privity of the owner, imported them into the United States in violation of the act of Congress of March 2, 1807, c. 22, and they were here seized by an officer of the customs of the United States, and delivered to an agent appointed by the Governor of the State of Georgia in conformity with the act of Congress, and some

of them sold by order of the Governor of the State, and the money obtained at the sale was, in the words of Mr. Chief Justice Marshall, "actually in the Treasury of the State, mixed up with its general funds," and the rest of the slaves remained in the hands of the agent of the State, "in possession of the government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the State by name, but against the Governor in his official capacity, was a suit against the State, and therefore, by reason of the Eleventh Amendment of the Constitution, could not be maintained. See also *Ex parte Madrazzo*, 7 Pet. 627.

In the case, on which the plaintiff principally relies, of *Meigs* v. *M'Clung*, 9 Cranch, 11, in which a Circuit Court of the United States, and this court on writ of error, gave judgment for the plaintiff in an action of ejectment for land held by the defendants as officers and under the authority of the United States, the full statement of their position in the bill of exceptions, on page 13 of the report, clearly shows that the fact that they so held the land was not set up in defence, except as supplemental to the position that the legal title to the land was in the United States; and it does not appear to have been mentioned in argument. No objection to the exercise of jurisdiction was made by the defendants or by the United States, or noticed by the court. That the court understood the United States to desire a decision upon the merits is further apparent from Mr. Chief Justice Marshall's summary towards the close of the opinion, "The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence and without compensation." Had the decision covered the question of jurisdiction, the Chief Justice would hardly have omitted to refer to it in *Osborn* v. *Bank of United States*, above stated.

In *Wilcox* v. *Jackson*, 13 Pet. 498, in *Brown* v. *Huger*, 21 How. 305, and in *Grisar* v. *McDowell*, 6 Wall. 363, which were also actions of ejectment against officers of the United States, the judgments were in favor of the defendants on the merits, no suggestion that the United States were so interested that the action could not be maintained was made by counsel or passed upon by this court, and that the court has not hitherto under-

stood any such question to be settled by any or all of those cases is clearly shown by its more recent judgments.

In the case of *The Siren*, 7 Wall. 152, the court said: "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is therefore without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, — the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*, 8 Pet. 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property."

In the case of *The Davis*, 10 Wall. 15, the court, stating the doctrine somewhat less broadly, yet affirmed the proposition, as clearly established by authority, that "no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court;" and in discussing the question, what constitutes a possession which protects the property from the process of the court, said: "We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with

the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of the property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

In *The Siren*, a claim for damages against a prize ship for a collision on her way from the place of capture to the port of adjudication, was allowed out of the proceeds of her sale upon condemnation, because the government was the actor in the suit to have her condemned. In *The Davis*, a claim was allowed for salvage of goods belonging to the United States in the hands of the master of a private vessel as a common carrier, because his possession was not the possession of the United States, and the United States could only obtain the goods by coming into court as claimant and actor. Each of those cases, as was pointed out in *Case* v. *Terrell*, 11 Wall. 199, 201, was decided upon the ground that "the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."

In *Carr* v. *United States*, 98 U. S. 433, in which it was decided that judgments in ejectment against officers of the government, in possession in its behalf of lands held for a marine hospital, did not bind nor estop the United States, it was said, in the opinion of the court: "We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the government suable in its courts. It is conceded in *The Siren*, 7 Wall. 152, and in *The Davis*, 10 id. 15, that without an act of Congress no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed that 'the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession.' If a proceeding would lie against the officers as individuals in the case of a marine hospi-

tal, it might be instituted with equal facility and right in reference to a post-office or a custom-house, a prison or a fortification. In some cases (perhaps it was so in the present case) it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defence of its property."

The view on which this court appears to have constantly acted, which reconciles all its decisions, and is in accord with the English authorities, is this: The objection to the exercise of jurisdiction over the sovereign or his property, in an action in which he is not a party to the record, is in the nature of a personal objection, which, if not suggested by the sovereign, may be presumed not to be intended to be insisted upon. If ejectment is brought by one citizen against another, the court *prima facie* has jurisdiction of the subject-matter and of the parties, and, if no objection is interposed in behalf of the sovereign, proceeds to judgment between the parties before it. If the property is in the possession of the defendants and not of the sovereign, an informal suggestion that it belongs to the sovereign will not defeat the action. But if the sovereign, in proper form and by sufficient proof, makes known to the court that he insists upon his exemption from suit, and that the property sued for is held by the nominal defendants exclusively for him and on his behalf as public property, the right of the plaintiff to prosecute the suit and the authority of the court to exercise jurisdiction over it cease, and all further proceedings must be stayed.

In the case at bar, the United States interposed in the most solemn and appropriate manner. The Attorney-General, before the trial, following the course approved by this court in the case of *The Exchange*, and by the Court of Exchequer in the case of *Doe* v. *Roe*, and other cases, already referred to, filed a suggestion and motion in writing, in which, appearing only for this purpose, he states that the land has been for more than ten years, and still is, held, occupied, and possessed by the United States, through their officers and agents charged in behalf of

the government of the United States, with the control of the property, and who are in the actual possession thereof, as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, known as the Arlington Cemetery, and for war, military, charitable, and educational purposes, as set forth in the certificate of sale of the land for non-payment of direct taxes lawfully assessed thereon, a copy of which is annexed to the suggestion. Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration may be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper. The plaintiff, by demurring to this suggestion, admitted the truth of the facts stated by the Attorney-General.

After these facts had been thus formally brought to the notice of the court by the chief law officer of the United States, and had been admitted by the plaintiff, we are of opinion that the court had no authority to proceed to trial and judgment; because the suit, which had been commenced against the individual defendants, was thenceforth prosecuted against the United States; because in ejectment, as in other actions at law, a court has no authority to render a judgment on which it has no power to issue execution; because, as was directly adjudged in *Carr* v. *United States*, 98 U. S. 433, above cited, no judgment against the defendants can bind or estop the United States; because the possession of the defendants is in fact and in law the possession of the United States, and the defendants may at any moment be displaced and removed by the executive, and other custodians appointed and installed in their stead; because to issue an execution against them would be to issue an execution against the United States, and to turn the United States out of possession of land held by the United States, under claim of title and color of right for public purposes; and because to maintain a suit which has that object and that result is to violate the fundamental principle that the sovereign cannot be sued without its consent, and to encroach

upon the powers intrusted by the Constitution to the legislative and executive departments of the government.

The court having no authority to proceed with the suit, the judgment afterwards rendered for the plaintiff was erroneous. The United States, having the right to interpose, and having interposed in due form, had an equal right to sue out a writ of error to make their interposition effectual. This is plainly shown by the case of *The Exchange*, 7 Cranch, 120, 147, before cited. It follows that upon the writ of error sued out by the United States the judgment below should be reversed, and the case remanded with directions to set aside the verdict and to dismiss the action.

As to Kaufman and Strong, the court erred in compelling them to proceed to trial after the interposition of the United States; and in declining to instruct the jury, as they requested, that if the United States, through their officers and agents charged with the control of the same, were in the possession of the property in controversy, using it as a national cemetery for the burial of deceased soldiers, and as a fort and military reservation, claiming title under the certificate of sale proved in the case, and the defendants occupied the same only as such officers and agents, in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession except as such officers, the verdict must be for the defendants. Judgment of reversal should therefore also be entered upon the writ of error sued out by them.

Being of opinion, for the reasons above set forth, that the question of the validity of the title, under which the United States, through their officers and agents, hold the land, cannot be tried and determined in this action, we of course express no opinion upon that branch of the case.

RICHARDSON *v.* HARDWICK.

A., the owner of lands, covenanted that by making certain payments within a period named B. might become equally interested in them. B. did not agree to purchase, and he never made any payment. *Held,* that an estate in the lands was not by the contract vested in B., and that his failure to make payment within the time limited therefor worked a forfeiture of his privilege under the contract.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated in the opinion of the court.

Mr. D. C. Holbrook and *Mr. H. H. Wells* for the appellant.

Mr. Alfred Russell and *Mr. Henry M. Campbell* for the appellee.

MR. JUSTICE WOODS delivered the opinion of the court.

This was a bill in equity filed by Richardson to compel the specific performance of a contract relating to lands between him and Hardwick.

The contract describes the lands, and then proceeds: —

"The above-described lands have been purchased by me under an arrangement with Arthur R. Richardson, as follows: It is understood that said Richardson may become equally interested in the above lands by paying to me one-half the purchase price of the lands, together with an equal share of all expenditures made by me for taxes or any other purpose, and also ten per cent interest on all capital furnished by me in connection with his half interest. It is further understood that the purchase price of the lands bought of T. H. Eaton is to be reckoned at $10 per acre, and the terms of the above agreement are limited to two years from this date. Said Richardson is to pay one-half his share in one year and the balance in two years.

"ALPENA, Oct. 1st, 1868.

"Arthur R. Richardson may cut timber on the within-described lands on the following terms: He is to pay ($1.50) one dollar and a half per thousand feet, board measure, for all timber cut by him, and he further agrees to cut not less than twelve (12) thousand feet from each and every acre on which he may cut any, or in the event of his not doing so, he agrees to pay for twelve thousand feet, the

same as though that amount had been cut by him. The logs are to be holden for the stumpage and to be his when paid for, it being understood that payment is to be made for the same when they come into market.

"B. C. HARDWICK.
"ARTHUR R. RICHARDSON.

"ALPENA, Oct. 1st, '68."

It is not disputed that before the date of this contract Hardwick purchased the lands described therein, paid for them in full out of his own means, and received a deed therefor in his own name. Prior to Oct. 1, 1870, the date at which the two years mentioned in the contract expired, Richardson had, on the terms mentioned in the contract, cut timber on the lands, and paid to Hardwick for "stumpage" $4,050, and, unless this is to be considered a payment on the contract, he, up to the date mentioned, made no payment whatever thereon. On or just before Oct. 1, 1870, by a verbal contract between the parties, the time for the payment by Richardson of the half of the price of the lands was extended to Oct. 1, 1871. Neither up to that time nor subsequently did he make or tender payment on the land. In the mean time Hardwick was selling timber off them, and in the year 1872 sold all the lands except one hundred and sixty acres. The contention of Richardson now is, that, after crediting upon the contract one-half the amount received by Hardwick for timber and lands sold, the half of the purchase-money and other expenses, which he was to pay in case he became equally interested in the lands, has been satisfied, and that he is entitled to an equal share of the proceeds of the timber and lands, and to a conveyance of an undivided half of the lands remaining unsold. But it was not until May or June, 1874, that he ever intimated to Hardwick that he claimed an interest in the lands, and his claim was then peremptorily denied by Hardwick, and it was not until he filed the bill in this case, Dec. 10, 1875, that he ever made any definite demand on Hardwick for an account of the proceeds of the sales of timber and lands, or a conveyance of the undivided half of the lands remaining unsold.

Upon final hearing, upon the pleadings and evidence, the Circuit Court dismissed the bill, and Richardson appealed.

The rights of the parties must be governed by their contract in writing entered into on Oct. 1, 1868. All their previous negotiations resulted in that contract, and it was never subsequently changed, except by the verbal agreement to extend for one year the time allowed by it to Richardson to refund to Hardwick one-half the purchase-money, expenditures, and taxes paid by him.

We cannot give any weight to the assertion of Richardson that it was one of the unexpressed terms of the contract that one-half of the proceeds of timber sold from the lands should be indorsed upon the contract as payments made by him thereon. It is a matter in dispute between the parties whether any such understanding existed.

If it were competent to prove such an understanding by parol, the burden of proof would be on Richardson to establish it. He, in his testimony, affirms the existence of this understanding, and Hardwick, in his testimony, denies it. We think that the other testimony in the case leaves the preponderance of evidence on this point with the defendant.

But evidence to establish this understanding is clearly inadmissible. In respect to this matter the contract is free from ambiguity. Its plain meaning is that Richardson was to make payment directly to Hardwick, in money of one-half the amount paid by the latter on the lands. It is, therefore, not competent to show by parol that payment was to be made in some other way than that specified in the written instrument. *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201; *Specht* v. *Howard*, 16 Wall. 564; *Forsythe* v. *Kimball*, 91 U. S. 291; *Brown* v. *Spofford*, 95 id. 474.

Looking, therefore, at the contract as reduced to writing by the parties, we are clear that Richardson is not entitled to the relief prayed for by his bill.

The written contract gives him the privilege, or, as counsel call it, an "option," to become equally interested in the lands by paying one-half the purchase-money, &c., within two years after its date. The contract, of itself, did not vest him with any interest or estate in the lands. It merely pointed out the mode in which he might acquire an interest, namely, by paying a certain sum of money within a certain time. He did not pay

the money within the time limited by the contract, and has never paid it or any part of it; and eighteen months before the commencement of this suit Hardwick gave him notice that his option to purchase had been lost, and told him that he had no interest in the lands.

It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the lands or to pay Hardwick any money. The contract gave Hardwick no cause of action against Richardson. The latter was not bound to become interested in the lands, or to pay any money thereon, unless he chose to do so.

In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound. *Jones* v. *Robinson*, 17 L. J. Exch. 36; *Mills* v. *Blackall*, 11 Q. B. 358; *Morton* v. *Burn*, 7 Ad. & E. 19; *Kennaway* v. *Treleavan*, 5 Mee. & W. 498.

In this case Richardson having failed to pay the money or any part of it within the time limited, the privilege accorded him by the contract was at an end, and all the rights under it ceased.

The decree of the Circuit Court dismissing the bill was, therefore, right, and must be

Affirmed.

BADGER *v.* RANLETT.

1. Cotton-ties, each consisting of an iron strip and an iron buckle, were, in 1880, imported in bundles, each bundle consisting of thirty strips and thirty buckles, each strip eleven feet long, the whole blackened. *Held*, that they are subject to a duty of thirty-five per cent *ad valorem*, as "manufactures of iron, not otherwise provided for," under schedule E of sect. 2504 of the Revised Statutes, and not to a duty of one cent and one-half per pound, under said schedule, as "band, hoop, and scroll iron."
2. The question as to whether the ties are subject to some other rate of duty than one of those two not having been raised below, cannot be raised by the plaintiff in error in this court.

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

The firm of D. L. Ranlett & Co. imported into the port of New Orleans, from Liverpool, England, in 1880, certain

articles, entered some as "bundles black iron cotton-ties, thirty strips each bundle, and thirty Kennedy buckles;" others as "bundles blacked iron cotton-ties, arrow buckles, No. 4, thirty buckles and thirty strips to each bundle, eleven feet;" others as "bundles blacked iron cotton-ties, Kennedy buckles, thirty buckles and thirty strips to each bundle, eleven feet." Having paid under protest the exacted duty of one cent and one-half per pound on the weight of the iron strips and the buckles, the importers, claiming that the lawful duty was thirty-five per cent *ad valorem*, appealed to the Secretary of the Treasury, who affirmed the decision of the collector. This suit was then brought against the latter by the importers. The petition alleges that the imported goods were "manufactures of iron, viz. certain invoices of black iron cotton-ties," "in bundles of thirty strips each, cut to the required length of eleven feet, and sundry buckles," "being thirty buckles to each bundle of said ties;" that the proper duty was thirty-five per cent *ad valorem*, and no more, because the ties, composed of the strips and buckles in said bundles, constituted a manufacture of iron for a special and important purpose, and were "manufactures of iron not otherwise provided for;" and that, even if the strips of iron were not to be admitted at a duty of thirty-five per cent *ad valorem*, the duty on the buckles could not lawfully have exceeded that rate, while that exacted on them amounted to an excess of $750. The whole amount claimed to be recovered back was $3,762.

The question involved arises under sect. 2504 of the Revised Statutes, which, in schedule E, imposes the following duties: "All band, hoop, and scroll iron, from one-half to six inches wide, under one-eighth of an inch in thickness, and not thinner than number twenty, wire gauge; one and one-half cents per pound. . . . All other descriptions of rolled or hammered iron, not otherwise provided for; one cent and one-fourth per pound. . . . Manufactures . . . not otherwise provided for, of . . . iron, . . . thirty-five per centum *ad valorem*."

The bill of exceptions states that on the trial certain facts were "conceded, as set forth in note of evidence and statement of facts filed in the cause in open court;" that "a sample of the articles of merchandise imported by plaintiffs, and described

in the petition," was "produced and exhibited to the jury;" that "witnesses" were "produced on the part of the plaintiffs and on the part of the defendant;" that it was "claimed on the part of the plaintiffs that the imported articles, for the recovery of a portion of the duties paid upon which this suit was brought, should have been classed and subjected to duties as cotton-ties, under the designation 'manufactured articles not otherwise provided for;'" and that it was "claimed on the part of the defendant that the said imported articles should have been classed and subjected to duties under the designation 'band or hoop iron.'" The "note of evidence and statement of facts" sets forth that the plaintiffs introduced the entries of the goods, and then proceeds: "It was admitted that the allegations of petition were correct as to partnership of plaintiffs, ownership and importation of property, amount of same, and duties paid, and protest, appeals and affirmance of collector's decision, and that the only issue disputed by defendant is the question, which is the sole question to be decided, whether the articles of merchandise described in the petition are dutiable under schedule E as hoop, band, or scroll iron, or as 'manufactures of iron not otherwise provided for' in said schedule. In case the plaintiffs be entitled to recover, it is understood that the amount is $3,722.99."

At the request of the defendant the court charged that "if the jury find from the evidence that the articles imported by the plaintiffs consisted of iron bands, blackened, cut into lengths of eleven feet, and put up in bundles of thirty, with thirty buckles on one band in each bundle, and not permanently attached, then the fact that the buckles accompany the bands will not prevent the bands from being included in and dutiable under the denomination of band iron." The court further charged "that the practical question to be determined by the jury is, whether the articles imported by plaintiffs are band, hoop, or scroll iron, or, on the other hand, cotton-ties;" that "this question must be determined by mercantile usage, as shown by the testimony in the cause; that, if the jury find from the evidence that said articles are cotton-ties, and are known in commerce as such, then they are subject to a duty of thirty-five per cent *ad valorem;*" but that, "if the

jury find that they are band, hoop, or scroll iron, and known in commerce as such, they are subject to a duty of one and a half cents a pound." The defendant excepted to said "last charge, and to each part of the same." The verdict was in these words: "We, the jury, find a verdict for the plaintiff in the sum of $3,722.99, and that sample on exhibition in court, and in controversy, is cotton-ties." A judgment was entered for said amount, and the collector brought this writ of error.

The Solicitor-General for the plaintiff in error.
Mr. William Wirt Howe and *Mr. J. H. Kennard, contra.*

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

The plaintiff in error contends that the court charged the jury, in substance, that if the goods were, and were known as, cotton-ties, they could not be at the same time band iron; and that this was error. The argument is, that the term "band iron" may include an article known as a "cotton-tie;" that to say that one sort of band iron is known by the name of "cotton-tie" is not to say that necessarily it is no longer band iron; that all that was done to the band iron was to cut it into lengths of eleven feet and blacken it; and that this is not to make a manufacture of iron not otherwise provided for, within the statute.

The charge complained of must be considered in connection with all that occurred at the trial, as shown by the record. The "note of evidence and statement of facts" says that the only issue disputed by the defence, and the only question to be decided, was, whether the articles "described in the petition" are dutiable as hoop, band, or scroll iron," or as "manufactures of iron not otherwise provided for." The description in the petition says that the articles are iron cotton-ties, in strips, each "cut to the required length of eleven feet," with a buckle to each strip. The record shows that there was evidence given on the trial by witnesses for both parties, but on what subject does not appear, except that some evidence was given as to "mercantile usage." Evidence may have been given as to whether the strips were cut in lengths from merchantable band iron, or cut in lengths in the process of original manufac-

ture. The agreed issue was as to whether the articles, so far as the strips were concerned, were "band iron," or "manufactures of iron not otherwise provided for." The court placed the issue before the jury as being whether the articles, so far as the strips were concerned, were "band iron" or "cotton-ties." Of course, the buckles were not band iron. The charge was to the effect that if the articles were known in commerce as "cotton-ties," and were not known in commerce as "band iron," they were subject to a duty of thirty-five per cent *ad valorem*, as "manufactures of iron not otherwise provided for," and not to duty as "band iron."

The petition avers that the cotton-ties, composed of the strips and buckles, "constitute a manufacture of iron for a special and important purpose." It is to be assumed that this fact was proved under the general issue pleaded. The verdict distinctly finds that the articles were "cotton-ties," which is to be taken as a finding that the articles were not "band iron." Not being "band iron," they could not, under the issues tried, have been other than "manufactures of iron not otherwise provided for." The substance of the whole charge was, that if the jury found that the articles were "band iron," the correct duty had been imposed and the plaintiffs could not recover. The strips not being band iron, and the buckles, certainly, not being band iron, the proper duty was thirty-five per cent *ad valorem*.

The plaintiff in error further contends that the court erred in charging that if the articles were not "band iron" they were subject to a duty of thirty-five per cent *ad valorem*. The contention is, that if what appears to have been done in respect of the strips, to produce the article, amounted to a manufacture, it brought the article within the duty of one cent and one-fourth per pound, as falling under the head of "all other descriptions of rolled or hammered iron, not otherwise provided for." But, by the "note of evidence and statement of facts" the defendant admitted that the only question which he raised was whether the articles were "band iron," and so dutiable at one cent and one-half per pound, or whether they were dutiable at thirty-five per cent *ad valorem*, as "manufactures of iron not otherwise provided for." This is shown by the record to have been the only question tried. The plaintiff in error

cannot here raise the question as to a duty of one cent and one-fourth per pound, because it does not appear that he raised it on the trial. The bill of exceptions distinctly states that his only contention was that the articles were dutiable as "band or hoop iron."

Judgment affirmed.

WALLACE *v.* PENFIELD.

1. A deed which a man caused to be made to his wife, for lands whereon they resided, will not be set aside at the instance of his subsequent creditors, it appearing that at its date, and when he paid for the lands and the improvements which he afterwards erected thereon, his property largely exceeded his debts, and that there was no intent to defraud.
2. A misdescription of the lands will not defeat the wife's right to them, to the exclusion of those creditors, there being no doubt as to the lands intended to be conveyed.

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

The First National Bank of Quincy, Illinois, recovered against William Y. Williams and others, in the Circuit Court of Lewis County, Missouri, three judgments, — one, on the 10th of May, 1873, upon their note dated June 19, 1871; and the others, on the 5th of March, 1874, upon their notes dated, respectively, June 3, July 3, and July 19, 1871.

The La Grange Savings Bank of Missouri recovered, May 12, 1873, in the same court, against him and others, two judgments, upon their two notes, — one for $1,635.25, dated Aug. 14, 1871; the other, upon a note, dated Feb. 1, 1872.

Upon these various judgments executions were issued, and levied upon a tract of land in that county, containing forty-two acres, which Williams and his family occupied as their residence. The legal title to it was, at that time, in his wife, it having been conveyed to her by deed dated Feb. 11, 1868, and duly filed for record on the 24th of that month. The deed did not accurately describe the metes and bounds of the property intended to be conveyed, and, in order to correct the description, another deed was made to her on the 13th of December,

1871, and duly filed for record on the 6th of the succeeding month. The property so levied on, with all the improvements thereon, was sold at public auction, and Uri S. Penfield became the purchaser, at the sum of twenty-five dollars, "in trust for the use and benefit of the execution creditors." It was by the sheriff conveyed to him accordingly. As to the balance due upon the judgments, the executions were returned unsatisfied.

This suit was commenced on the 30th of June, 1875. It proceeds upon these grounds: that Williams purchased and paid for the property with his own means, and caused the title to be placed in the name of his wife, with the fraudulent intent to hinder and delay his creditors; that after the conveyance, he being insolvent, and in expectation of contracting future debts, and with intent to hinder, delay, and defraud his creditors, existing and future, and for the purpose of placing his means beyond their reach, did, to their injury, and with her knowledge, consent, and approval, make, solely by his own means, valuable, permanent, and expensive improvements on the land; that she accepted the conveyance with knowledge and notice of the fraud imputed to him, and confederated with him to cheat and hinder his creditors by withholding from them as well the land as all the moneys invested in improving it.

The prayer of the bill is that the conveyance to her be declared inoperative against his creditors; that the title to the land be vested in Penfield, in trust for the execution creditors, and the possession thereof adjudged to him for their use and benefit; and that if the deed cannot be declared inoperative, as to creditors, then that the amount expended by Williams in improving the land be declared a charge and an incumbrance thereon in their favor.

The material allegations of the bill are denied in the answer of Williams and wife.

The Circuit Court, upon final hearing, decreed that all the right, title, and interest of Williams and wife in the land be, without further conveyance, vested in Penfield in trust for the banks, and that possession be forthwith delivered to him. From that decree this appeal was taken.

Mr. Eppa Hunton and *Mr. W. H. Hatch* for the appellants.

Mr. John D. S. Dryden, contra.

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

A very careful scrutiny of the record has brought our minds to the conclusion that the decree below cannot be sustained. The evidence clearly establishes that Williams, with his own means, purchased the land in question with the intention of immediately improving it and making it the permanent residence of himself and family. Indeed, the fact is substantially admitted in the answer of himself and wife. But fraud is not shown upon his part, either in causing the conveyance to be made to her, or in using his means, to the extent that he did, in improving the land. The facts are entirely consistent with an honest purpose to deal fairly with any creditors he then had, or might thereafter have in the ordinary course of his business. It is true that he was somewhat indebted at the time of this voluntary settlement upon his wife, but his indebtedness was not such in amount or character as, taking into consideration the value of his other property interests, rendered it unjust to creditors, existing or future, that he should, out of his income or estate, provide a home for his family by improving this tract. When it was conveyed to her, as well as during all the period when he improved it by the erection of a dwelling and other houses thereon, he had, according to the weight of the evidence, property which his creditors could reach, exceeding, in value, all his existing indebtedness by several thousand dollars. He was engaged in active business, with fair prospects, good credit, and, as we may infer from the record, unsullied reputation. His indebtedness existing at the time of the settlement upon the wife, as well as that which arose during the period of the improvements, was subsequently, and without unreasonable delay, fully discharged by him. Commenced in 1868, they were all, with trifling exceptions, completed and paid for before the close of the summer of 1869. So far as the record discloses, no creditor, who was such when the settlement was made or the improvements were going on, was materially hindered by the withdrawal by Williams, from his means or business, of the sums necessary to pay for the land and improvements. Those who seek, in this suit, to impeach the original settlement, or to reach the means he invested in improving his wife's land,

became his creditors some time after the improvements (with slight exceptions not worth mentioning) had been made and paid for. If they trusted him in the belief that he owned the land, it was negligent in them so to do, for the conveyance of Feb. 11, 1868, duly acknowledged, was filed for record within a few days after its execution. The circumstance that the original deed did not give an accurate description of the land intended to be conveyed ought not to defeat the original settlement upon her, inasmuch as the description could leave no one in serious doubt that the land intended to be conveyed was that now in dispute. There is no intimation in the pleadings that the banks supposed, when contracting with him, or accepting from others commercial paper upon which his name appeared, that the deed of Feb. 11, 1868, described land other than that upon which he, after that date, resided. On the contrary, the amended bill proceeds, in part, upon the ground, distinctly stated, that the land intended to be conveyed by that deed is that now in dispute, and that the only purpose of the deed of Dec. 13, 1871, was to correct the erroneous description in the deed of 1868.

An effort is made to show that some of the debts, evidenced by the notes upon which the banks obtained judgment, existed when the conveyance of 1868 was executed or the improvements in question were made. But the evidence furnishes no basis for such a contention, except as to the note for $1,635.25, executed Aug. 14, 1871, held by the La Grange Savings Bank. As to that note, the president of the bank states that in it was merged a prior note for $800 or $1,000, given by the parties last named in 1866 or 1867. But his evidence shows that he is not at all clear or positive in his recollections upon the subject; and, according to the decided preponderance of testimony, Williams was not a party to the note, which, it is claimed, was merged in that of Aug. 14, 1871. The proof, upon this point, renders it quite certain that no part of the debt evidenced by that note existed against Williams, until, as surety for Simpson, he signed that note.

The principles of law which must determine the rights of the parties are well established by the decisions of the Supreme Court of Missouri. In *Pepper* v. *Carter*, 11 Mo. 540, that court,

after remarking that the question as to what would render a voluntary conveyance void as to creditors under the statute of Elizabeth, from which the Missouri statute was borrowed, had undergone much discussion, and been the subject of contradictory opinions, said: "Some would make an indebtedness *per se* evidence of fraud against existing creditors. Others would leave every conveyance of the kind to be judged by its own circumstances, and from them infer the existence or non-existence of fraud in each particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors, although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the fact, whether it is fraudulent or not, is to be determined from all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases, but that it is not conclusive." In the later case of *Payne* v. *Stanton*, 59 Mo. 158, the same court, while quoting approvingly the language just cited from *Pepper* v. *Carter*, said that the "doctrine is well settled that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid; but no such reason can be urged in behalf of those who become creditors afterwards."

These decisions control the present case. Neither the conveyance to the wife nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon her, had the effect and operation to hinder or defraud his then existing creditors. Nor does the evidence justify the conclusion that the conveyance was executed, or the improvements made, with an intent to hinder or defraud either existing or subsequent creditors. Giving full weight to all the circumstances, there is no reason to impute fraud to the husband.

Decree reversed with directions to dismiss the bill.

FARMERS' LOAN AND TRUST COMPANY *v.* WATERMAN.

1. A party to a suit cannot appeal from a decree therein rendered, if he is not thereby affected.
2. Where parties severally assert in the same suit a separate cause of action, the decrees which are rendered in favor of them respectively cannot be joined to render the amount involved sufficient to give this court jurisdiction. *Ex parte Baltimore & Ohio Railroad Company, ante*, p. 5, cited and approved.

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

Motion by the appellees to dismiss as to part of them, and to affirm as to the rest.

The facts are stated in the opinion of the court.

Mr. John M. Butler in support of the motion.

Mr. J. D. Campbell in opposition thereto.

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

These motions present the following facts: —

On the 24th of July, 1877, in a suit pending in the court below for the foreclosure of certain mortgages on the property of the Indianapolis, Bloomington, and Western Railway Company, a decree was entered directing a sale of the mortgaged property and an application of the proceeds to the payment, among others, of "all such . . . claims and sums of money as shall be hereinafter allowed by this court . . . in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust for debts due by said railway company for work, labor, supplies, and material done and furnished during the six months next preceding the first day of December, 1874, . . . which payment for debts due as last aforesaid for six months prior to December 1st, 1874, shall be made into court without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court directing the money so paid to be distributed to the various claimants thereof."

At the time this decree was made, the amount of the debts for labor and supplies was not known. That matter had been

referred, on the 4th of June before, to certain special masters to take testimony and report, but their report was not filed. To meet this condition of the case, the decree further provided that on the delivery of the deed the purchaser should pay into court enough of the purchase-money to satisfy any amount that might in the further progress of the cause be found to be owing. It was also specially provided that the reference to the master, which had been made and which was approved and continued, should "in nowise abridge or impair the right of any of the parties hereto to prosecute an appeal from any order or orders of the court allowing or disallowing said claims, or any part thereof, and declaring the same to be prior and superior to said mortgage."

The Farmers' Loan and Trust Company was the trustee of the mortgages having the paramount mortgage liens on the property.

On the 16th of November, 1877, the special masters filed their report as to the labor and supply claims, allowing eleven hundred and sixty-three separate claims, which had been presented to them by petition in accordance with the provisions of the order of reference, and which, in their opinion, had been established by the evidence. Of these claims only fourteen were for sums exceeding $5,000. All the rest, being eleven hundred and forty-nine in number, were in every instance for less than that amount. On the coming in of the report, numerous exceptions were filed by the Trust Company. These exceptions remaining undisposed of, and no sale having been made under the decree, "on motion of the Farmers' Loan and Trust Company" it was, on the 8th of May, 1878, "by way of further directions for the execution of the decree . . . of date July 24, 1877, . . . considered by the court, and ordered, adjudged, and decreed that the said original decree be, and the same is hereby, amended and modified as follows: . . .

"13th. That the sale be made . . . subject to . . . such . . . claims and sums of money as are now under consideration by and as shall be hereafter allowed by this court, . . . and affirmed by the Supreme Court of the United States on appeal, should an appeal be taken, in preference to liens of the hereinbefore mentioned mortgages or deeds of trust for debts due by

said railroad company for work and labor done and supplies and material furnished, . . . without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto; . . . and such back pay, labor, and supply claims as shall be finally adjudged against the property herein directed to be sold, after an appeal so taken, shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase-money so bid. . . . And the payment of the amount of any claims so allowed . . . shall not be required to be made at or prior to the time of the delivery of the deed, but the said sale shall be made subject to, and the purchaser or purchasers of said property shall agree to pay off so much of the said claims or sums of money as shall be finally allowed in the progress of this cause, on or after such appeal, and the same shall be paid and discharged by said purchaser or purchasers within six months after the entry of an order of this court, upon a mandate of the Supreme Court concerning matters so appealed from being filed in this court, and the said deed shall be delivered without payment of said claims or sums of money, or any part thereof, upon the purchaser so conditionally agreeing to pay so much and no more of such claims and sums of money as may finally be allowed on such appeal, and it shall be competent for the court to enforce hereafter, by proper order or decree herein, or to be added to the foot of this decree, any of the provisions or conditions of this thirteenth article of this decree."

On the 30th of October, 1878, the mortgaged property was sold under the decree of July 24, as thus modified, to Austin Corbin, Giles E. Taintor, and Josiah B. Blossom, "purchasing committee, in trust for certain bondholders under the trusts expressed in certain agreements, dated December 20th, 1875, and a supplement thereto, dated July 25, 1878," copies of which were attached to the report of the sale. These agreements had reference to a plan adopted by certain of the stockholders, bondholders, and general creditors, for the purchase of the property, and defining their respective interests therein, if the purchase should be made.

The sale was confirmed by the court on the 31st of March,

1879, upon the application of the purchasers, and the master was directed to make and deliver to them a deed of the property, subject, among other things, "to . . . such . . . claims and sums of money as are now under consideration by and as shall be hereafter allowed by the said court, . . . in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due by said railroad company for work and labor done and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, . . . but nothing herein contained shall be taken to prejudice the Farmers' Loan and Trust Company, or the said Austin Corbin, Giles E. Taintor, and Josiah B. Blossom, their successor or successors and assigns, or any of them, to object to the same, or to appeal from any order or orders which may be hereafter made by the said court, or either of them, in relation thereto to the Supreme Court of the United States, which said . . . back pay, labor, and supply claims . . . finally adjudged against said property hereby conveyed, are hereby expressly assumed by the said Austin Corbin, Giles E. Taintor, and Josiah B. Blossom, purchasing committee, their successor and successors or assigns, as and for a charge and lien upon the property hereby conveyed, . . . prior and superior to any interest or estate hereby vested in them or any of them. . . ."

After this deed was delivered, a further reference was made to take testimony and report as to certain special matters connected with the claims before reported on. Upon the coming in of the report under this last reference, exceptions were filed by the Trust Company and the purchasers, and on the 31st of October, 1881, the court, after a hearing, decreed "that said Austin Corbin, Giles E. Taintor, and Josiah B. Blossom do, within sixty days, excluding Sundays, from and after the date of the decree, pay to said several intervening petitioners and claimants the several amounts set opposite their respective names, that is to say, to Charles F. Webb two hundred and seventy dollars." Then followed the names of all the other separate claimants, with the amount due them respectively set opposite.

From this decree of the 31st of October the Trust Company

and Corbin, Taintor, and Blossom took the present appeal, which the appellees having claims less than $5,000 move to dismiss as to them for want of jurisdiction. Those whose claims exceed $5,000 have filed motions to affirm as to them, on the ground that it is manifest the appeal was taken for delay.

To our minds it is clear the Trust Company has no interest in the questions arising under this appeal. That company represented the bondholders for all the purposes of the foreclosure of the mortgages under which it was trustee, but the interest of the bondholders in the suit ended when the property was sold and the proceeds were distributed. As the purchasers took the property subject to the lien, if any there was, of the back-pay claims, the bondholders, as bondholders, cannot in any manner be affected by the result of the proceedings to determine whether such lien exists, and if so, to what extent. All questions as to such matters are between the purchasers and intervening petitioners alone. The decree ordering a sale subject to the claims was entered on the motion of the Trust Company, and the appeal is in express terms confined to the order establishing the claims against the purchasers. If, by reason of the agreement under which the purchase was made by the purchasing commitee, any of the bondholders secured by the mortgages to the Trust Company are entitled to share in the property, they are for all such purposes represented by the purchasing committee, and not by the mortgage trustee. The trust created by the mortgage was fully executed when the foreclosure was complete. After that the purchasing bondholders became purchasers of the mortgaged property, and their rights are to be determined accordingly.

Neither is it of any importance that in the decree of sale as modified, as well as in that originally entered, a right of appeal by the Trust Company was expressly reserved. Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree. A reservation of the right to appeal has no effect if there is no decree from which an appeal such as has been reserved will lie. In the present case, as has already been seen, the several claimants or intervenors and the purchasing

committee were the only parties to the suit affected by the decree of October 31. The purchasing committee became parties by their purchase to the extent that was necessary to protect their rights in the property purchased against any further orders to be made in the execution of the decree under which they bought. The Trust Company, by consenting to the decree ordering a sale subject to the back-pay and supply liens, in effect voluntarily abandoned that part of the litigation, and left it to be carried on thereafter between the several claimants and the purchasers alone. Neither the Trust Company nor those it in equity represents can gain or lose by either a reversal or affirmance of the decree appealed from.

Our jurisdiction, therefore, depends on the case as it stands between the purchasing committee and the several back-pay claimants. As we have shown in *Ex parte Baltimore & Ohio Railroad Company*, *ante*, p. 5, if distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit, and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give us jurisdiction; but if the controversy is about a matter in which several parties are interested collectively under a common title, and in the decree, after establishing the common right, a division is made among the claimants according to their respective interests, this separation of the decree into parts will not prevent an appeal.

We are satisfied the present case comes under the first division of this rule. There is a question involved common to all the intervenors; that is to say, whether back-pay and supply claims of any kind are to be paid by the purchasers; but if that is settled in favor of the claimants it will still have to be determined whether each one of the separate claimants has a claim of that kind. In determining this question each claim will depend on its own facts. A recovery by one claimant will not necessarily involve a recovery by another. While the rights of all depend on establishing a liability of the purchasers for the payment of debts of a particular kind, no one can recover unless he shows that there is owing to him individually a debt of that kind. There are, therefore, necessarily in the case as many separate and distinct controversies as there are separate

claimants and intervenors. The purchasers have the right to contest each claim separately. They stand in the same relation to the several claimants that the ship-owner did in *Oliver* v. *Alexander*, 6 Pet. 143, to the seamen, or the alleged fraudulent grantee in *Seaver* v. *Bigelows*, 5 Wall. 208, to the judgment creditors. The several intervenors do not, as in *The Connemara*, 103 U. S. 754, claim under one and the same title, and it *is* material to the purchasers how much is allowed to each and every one, for the amount of the recovery is not determined by any fixed sum, but by the aggregate of all the separate sums allowed the several claimants individually. The amount of the recovery by one is not affected in any manner by what is allowed to another. Clearly, therefore, distinct causes of action in favor of distinct parties have been joined in the same suit, and distinct decrees rendered in favor of the distinct parties. This is not only the form of the decree, but the substance.

There is no question here of a fund for distribution. The purchasing committee bought the road subject to the liens of the various back-pay and supply claimants, if any such liens existed. The claimants are seeking to establish and enforce their respective liens. They, in effect, join in one suit for that purpose, but both their claims and decrees are separate and distinct.

It follows that the motion to dismiss must be granted, and it is so ordered.

The questions involved in the appeals from the decrees for more than $5,000 are not such as we are willing to consider on a motion to affirm. The motion for an affirmance is, therefore,

Overruled.

FINK *v.* O'NEIL.

The homestead of a defendant is not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action, if, had a private party been the plaintiff, it would be exempt therefrom, by the law of the State where it is situate.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

This is a bill in equity filed by O'Neil praying for a perpetual injunction to restrain Fink, the then marshal of the United States for the Eastern District of Wisconsin, from further proceeding under a *fi. fa.*, issued upon a judgment rendered in favor of the United States in the District Court for that district, against the complainant and others, and which had been levied on real estate alleged to be his homestead, and exempt under the laws of that State from sale on execution. The premises levied on are forty acres, with a dwelling-house and appurtenances thereon, which he occupied as a residence for himself and family, consisting of his wife and seven children, the same being used for agricultural purposes, not included in any town, city, or village plot, and alleged to be of the value of $6,000 and upwards; and it is averred that the cause of action upon which the judgment was rendered was not for any debt or liability contracted prior to Jan. 1, 1849.

To this bill there was filed a general demurrer, for want of equity, which being overruled, and Fink declining to answer or plead, a decree was rendered granting the relief prayed for, from which he prosecutes this appeal.

The provision of the statute of Wisconsin on the subject of homestead exemptions, the benefit of which was secured to the appellee by the decree, is as follows: —

"A homestead to be selected by the owner thereof, consisting, when not included in any village or city, of any quantity of land, not exceeding forty acres, used for agricultural purposes, and when included in any city or village, of a quantity of land not exceeding one-fourth of an acre, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this State, shall be exempt from seizure or sale on execution, from the lien of every

judgment, and from liability in any form for the debts of such owner, except laborers', mechanics', and purchase-money liens, and mortgages lawfully executed, and taxes lawfully assessed, and except as otherwise specially provided in these statutes," &c. Rev. Stat. Wisconsin of 1878, 783, ch. 130, sect. 2983.

Mr. Assistant Attorney-General Maury for the appellant.

If the law of Wisconsin exempting forty acres of land from execution is operative as against the United States, it must be on one of two grounds: —

First, That the law providing for executions on judgments in the Federal courts, now embodied in sect. 916, Rev. Stat., has made it so; or,

Second, That Wisconsin has the power to enact a law which, *proprio vigore*, exempts the property of a debtor from execution sued out by the United States.

The law regulating final process on the common-law side of the Federal courts cannot apply to the extent of making the homestead exemption law of a State operative against the United States, whatever may be its effect as to individuals, because: 1. It is an invariable rule that statutes which derogate from the powers and prerogatives of the government, or tend to diminish or restrain any of its rights and interests, do not apply to it unless it is expressly named. *United States* v. *Herron*, 20 Wall. 251; *Savings Bank* v. *United States*, 19 id. 228, 239, and cases cited; Dwarris, p. 523; Sedgw. Stat. and Const. L., pp. 105, 395, ed. 1857. 2. Sect. 916, Rev. Stat., while it adopts the State laws providing execution, does not adopt any restrictive legislation which is collateral to them. *Boyle* v. *Zacharie*, 6 Pet. 659; *Wayman* v. *Southard*, 10 Wheat. 1. 3. The provision of sect. 986, that executions sued out by the United States in any court thereof, in one State, may run and be executed in any State or Territory, is repugnant to the idea that such process was intended to be affected by State exemptions of any kind under sect. 916.

No law of Wisconsin exempting property from execution can be operative *proprio vigore* against the United States.

The independence and sovereignty of the national government cannot coexist with a power in the several States to

defeat or embarrass the exercise of any of its delegated powers. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Crandall* v. *Nevada*, 6 Wall. 35; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *The Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Company*, 17 id. 322; *Wayman* v. *Southard*, *supra*; *Bank of United States* v. *Halstead*, 10 Wheat. 51; *Beers* v. *Haughton*, 9 Pet. 329.

The States are not expressly prohibited from interfering with the operations of the general government. The inhibition comes by necessary implication, their possession of such a power of obstruction and interference being in irreconcilable antagonism to the sovereign authority which it was the purpose of the Constitution to ordain and establish.

If, then, a State cannot subject to taxation a bank created by the United States, and made a part of its fiscal machinery, or a debenture of the United States, or the salary of a Federal officer, or a citizen passing through its territory, because such an exercise of her taxing power would tend to embarrass the operations of the general government, it would seem to follow as a necessary consequence that the law of Wisconsin could not exempt from execution the land levied on under the execution in question, without retarding, impeding, and burdening the appropriate and rightful means for the enforcement and collection of a debt due to the United States.

If a State cannot tax the final process of the Federal courts, by a parity of reasoning it cannot withdraw property from the operation of such process.

The judicial power has heretofore been considered ample for all the purposes of the Constitution. *Martin* v. *Hunter*, 1 Wheat. 304; *Tennessee* v. *Davis*, 100 U. S. 258. But it must hereafter be regarded as a delusion, if the several States can determine whether any, and, if any, how much, of a defendant's property may be seized under an execution sued out of a Federal court at the instance of the United States.

There was no opposing counsel.

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

The statutory provision in relation to homesteads was enacted by Wisconsin in express compliance with a constitutional injunction, wherein it is declared, in the seventeenth section of the Bill of Rights, that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws." *Phelps* v. *Rooney*, 9 Wis. 70, 83.

It has been the constant policy of the State in this legislation, as construed by many decisions of its Supreme Court, to favor by liberal interpretations the exemptions in favor of the debtor. "For it cannot be denied," says that court, in *Hanson* v. *Edgar*, 34 id. 653, 657, "that in all the enactments found in our statute books in regard to homestead exemption, the most sedulous care is manifest to secure the homestead to the debtor and to his wife and family against all debts not expressly charged upon it."

We have found no case in which the question has been raised, or where there has been any expression of judicial opinion, whether the exemption would prevail or not, as to judgments in favor of the State; but we do not doubt, from the language of the constitutional and statutory provisions, and the rules of construction followed in other cases, that it would be held by its courts, if the question should be directly made, that the State, except as to taxes, which are expressly excepted, would be bound by the exemption.

In *Doe, ex dem. Gladney*, v. *Deavors*, 11 Ga. 79, it was decided by the Supreme Court of Georgia, in 1852, that the State was bound by acts of the legislature exempting certain articles of personal property from levy and sale for debts, for the benefit of the wife and children of the debtor, so that they could not be seized and sold under execution for the payment of taxes. The court said, p. 89: "These laws are founded in a humane regard to the women and children of families. The preamble to the act of 1822 announces the grounds on which the legislature acted. 'Whereas' (is its language) 'it does not comport with justice and expediency to deprive innocent and helpless women and children of the means of subsistence, be it therefore enacted,' &c. . . . In our judgment, the State

falls within the operation of a public law, passed for the benefit of the poor, and the State is within the policy of our own legislation upon this subject-matter."

Mr. Thompson, in his Treatise on Homesteads and Exemptions, sect. 386, says: "In many of the States this question is determined by the express provisions of statutes, which declare, in various terms, that nothing shall be exempt from execution where the debt, other than public taxes, is due the State; or where the debt is for public taxes legally assessed upon the homestead or other property; or where the demand is for a public wrong committed, punished by fine. But where the question has arisen, in the silence of statutes, the highest courts of the States, with two exceptions, have held otherwise."

Commonwealth v. *Cook*, 8 Bush (Ky.), 220, which is one of the exceptions referred to, is shown, however, to have been materially qualified by the decision in *Commonwealth* v. *Lay*, 12 id. 283. *Brooks* v. *The State*, 54 Ga. 36, turned on the point that the exemption claimed operated retrospectively, and was disallowed on the authority of *Gunn* v. *Barry*, 15 Wall. 610. So that in point of fact the decisions of State courts upon the point are practically unanimous.

It is said, however, that the laws of the State creating these exemptions are not laws for the United States; and this is certainly true, unless they have been made such by Congress itself. This has not been an open question in this court since the decision in *Wayman* v. *Southard*, 10 Wheat. 1, and *Bank of the United States* v. *Halstead*, id. 51. Mr. Justice Thompson, delivering the opinion of the court in the latter case, said: "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by State laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the State law, but under that of the United States, which adopts such law. An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit," &c. In *Wayman* v. *Southard*, Mr. Chief

Justice Marshall had said that the proposition was "one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused."

The question, therefore, is, whether the United States, by an appropriate legislative act, has adopted the laws of Wisconsin exempting homesteads from execution, and, if at all, whether they apply in cases of executions upon judgments in favor of the United States.

Sect. 916, Rev. Stat., is as follows: "The party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Courts; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid, by execution or otherwise."

This provision is part of the sixth section of the act of June 1, 1872, c. 255, entitled "An Act to further the administration of justice," and has in its present form been in force since that day. It is the result of a policy that originated with the organization of our judicial system. The fourteenth section of the act of Sept. 24, 1789, c. 20, commonly known as the Judiciary Act, provided that the courts of the United States should have "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" and this was held to embrace executions upon judgments. *Wayman* v. *Southard*, 10 Wheat. 1. The act of Sept. 29, 1789, c. 21, entitled "An Act to regulate processes in the courts of the United States," enacts "that until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style and modes of process and rates of fees, except fees to judges, in the Circuit and District Courts, in suits at common law, shall be the same in each State respec-

tively as are now used or allowed in the Supreme Courts of the same."

This act was temporary, and expired by its own limitation at the end of the next session of Congress. The act of May 8, 1792, c. 34, provided that the forms of writs, executions, and other process, and the forms and modes of proceeding in suits at common law, should continue to be the same as authorized by the act of 1789, "subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court shall think proper, from time to time, by rule to prescribe to any Circuit or District Court concerning the same." This legislation came under review in this court in *Wayman* v. *Southard* and *Bank of the United States* v. *Halstead*, in the latter of which it is said, 10 Wheat. 60: "The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the State process and proceedings as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. They have authority, therefore, from time to time, to alter the process in such manner as they shall deem expedient, and likewise to make additions thereto, which necessarily implies a power to enlarge the effect and operation of the process."

This discretionary power in the courts of the United States was restricted by the act of May 19, 1828, c. 68, so that thereafter writs of execution and other final process issued on judgments rendered in any of the courts of the United States, and the proceedings thereupon, should be the same, except their style, in each State respectively, as were then used in the courts of such State; provided, however, that it should be in the power of the courts, if they saw fit in their discretion, by rule of court, so far to alter final process in said courts as to conform the same to any change which might be adopted by the legislatures of the respective States for the State courts.

It will be seen from this provision that it was thereafter prohibited to the courts of the United States either to adopt or recognize any form of execution, or give any effect to it, except such as was, at the time of the passage of the act, or had sub-

sequently become at the time of their adoption, a writ authorized by the laws of the State. The same provision has ever since been continued in force, and is now embodied in sect. 916 of the Revised Statutes, already quoted.

In *Beers* v. *Haughton*, 9 Pet. 329, which was governed by the act of 1828, it was held that "the words, 'the proceedings on the writs of execution and other final process,' must, from their very import, be construed to include all the laws which regulate the rights, duties, and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and also all the exemptions from arrest or imprisonment under such process created by those laws."

It is further to be observed that no distinction is made, in any of these statutes on the subject, between executions on judgments in favor of private parties and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States. The general power to issue process, originally conferred by sect. 14 of the Judiciary Act of 1789, which now appears as sect. 716, Rev. Stat., as being *in pari materia* with that contained in sect. 916, must be construed as subject to the same limitations, especially as the general power is confined in express terms to writs not specifically provided for by statute, and hence, *ex vi termini*, embraces none included in the subsequent section. Besides, as was said by Mr. Chief Justice Marshall, in *Wayman* v. *Southard*, "this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate."

As the statute of Wisconsin, exempting homesteads from levy and sale upon executions, was in force at the time the act of Congress of June 1, 1872, c. 255, took effect, and has remained so continuously from that time, it also follows that the exemption has thereby become a law of the United States within that State, and applies to executions issued upon judgments in civil causes recovered in their courts in their own

name and behalf, equally with those upon judgments rendered in favor of private parties. Laws of Wisconsin for 1848, pp. 40, 41; Rev. Stat. Wisconsin for 1871, § 23, p. 1548.

This conclusion cannot be avoided by the consideration which has been urged upon us, that the process acts do not limit the sovereign rights of the United States, upon the principle that the sovereign is not bound by such laws, unless he is expressly named. These laws are the expression of the sovereign will on the subject, and are conclusive upon the judicial and executive officers to whom they are addressed; and as they forbid the issue of an execution in every case, except subject to the limitations which they mention, and as there is no authority to issue an execution in any case whatever, except as conferred by them, the sovereign right invoked is left without the means of vindication. The United States cannot enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it. And if the laws in question do not permit an execution to issue upon a judgment in favor of the United States, except subject to the exemptions which apply to citizens, there are no others which confer authority to issue any execution at all. For, as was said by Mr. Justice Daniel, in *Cary* v. *Curtis*, 3 How. 236, 245, "the courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."

This objection is also met expressly by the decision of this court in *United States* v. *Knight*, 14 Pet. 301. It was there decided that the act of May 19, 1828, c. 68, gives the debtors imprisoned under executions from the courts of the United States, at the suit of the United States, the privilege of jail limits in the several States, as they were fixed by the laws of the several States at the date of that act. It was there objected, as here, that the provision of the statute did not

embrace executions issued on judgments rendered in favor of the United States, upon the ground that the United States are never to be considered as embraced in any statute, unless expressly named. Mr. Justice Barbour delivered the opinion of the court, and said: "The words of this section being 'that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States,' it is obvious that the language is sufficiently comprehensive to embrace them, unless they are to be excluded by a construction founded upon the principle just stated." Referring to the maxim *nullum tempus occurrit regi*, he says it rests on the ground that no laches shall be imputed to the sovereign; but he adds: "Not upon any notion of prerogative; for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute for the public good; and the King represents the nation. The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers to whose care they are confided. Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute, which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but, on the contrary, makes provisions, in accordance with the policy which the government has indicated by many acts of previous legislation, to conform to State laws in giving to persons imprisoned under their execution the privilege of jail limits; we shall best carry into effect the legislative intent by construing the executions at the suit of the United States to be embraced within the act of 1828."

The same line of reasoning was adopted by this court in *Green* v. *United States*, 9 Wall. 655. It was there held that the act of July 2, 1864, c. 210, which enacts that in courts of the United States there shall be no exclusion of any witness in civil actions, "because he is a party to or interested in the issue tried;" and the amendatory act of March 3, 1865, c. 113, making certain exceptions to the rule, apply to civil actions

in which the United States are a party as well as to those between private persons. It was argued by the Attorney-General that the statutes were meant to give both parties an equal standing in court in respect to evidence; that the United States not being able to testify, a party opposed to them should not be allowed to do so either; and that, independently of this, it was a rule of construction that "the King is not bound by any act of Parliament, unless he be named therein by special and particular words." Mr. Justice Bradley, who delivered the opinion of the court, replying to this argument, said: "It is urged that the government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to *civil* actions would seem to show that Congress intended it to apply to actions in which the government is a party as well as those between private persons. For the United States is a necessary party in all criminal actions, which are excluded *ex vi termini;* and if it had been the intent to exclude all other actions in which the government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the government is not a party, instead of confining it to *civil* actions. It would then have corresponded precisely with such intent. Expressed as it is, the intent seems to embrace, instead of excluding, civil actions in which the government is a party. Nothing adverse to this view can be gathered from the exceptions made in the amendment passed in 1865." See also *United States* v. *Thompson*, 93 U. S. 586; *United States* v. *Railroad Company*, 105 id. 263.

And although it has been decided by the highest judicial tribunals in England — *Feather* v. *The Queen*, 6 B. & S. 257; *Dixon* v. *London Small Arms Co.*, 1 App. Cas. 632 — that the sovereign is entitled to the use of a patented process or invention without compensation to the patentee, because the privilege granted by the letters-patent is granted against the subjects only, and not against the crown, a contrary doctrine was held by this court in *James* v. *Campbell*, 104 U. S. 356, to prevail in this country. Mr. Justice Bradley, delivering the

opinion of the court in that case, said: "The United States has no such prerogative as that which is claimed by the sovereigns of England by which it can reserve to itself, either expressly or by implication, a superior dominion and use, in that which it grants by letters-patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent, the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor."

It is true that in *United States* v. *Herron*, 20 Wall. 251, it was decided that a debt due to the United States is not barred by the debtor's discharge with certificate under the Bankrupt Act of 1867; but in that case Mr. Justice Clifford took pains, by a careful collation of numerous provisions of the statute, to show that the words "creditor or creditors," as contained in the act, did not include the United States, adopting and extending the definition by Mr. Justice Blackburn, in *Woods* v. *De Mattos*, 3 Hurl. & Colt. 987, 995, because used in the sense of persons having a claim which can be proved under the bankruptcy, and not required by the act to be paid in full in preference of all others. But the Bankrupt Act furnished clear evidence of the policy of Congress in reference to exemptions of property from sale for the payment of debts, by excepting from its operation personal property, necessary for the use of the family, to the amount of $500, and such other property as was exempt from execution by the laws of the United States and of the State of the debtor's domicile. Rev. Stat., sect. 5045. And Congress, since the passage of the act of May 20, 1862, c. 75, providing for the acquisition of homesteads for actual settlers upon the public lands, has made their exemption from sale on execution a permanent part of the national policy, by declaring that lands so acquired shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Rev. Stat., sect. 2296; *Seymour* v. *Sanders*, 3 Dill. 437; *Russell* v. *Lowth*, 21 Minn. 167.

If a contrary construction to the process acts should be given, on the ground that they do not include the United

States, which, although a litigant, continues nevertheless to exercise the prerogatives of a sovereign, it would follow that they might resort to any writ known to the common law, however antiquated or obsolete, and in defiance of the progress of enlightened legislation on that subject, revive all the hardships of imprisonment for debt, even without the liberty of local statutory jail limits. But that this is not within the meaning of these acts of Congress, we have positive and plenary proof in sect. 1042 of the Revised Statutes. This was sect. 14 of the act of June 1, 1872, c. 255. It provides that "when a poor convict sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and cost, has been confined in prison thirty days solely for the non-payment of such fine, or fine and cost, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him" an oath, the form of which is set out, in which he swears that he has not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of the State where the oath is administered, and that he has no property in any way conveyed or concealed, or in any way disposed of, for his future use or benefit. "And thereupon," the statute proceeds, "such convict shall be discharged," &c. This section is repeated as sect. 5296, Rev. Stat., under the title, Remission of fines, penalties, and forfeitures.

Nothing can be more clear than this, as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the State in which

the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offences against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases.

In *Magdalen College Case*, 11 Rep. 66 *b*, Lord Coke, referring to *Lord Berkley's Case*, Plowd. Com. 233, 246, declares that it was there held that the King was bound by the statute *De Donis*, 13 Edw. I. c. 1, because, for other reasons, "it was an act of preservation of the possession of noblemen, gentlemen, and others," and "the said act," he continues, "shall not bind the King only, where he took an estate in his natural capacity, as to him and the heirs male of his body, but also when he claims an inheritance as King by his prerogative." By parity of reasoning based on the declared public policy of States, where the people are the sovereign, laws which are acts of preservation of the home of the family exclude the supposition of any adverse public interest, because none can be thought hostile to that, and the case is brought within the humane exception that identifies the public good with the private right, and declares "that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words;" for civilization has no promise that is not nourished in the bosom of the secure and well-ordered household.

Decree affirmed.

MILTENBERGER v. LOGANSPORT RAILWAY COMPANY.

1. In August, 1870, a first mortgage on a railroad was made. In January, 1873, a second mortgage on the same railroad was made. Both mortgages covered after-acquired property. A default on the first mortgage occurred in November, 1873, and on the second mortgage in January, 1874. In August, 1874, the second mortgagee filed a bill to foreclose the second mortgage, making the first mortgagee a party, acknowledging the priority of the first mortgage, not praying any relief against the first mortgagee, and praying for a receiver, and for the payment of his net revenue to those entitled to it. On the same day, an order was made appointing one Schuyler receiver, and directing that a copy of the order be served on the first mortgagee, a corporation, requiring it to appear "on or before" the first Monday of November then next, and authorizing the receiver to pay the arrears due for operating expenses for a period in the past not exceeding ninety days. A copy of the order was served on the first mortgagee three days afterwards, and proof of that service was filed two days after the service. In October following, the receiver, on his petitions filed, was authorized, by order, to purchase certain rolling-stock, and to pay indebtedness, not exceeding $10,000, to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which was incurred more than ninety days before the order appointing the receiver was made, and to expend a sum named in building six miles of road and a bridge, which were part of the main line of the road, and the expenditures were charged as a first lien on the earnings of the road. The first mortgagee appeared and answered on the first Monday of November, and not before. The answer objected to the creation of fresh indebtedness. Nothing more was done in the suit for eleven months. Then the receiver reported that he had built the six miles and the bridge, and purchased rolling-stock, and incurred debts therefor. He also filed a petition showing that his trust owed $232,000, and asking leave to borrow that amount and $90,000 to put the road in order, on receivers' certificates, to be made a first lien. The petition set forth a meeting of both classes of bondholders, at which, on the report of a committee, the receiver was directed, by a resolution passed, to obtain authority to borrow $322,000 on receivers' certificates. An order was made authorizing him to borrow $201,000 on receivers' certificates, payable out of income, and to be provided for in the final order of the court in the suit, if not paid out of income. Soon after four holders of first-mortgage bonds were made defendants, with leave to answer and to file a cross-bill. They answered and filed a cross-bill, in November, 1875, to foreclose the first mortgage. The cross-bill claimed that the six miles of road, and the bridge and the rolling-stock, and the other property acquired by the receiver, were subject to the lien of the first mortgage, and that the mortgagor had been insolvent from October, 1873, and affirmed the foregoing statement as to the meeting of the bondholders and their resolution, and stated that the plaintiffs in the cross-bill had desired and sought for more than a year to have the first mortgage foreclosed; that the $201,000 ought not to be borrowed and made a first lien on the road; and that the receiver ought to be removed, and

another receiver appointed under the cross-bill. In December, 1875, a reference was made to take evidence on the subject of the appointment of a new receiver. More than four months after that the first mortgagee answered the cross-bill, and, the two suits being ready for hearing, they were consolidated and heard. One decree was made in them, in May, 1876, declaring that both mortgages covered all the property held by the mortgagor when the original suit was brought and all subsequent additions thereto, and providing for a foreclosure of the right of the second mortgagee to redeem, and for the presentation to a master of claims against the property and the receiver. In July, 1876, one Claybrook was appointed additional receiver in the original suit. He acted, after Aug. 11, 1876, as sole receiver until Aug. 25, 1876, after which he and Schuyler were joint receivers, until December, 1876, when Schuyler resigned. Claybrook, on Aug. 12, 1876, took possession of the entire property which Schuyler had, including a railway twenty-three miles long, used under a lease from another company. The master reported as to claims against the property and the receiver, from time to time. The plaintiffs in the cross-bill interposed objections to making any of the claims prior in lien to the lien of the first mortgage. In January, 1879, the court, by order, allowed certain claims, many of them not over $5,000, specifying the names of the claimants and the amounts allowed, and giving the claims allowed preference in payment out of the income and proceeds of sale, over the claims of the mortgagees. In this order the plaintiffs in the cross-bill prayed an appeal to this court. In July, 1879, the court made a decree for the sale of the road as an entirety, and for the payment out of the proceeds of sale of the claims allowed, before paying any principal or interest on the mortgage debts. In this decree the plaintiffs in the cross-suit prayed an appeal from it to this court. On a hearing of the appeal, *Held:* 1. The appeals were appeals in open court, not requiring citations, and the order and the decree appealed from sufficiently designated all the appellees by name. 2. The first mortgagee was a proper party to the original bill of foreclosure, because a receiver was prayed for; and, the order appointing the receiver having been served on the first mortgagee three days after it was made, such mortgagee was bound to protect promptly the interests of the first-mortgage bondholders. 3. The original bill did not seek to create a receivership for the sole benefit of the second-mortgage bondholders. 4. The property in court under the original bill was the entire mortgaged property, and not merely the equity of redemption of the mortgagor, as against the second mortgagee. 5. The exclusive right of a second mortgagee to the income of a receivership created under a bill filed by him is limited to a case where the first mortgagee is not a party to the suit. 6. The first mortgagee having been entitled, by the terms of the first mortgage, to take possession of the mortgaged property and operate the road, and the cross-bill not having been filed for more than a year after the receiver was appointed and the first mortgagee had appeared and answered in the original suit, and it having been, in judgment of law or in fact, fully known, all the time to the first-mortgage bondholders, what was doing by the receiver in creating the claims, it was inequitable for the appellants to lie by and see the receiver and the court dealing with the property in the manner complained of, and merely protest generally and disclaim all interest under the receivership, and yet assert in the cross-bill that the property acquired by the receiver was subject to the lien of the

first mortgage, and claim the proceeds of that property without paying the debts incurred for acquiring it.

2. A court has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage. It may therefore provide that the receiver shall pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and pay indebtedness, not exceeding $10,000, to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which had been incurred more than ninety days before the order appointing him was made, and purchase rolling-stock, and build six miles of road and a bridge, part of the main line of the road, and make such expenditures a lien prior to the lien of the mortgages.
3. The mortgagor held a leased road, under a written lease, providing for rent and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive receivers took possession of the leased road and operated it as a continuation of the mortgaged road. Part of the rent which accrued before Claybrook became receiver was unpaid. Claybrook, after he became receiver, paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum based on the actual value of the use of the road by the receivers, and for depreciation, and allowed, with a like preference, claims for supplies and materials furnished for the road, while so operated. *Held*, that the allowances were proper, and that the final decree was not erroneous in not requiring the accounts of the receiver to be settled before paying out of the proceeds of sale the debts allowed against him, nor in ordering the sale of the property as an entirety, without separating that acquired by the receiver.
4. The question of the jurisdiction of this court, in respect of the claims not over $5,000, was not considered.

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

The case is stated in the opinion of the court.

Mr. Charles M. Osborn for the appellants.

Mr. Benjamin Harrison and *Mr. John G. Williams*, *contra.*

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 1st of August, 1870, the Logansport, Crawfordsville, and Southwestern Railway Company, an Indiana corporation, executed to the Fidelity Insurance, Trust, and Safe Deposit Company, a Pennsylvania corporation, located at Philadelphia, as trustee, a mortgage to secure the payment of bonds to the amount of $1,500,000, covering the railway of the mortgagor from Logansport to Rockville, in length about ninety-two

miles, with all its franchises and property used in or connected with the operation of said railway, which the mortgagor then owned or might thereafter acquire. The bonds were coupon bonds, payable in gold, in the year 1900, with interest at eight per cent per annum, in gold, payable quarterly, on the first days of November, February, May, and August. The mortgage provided that, in case of default in the payment of the principal or interest of any of the bonds, the mortgagor would, within six months after the default should occur, it still continuing, surrender to the trustee, on its demand, the possession of the mortgaged property, and all management and control thereof; that, if possession should be so taken, all expenses of managing and operating the property should be paid from the income, and, if the property should thereafter be sold, from the sale; that the trustee, having taken possession, might manage and operate the road and property, and receive all the income and apply it to pay the interest in default, first paying all expenses of management and all charges on the property; but that the trustee should not demand possession until required in writing to do so by the holders of at least one-half of all the said issue of bonds then unpaid and outstanding. The mortgage also provided that, in case of such default and its continuance, the trustee might, after such entry, or other entry, or without entry, sell the mortgaged property as an entirety, at public auction, having first demanded of the mortgagor payment of all money then in default, and convey title to the franchises and property to the purchaser, and first pay out of the proceeds of sale all advances or liabilities of the trustee in operating and maintaining the railway and property and managing its business and affairs while in possession, and then apply the proceeds to paying, first, the interest on the bonds, and then the principal, such payment to be made on the bonds whether they should have become due or not at the time of the sale. The mortgage also provided that, if there should be a default continuing for six months after demand for the payment of any half-year's interest, the principal of the bonds should immediately become due, and the trustee might so declare and notify the mortgagor, and, on the written request of the holders of a majority of the bonds, should proceed to

collect the principal and interest of the bonds by foreclosure and sale of the property, or otherwise, as therein provided. Up to and including Aug. 1, 1873, the Logansport Company paid the interest on the bonds. On Nov. 1, 1873, and thereafter, it failed to pay any interest.

On the 1st of January, 1873, the Logansport Company executed to the Farmers' Loan and Trust Company, a New York corporation, located at the city of New York, as trustee, a mortgage to secure the payment of bonds to the amount of $500,000, covering the entire railroad of the mortgagor, with all the property which it had or might at any time thereafter acquire in the same, extending from Logansport to Rockville, about ninety-two miles in length, with all branch roads extending from said main line, built or to be built, with the right of way, and all the property used for operating and maintaining said road and branches, whether then owned or thereafter to be acquired, and all the corporate franchises of the mortgagor. The bonds were coupon bonds, payable in gold, in the year 1903, with interest at eight per cent per annum, in gold, payable semi-annually, on the first days of July and January. The mortgage provided that, in case of default in the payment of any principal or interest, the mortgagor should, within six months after such default, the default continuing, surrender to the trustee, on its demand, the possession of the mortgaged property, and that the expense of managing the property should, if possession should be taken, be paid from the income, and, if necessary, from the sale of such personal property as the trustee might deem proper. The mortgage also contained a warrant of attorney, by which, in case of default by the mortgagor to pay any principal or interest for six months after the same should become due, it authorized any attorney or solicitor of the State of Indiana, after notice to it as thereinafter provided, to enter its appearance, without process, in any court of competent jurisdiction, to any bill filed by the trustee to foreclose and sell the mortgaged premises, and, if requested by the trustee, to consent, on behalf of the mortgagor, that a receiver be appointed forthwith, by order of said court, to take possession of said railway or any part thereof, and of all or any of the mortgaged property, on such terms as the court should

prescribe, and to consent that a decree forthwith pass for the sale of the whole or any part of the mortgaged property, without appraisement, but under the direction of the court, provided that the trustee should not demand a surrender of possession, or file a bill to foreclose and sell, unless requested in writing by the holders of a majority in interest of the bonds at par. The mortgage also provided that, in case of default in the payment of any interest for six months after the demand of payment after due, the whole principal money named in the bonds should become due, and that, in case of a sale, the proceeds should be applied, first, to paying the trustee all reasonable expenses; second, to paying the principal and interest of the bonds; and, third, to paying the surplus to the stockholders. The mortgage declared that it and its lien were subordinate to the mortgage to the Fidelity Company. The mortgagor did not pay any of the interest which fell due Jan. 1, 1874, and July 1, 1874, respectively.

On the 26th of August, 1874, the Farmers' Loan Company filed, in the Circuit Court of the United States for the District of Indiana, a bill for the foreclosure of the second mortgage, making as parties the mortgagor and the Fidelity Company and certain judgment creditors of the mortgagor. The bill set forth that the mortgage to the Fidelity Company covered the same property as the second mortgage, and that the latter was subordinate to the lien of the former. It alleged facts showing that, by the terms of the second mortgage, the entire indebtedness secured by it had become due; that a majority in interest of the holders of the second-mortgage bonds had, in writing, requested the plaintiff to foreclose the mortgage, and it had, more than thirty days before filing the bill, given notice to the mortgagor of its purpose to file the same; that the mortgagor was insolvent and unable to pay its debts; that its entire property and franchises were not equal in value to the amount of the two series of bonds; that its earnings, after paying current expenses and necessary repairs, were inadequate to the payment of interest on the two series of bonds; that the only possibility that it would in the future be able to pay the interest on the mortgage debt depended on its, or some person's, as its representative, being permitted to operate the road untram-

melled by the embarrassments under which it labored; that it had a large floating debt, partly in judgment; and that executions had been levied on the property covered by the second mortgage and used by it in the operation of the road, and such property had been carried off by the officers of the law, whereby the operations of the road had been crippled, and the expense of its management increased, whilst its revenues were diminished. The bill prayed a foreclosure of the rights of the mortgagor and of the judgment creditors, and a sale of the mortgaged property, and the application of the proceeds to the payment of the plaintiff's claims according to law. It also prayed the appointment of a receiver to take into his custody and control the mortgaged property during the pendency of the suit, to operate the railroad, receive its revenues, pay its expenses, make repairs, and manage its entire business, and any surplus revenues, after paying said expenses, to bring into court and pay out, under the order of the court, "to such persons or corporations as shall be adjudged by the court to be entitled thereto."

On the day the bill was filed the Logansport Company put in an answer admitting all the material allegations of the bill, and that the plaintiff was entitled to the relief demanded.

On the same day, on the bill and said answer, the court made an order that the Fidelity Company appear, and plead, answer, or demur to the bill on or before the first Monday of November then next, and that a copy of said order be served on it not less than thirty days prior to that day, and directing that Spencer D. Schuyler be appointed receiver, on filing a bond, to take into his custody and control the mortgaged property, and all the property of the mortgagor of every kind and wherever situate, and empowering him to operate and manage said road, receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses.

On the 29th of August, 1874, a copy of said order was served on the Fidelity Company, by being given to its president, and proof of such service was filed on the 31st of August, 1874.

The receiver, having filed his bond and entered on his duties, the court, on his petition, made an order, on the 23d of September, 1874, giving him leave to sell an unserviceable car and buy a new one, provided that, in the purchase, no lien should arise, for the money expended, against the interest of the first-mortgage creditors.

On the 9th of September, 1874, the receiver filed a petition representing that the rolling-stock of the road was insufficient to meet the demands of business on the same; that the line of the road was about eighty-seven miles long; that the company owned only six locomotive-engines, on one of which was a lien for its full value, and was paying a rental of $200 a month for another; that it would be for the interest of the trust for him to purchase four more locomotive-engines, and to make an adjustment in regard to the one hired and the one on which there was a lien; that the company owned only two first-class passenger-cars and one second-class, and had in use one passenger-car on lease; that it owned but one baggage-car and had one on lease; that it needed four more passenger-cars; that one of its main branches of business was transporting coal, and its rolling-stock suitable to be used in transporting coal was inadequate to meet the then demands of said business; that it owned only twenty coal-cars free from lien, and about one hundred and thirty on which there was a lien to their full value; that he ought to be authorized to make an adjustment respecting the latter and to purchase not over one hundred additional coal-cars; that the business of the road was greatly crippled for the want of such additional rolling-stock; that the company was indebted to other and connecting lines of road in about $10,000, for materials and repairs, and for ticket and freight balances; that a part of said indebtedness was incurred more than ninety days prior to the order of the court appointing him receiver and making provision for the payment of certain claims, but the payment of that class of claims was indispensable to the business of the road, and it would suffer great detriment unless he was authorized to provide for them at once; that about five miles of the road between Clymer's Station and Logansport, including a bridge across the Wabash River at Logansport, had never been built; that the city of

Logansport had recently appropriated $80,000 to aid the railroad company to build said track and bridge, which appropriation had been placed in the hands of a trustee, to be appropriated as the work progressed; and that, as the completion of said work would very largely increase the value of the property under his control, and materially aid the present and future business of the road, he asked for leave to expend such sums of money as might be necessary to complete the railway between the points named.

On the 30th of September, 1874, the receiver presented to the court a supplemental petition, setting forth that the $80,000 for building the five miles of road was raised; that the bridge would cost about $30,000; that the Detroit, Eel River, and Illinois Railroad Company, with which the receiver's road would form an advantageous connection by the building of the bridge and the five miles of road, agreed to give to the Logansport Company the one-half of the $30,000, so that that company would be the sole owner of the bridge on paying one-half of the cost of its construction; that five acres of valuable land at Logansport had been given to the Logansport Company on condition that the five miles of road should be built, said land being worth $2,500 and suitably located for a yard and shops of the company; that the total cost of the five miles of road and the bridge would not exceed $30,000 above the amounts given by the city of Logansport and the Detroit Company; that the necessary expenditure could be met by anticipating the earnings of the railway for a comparatively short time; that the increased business that would accrue to the railway by the connections made by completing said five miles of road would soon reimburse all moneys expended in constructing the same; that the building of the five miles and the bridge would be greatly to the advantage of the bondholders of the company and would add a large amount to their security, because the five miles and the bridge, when completed, would become part and parcel of the property and covered by its mortgages; that the road, without the completion of said five miles, had no terminus connecting it with other lines, but ended at a point where there was no business of importance; and that said five miles was a part of the original line of the railway and covered by both mortgages.

On the 3d of October, 1874, the court, on the said two petitions, made an order empowering the receiver to buy four new locomotive-engines, four new passenger-cars, and one hundred new coal-cars, and to make an adjustment respecting the liens on, and rentals of, rolling-stock, and to pay the indebtedness to other connecting lines for the purposes set forth in said petition, not exceeding $10,000, notwithstanding said limitation of ninety days, and to expend $30,000 in addition to said gifts and advances, to complete said five miles of road and said bridge, and to enter into the contracts required therefor. The order provided that, as to all the moneys that might be expended, and all liabilities incurred by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road."

On the 3d of November, 1874, the Fidelity Company filed an answer to the bill, setting up the mortgage to it and its priority to the second mortgage. It admitted that the earnings of the road had been inadequate to pay current expenses and necessary repairs and the interest on the two series of bonds. It denied that the appointment of a manager or receiver to operate the road would enable the company to pay the interest on its mortgage indebtedness, and alleged that to appoint a manager or receiver of the road, with authority to incur expense and create fresh indebtedness, for which the road or its earnings could in any way be made responsible, would only perpetuate its past condition of embarrassment and be unjust to the respondent and the holders of the first-mortgage bonds; that the first mortgage could not rightfully, and ought not to be, affected, or its lien impaired, by any proceedings on the second mortgage; that any decree that might be made on the bill should be made expressly subject to the first mortgage; and that no order ought to be made in the cause that might or could lessen the paramount lien of the first mortgage on the property and franchises of the company, or impair the right of the holders of the first-mortgage bonds to proceed against the company when entitled so to do under the mortgage.

No further proceedings in court, of any materiality, appear to have taken place for eleven months. On the 4th of October, 1875, the receiver filed a report and statement, showing that

he had constructed six miles of new road from Clymer's Station to Logansport, including the bridge, and had the same in running operation as a part of the main line; that the cost had been $104,651, of which he had paid and was to pay $29,015.64; and that he had purchased rolling-stock, under said order of the court, for $110,260.46, on which there was unpaid $79,536.68. On the same day he filed a petition, showing that there was due from his trust $232,000, — being $80,000 on rolling-stock, $30,000 on the five miles of road and the bridge, $25,000 for taxes, $25,000 for rights of way, $43,000 for back pay and supplies in operating the road, $20,000 for rental due to the Evansville and Crawfordsville Railroad Company for that portion of the line extending from Rockville to Terre Haute, twenty-three miles, and $9,000 to the Missouri Car and Foundry Company, on rolling-stock and in operating the road; and that $90,000 was required to place the road in proper running order. The petition prayed for authority to borrow $322,000 for said purposes, on receiver's certificates, made a first lien on the property, as for the best interest of the trust property. It set forth the grounds for asking such authority. As bearing on the interests of the first-mortgage bondholders, it contained the following statement: "The receiver went to New York City in May last, to consult with the first-mortgage bondholders, with the view of their taking some steps for the financial relief of the road. While there he met with parties holding and representing large numbers of the bonds in Boston, New York, Baltimore, Philadelphia, and other cities and their vicinities, and, as a result of his consultations with them, a meeting was advertised and held at the Fifth Avenue Hotel, in New York City, on May 24. At that meeting a committee was appointed to examine the road and ascertain its condition, its original cost, its present liabilities, and what amount would be necessary to place it in working order, &c., and to report at a subsequent meeting, to be called by the chairman. That committee afterwards inspected the road, and, at a meeting held in New York City, September 3, made their report. To that meeting the original holders of the first-mortgage bonds were each invited by timely notice, naming the time and place of the meeting, to hear the report of the com-

mittee, and to take part in the deliberations of the meeting. A large representation of the first-mortgage bondholders was present. A letter from the Hon. John Baird, chairman of the meeting, to the receiver, states that from $800,000 to $1,000,000 were represented. A copy of the minutes of that meeting, duly certified by its president and secretary, together with a copy of the report of the committee previously appointed, is filed herewith. By reference to the report of that committee the court will observe that three propositions were suggested to the bondholders, viz.: 1st, Foreclosure of first mortgage and sale of the road. 2d, An assessment of not less than twenty per cent upon the par value of the bonds held by them, to pay off debts and repair the road. 3d, To devise some means for borrowing not less than $300,000. These propositions were all fully discussed, and the discussions resulted in the passage of a resolution directing the receiver to obtain from the court authority to borrow, upon receiver's certificates, the sum of $322,000. The receiver was present and heard the discussions, and but repeats what was there many times positively asserted, — that it would be impossible to collect, in time for the pressing necessities of the hour, an assessment of the requisite amount of money from the bondholders. Many of the bonds are held in small amounts by people of limited means, who must have a lengthy previous notice of an assessment to be able to meet it, if at all. He would show to the court, that, as he has observed the condition of the bondholders, he believes that an immediate foreclosure of the first-mortgage bonds, or any other steps requiring the early payment of any considerable sum by the holders of bonds, would result in the complete destruction of their interests, whereas, if the court will make some present provision for these pressing necessities, their interests will be preserved to them." Thereupon the court, on the same day, made an order setting forth that it appeared to its satisfaction that, under its orders, the receiver had purchased for the use of the road, and then had in use on it, as part of its property, rolling-stock on which there was due $79,536.68, and that there was danger of losing the property by reason of the forfeiture of the contract under which the same had been purchased, unless provision was made for the payment of that sum; and that, under its orders, he had in-

curred liabilities, in constructing and completing the five miles of road and the bridge, to the amount of $29,015.64, and that said part of the road was a part of the line of the road, and contributed materially to its value, and that there were the said amounts due for taxes and rights of way and back pay and supplies, making, in all, $201,552.32; and that it appeared that those several sums could not at that time be paid or provided for out of the current receipts of the road, and then authorizing the receiver to raise money for that purpose by issuing and negotiating receiver's certificates, due in one year from that date, bearing interest not to exceed eight per cent per annum, and payable out of the income of said road, to bearer or order, "which certificates are to be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid." The order further set forth that, it appearing to the court that there were other liabilities which had accrued "in connection with the operating of said road," being the $20,000 due for rental to the Evansville Company, and the $9,000 due for rental to the Missouri Car Company, and that $90,000 was required to place the road in proper running order, and the same could not be provided for out of its income, it was, therefore, further ordered that, in case the plaintiff and the Fidelity Company, on due notice given to them of such application by the receiver, should file a memorandum therein consenting to that part of the order, or stating that they had no objections thereto, the receiver should be authorized to issue receiver's certificates and negotiate and sell them to raise money to pay said indebtedness and make said improvements, such certificates to be of like tenor and date, and to be provided for in the same manner, as those first authorized, and not to be sold or used at less than their par value. No certificates were ever issued under the second branch of this order.

On the 27th of November, 1875, the court, on the petition of the appellants in this appeal, filed on the part of themselves and all other holders of the first mortgage bonds, made the appellants parties defendant to said suit, and gave them leave to file an answer and a cross-bill. On the same day their answer was filed. It contained substantially the same allegations and deni-

als as the answer of the Fidelity Company, and, in addition, admitted that the mortgagor was insolvent and unable to pay its debts, and that its entire property and franchises were not equal in value to the amount of the two series of bonds, and that the appointment of a manager or receiver to operate and run the road was necessary.

On the same day the appellants filed a cross-bill, on their own behalf and on behalf of all holders of the first-mortgage bonds who should choose to join in the prosecution of the suit, making as defendants the Logansport Company, the Farmers' Loan Company, the Fidelity Company, and sundry judgment creditors. The cross-bill set forth the filing and the contents of the original bill and the proceedings in the original suit, including the petitions of Sept. 9, 23, and 30, 1874, the order of Oct. 3, 1874, the report of Oct. 4, 1875, and the petition and the order of the same date. It set forth the first mortgage, and averred that, before Aug. 26, 1874, the mortgagor built a line of road from Rockville to Clymer's Station, a point between five and six miles southwesterly from Logansport, being a portion of the line contemplated by its charter and by said first mortgage, and acquired certain property which it used in constructing said road and in connection with operating it, and certain other property intended for the purpose of building the remainder of the road from Clymer's Station to Logansport, all of which were within the terms, and covered by the lien, of the first mortgage; that, since the appointment of said Schuyler as receiver, he had built and completed said line of road from Clymer's Station to Logansport, and said bridge, and had acquired a large amount of personal property connected therewith, including certain lands intended to be used for machine-shops at Logansport, and certain rolling-stock and other property for use on said railroad, and had, in so doing, used much of the property subject to the lien of the first mortgage; and that all of said property acquired by the mortgagor, and that so acquired by the receiver, and the road built by him, were equitably subject to the lien of the first mortgage. The cross-bill set forth the failure of the mortgagor to pay the interest on the first-mortgage bonds on and after Nov. 1, 1873, and averred that on and always after Oct. 20, 1873, it was

insolvent; that its entire property had not been and was not of sufficient value to pay the first series of bonds; and that its income had not been and was not more than sufficient to pay its necessary expenses incurred in operating and managing its property and making necessary and proper repairs. The cross-bill also set forth that a meeting of the bondholders was held May 24, 1875, at which the holders of a considerable number of the bonds of both series were present, and a committee was appointed to examine the road and ascertain its condition, original cost, and present liabilities, and the amount which would be necessary to place it in working order, and to report at a subsequent meeting; and that, on the 3d of September, 1875, said committee reported to an adjourned meeting its views respecting the property, to the effect that repairs and other expenditures to put the road in fair condition for use were needed, to the amount of several hundred thousand dollars; that additional rolling-stock, to the amount of $168,000, was needed for the efficient conduct of its business; that liens to the amount of $322,000, being the items above mentioned, superior in dignity to the bonded debt, existed; that there were claims against the road and the receiver aggregating $25,000; that the income of the road over actual operating expenses and repairs, for 1874, was about $20,000; and that there had been a deficit of $79,800.87 during the same time, by reason of what were called extraordinary expenses, and, during the six months next preceding July 1, 1875, a like deficit of $43,883.50, and an income of $3,000, after deducting what were called extraordinary expenses. The cross-bill averred that said statistics and statements were substantially correct, but it denied that there were any prior liens to the lien of the first mortgage. It averred that the committee in substance recommended that the first mortgage should not be foreclosed, and that the receiver should apply to the court for leave to borrow $322,000, payable in one year, to relieve the road from its present necessities, and said sum should be made a first lien upon said property, prior to the lien of either mortgage; that said report was made at the instance of said Schuyler and of the holders of the second-mortgage bonds; that the holders of first-mortgage bonds, including the plaintiffs, to the amount

of $148,700, had not consented to said scheme for borrowing money, and had joined in the cross-bill; that the plaintiffs desired, and had for more than a year last past desired and sought, to have the first mortgage foreclosed and the property sold; that they elected that the principal and interest should be due; that the Fidelity Company had refused, after request, to take measures to foreclose the first mortgage; that, under pretence of improving the property and increasing its value and earnings and acquiring additional property, the entire property was being destroyed, and liens were being attempted to be created to take precedence of the first-mortgage lien; that the Fidelity Company refused to take any means to preserve the property; that no material part of the sum of $201,552.32, which the said receiver had been authorized to borrow, could be paid from the income of the road, and it was not probable the interest on it could be paid from said income; that the borrowing of it for one year was not in the interest of the first-mortgage bondholders, and it ought not to be made a first lien upon the property; and that said Schuyler did not own any of the first-mortgage bonds, but was interested only in the second-mortgage bonds and the stock, and, for various reasons assigned, was not a proper person to have charge of the property. The cross-bill prayed for the sale of the mortgaged property to pay the first-mortgage bonds, and for the appointment of a receiver to take possession of the property and operate the road, and for the removal of Schuyler as receiver.

On the 18th of December, 1875, the plaintiffs in the cross-bill moved for a receiver thereunder and for the discharge of Schuyler as receiver. A reference to a master was ordered to take evidence on the subject.

Nothing further of importance appears to have been done in the suit until the 1st of May, 1876, when the Fidelity Company filed an answer to the cross-bill, averring that it had declined to take proceedings to foreclose the first mortgage because it had not been requested to do so by the holders of a majority of the first-mortgage bonds, and that their true interests would be best subserved by an early foreclosure of said mortgage. On the same day the Farmers' Loan Company and the mortgagor filed separate answers to the cross-bill. These answers denied

all allegations made against Schuyler in the cross-bill, and alleged that all improvements had been made in good faith, for the benefit of the property, and had added largely to its value.

On the 3d of May, 1876, the original suit and the cross-suit were brought to a hearing together on the bills and the answers therein and certain stipulations, and one decree was made in both suits, on the 17th of May, 1876, consolidating the suits, adjudging what was due on each mortgage, and declaring that the properties covered by the two mortgages were one and the same, and that the lien created by them respectively covered all the property held by the mortgagor at the time of the bringing of the original suit and all subsequent additions made thereto. The decree described said property as being the railroad from Logansport to Rockville, ninety-two miles, with all branch roads extending from said line, which had been built or acquired by the mortgagor, or for its use, with all its franchises and property which had been acquired for the purpose of operating said road and its branches, and all leases, contracts, and agreements made with the mortgagor or for its use and benefit. It declared that the lien of the first mortgage was superior to that of the second mortgage upon all of said property. It provided for a redemption of the first-mortgage lien by the second mortgagee, and, on failure, for a foreclosure of all its rights in said property except in the proceeds of a sale. It provided for the presentation before a master of claims by the holders of first-mortgage bonds and coupons, and of claims to an interest in the property, and of claims against the receiver arising out of his actings and doings as such, allowing any parties interested in the funds to be derived from a sale to dispute and contest such claims. It reserved all questions concerning priority of liens, except as between persons entitled under the first and second mortgages, and declared that it should not be necessary to pass on said claims before having a sale.

On the 25th of July, 1876, the court appointed Joseph P. Claybrook joint receiver with Schuyler in the original suit, without prejudice to the right of the plaintiffs in the cross-bill and of the Fidelity Company to claim that the receivership of Schuyler was not in their interest and by their consent, as fully

as they might have done if no such joint receiver had been appointed, and the order declared that it should not be held to entitle the first-mortgage bondholders, or their trustee, to any of the income of the property which might be realized by the receivers, until said Claybrook should qualify as receiver, or until Schuyler should requalify, which he was ordered to do by a day named. Claybrook qualified on the 11th of August, 1876, and after that acted as sole receiver, until Schuyler requalified on the 25th of August, 1876.

Under the decree of May 17, 1876, the master made reports, from time to time, as to claims, allowing some wholly or in part and rejecting some. Various questions arise on this appeal in respect to those of said claims which were allowed.

On the 20th of October, 1876, Claybrook filed a report, stating that, as receiver, he took possession, on the 12th of August, 1876, of the line of railway from Logansport to Rockville, $92\frac{87}{100}$ miles, and a line of railway from Rockville to Terre Haute, 23 miles, said to belong to the Evansville and Crawfordsville Railway Company, and $4\frac{90}{100}$ miles of side-tracks at stations between Logansport and Rockville, and a hand-railway, $1\frac{3}{4}$ to 2 miles, from Sand Creek to the coal-mines, and certain station buildings and other property, and certain rolling-stock, some owned by the mortgagor and some leased by it.

On the 22d of November, 1876, the court suspended Schuyler from his position as receiver. On the 1st of December, 1876, an order was made, on the consent of Schuyler and the plaintiffs in the cross-suit, vacating said order of suspension and accepting Schuyler's resignation as receiver, and allowing him $500 for services and expenses as joint receiver, and $15,330.29 for salary as separate receiver, without prejudice to the rights of the parties to contest any matter connected with the accounts of Schuyler as receiver, except as therein expressed, or any claims made under said accounts and asserted against said trust estate, or the claim that the receiver's indebtedness should have priority over the first mortgage.

On the 19th of February, 1877, the plaintiffs in the cross-suit filed a paper setting forth that any fund derived from the property covered by the first mortgage, or from any property acquired for the use of said railway, which was or should be

subject to the lien of said mortgage, ought not to be charged with any indebtedness whatever, whether incurred by the mortgagor, or by Schuyler, as receiver, under the prayer of the original bill; also objecting to certain items in Schuyler's account, because credited or paid out without the authority of the court, or upon accounts or contracts and debts which accrued or were made and matured more than three months before Schuyler became receiver, or because for indebtedness which Schuyler, as receiver, had not lawful authority to incur or pay, or because for his personal indebtedness, or unnecessary or excessive; also alleging that the receiver's certificates and certain notes were issued improvidently and improperly and without the authority of the court. Afterwards, further objections, of like tenor, were filed to other items. The plaintiffs in the cross-suit also filed various exceptions to the reports of the master allowing various claims.

On the 22d of January, 1879, after a hearing as to the claims, on the reports, the evidence, and the exceptions, the court made an order allowing certain claims, many of them not over $5,000, specifying the names of the claimants and the amounts allowed, and referring back the claim of the Evansville Company for further evidence, and a report based on certain specified rulings then made. The order also contained this provision: "All claims allowed by the court, by this order of this day, against the receiver, are adjudged to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale hereafter made, and prior in equity to any claims of the mortgagees of the railroad, the court reserving to the mortgagees the right to object to any order hereafter to be made in distributing the whole or any part of the funds which may be in court arising from the income of the railroad, or from the sale of the same." In the order the plaintiffs in the cross-suit prayed an appeal to this court.

On the 25th of June, 1879, the master filed a special report as to the claim of the Evansville Company, to which, two days afterwards, the plaintiffs in the cross-suit filed exceptions. On the 3d of July, 1879, the court allowed the claim at $35,318.62, in preference to the mortgage liens. On the same day it made

a decree for the sale, as an entirety, by the master, of the road from Logansport to Rockville, together with all the branch roads of the mortgagor extending from said main line, which had been built or acquired by it or for its use, together with all its franchises and property owned by it, or which had been acquired for the purpose of operating said road, together with all contracts and agreements made with it or for its use or benefit, giving a particular description of the property in schedules. The decree provided that, out of the net proceeds of sale, the master should pay, *first*, the costs of suit and the allowances made to the trustees and the solicitors; *second*, the taxes; *third*, the claims against the receivership and fund in court allowed by the order of Jan. 22, 1879, and the claim of the Evansville Company as so allowed, and all other claims against said receivership and fund which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted; *fourth*, the surplus to be applied, first, to the payment of the first-mortgage bonds and coupons *pro rata*, and the remainder, if any, to be distributed as the court might thereafter direct. The decree contained a prayer for an appeal from it to this court, by the plaintiffs in the cross-suit. That appeal was perfected.

This chronological history of the proceedings in the case is given, because a full understanding of those proceedings conduces to an easy solution of the questions involved in the appeal herein.

The appellees insist that the appeal should be dismissed for the alleged reason that the parties have not been named as either appellants or appellees on the docket of this court or in the transcript. But the order of Jan. 22, 1879, allows the claims, specifying the persons to whom allowed and the amounts, and the body of the order states that the plaintiffs in the cross-suit pray an appeal to this court; and the decree of July 3, 1879, orders the payment of the claims allowed by the order of Jan. 22, 1879, and contains a prayer by the plaintiffs in the cross-suit for an appeal from said decree. These were appeals in open court, not requiring citations, and the order and the decree appealed from sufficiently designated all

the appellees by name, and the appeals were appeals from the whole of the order and the whole of the decree. The decision in *The Protector*, 11 Wall. 82, does not apply to a case of this kind.

As a general proposition, applicable to the whole case, the appellants insist that the mortgagee under the second mortgage carried out a fraudulent scheme to obtain a priority over the lien of the first mortgage for the claims allowed, without giving the mortgagee under the first mortgage an opportunity to resist it until after the orders had been obtained and acted on. As evidence of this, the fact is urged that the first mortgagee was made a party to the original foreclosure suit, without any relief being asked against him. It is contended that the first mortgagee was not a proper party to the bill. The appointment of the receiver without notice to the first mortgagee, although a party to the suit, is commented on, coupled with the fact that its day of appearance was fixed as being on or before the first Monday of November then next. It is further suggested that, under the receivership originally created, the second-mortgage bondholders alone were entitled to the income from that receivership, and that the trust fund under the control of the court was only that which the second mortgagee could put there; namely, the mortgagor's right to an equity of redemption as against the second mortgagee, and not the entire property.

We see no warrant for the charge of fraud. The second mortgagee, in filing its bill, made the first mortgagee a party, though admitting the priority of the lien of the first mortgage, and not asking any direct relief against the first mortgagee, evidently because a receiver was prayed for. This was proper. Although the order of Aug. 26, 1874, appointing the receiver, was made without notice to the first mortgagee, it was served on the first mortgagee three days after it was made; and its broad terms, as to the powers conferred on the receiver, called upon the first mortgagee to appear in the suit promptly, to protect the interests of the first-mortgage bondholders, and not to wait, as it did, until the first Monday of November following. It was required by the order to appear and answer "on or before" that day. It waited until that day before appearing or answering. The original bill evinced no intention to create

a receivership for the sole benefit of the second-mortgage bondholders. On the contrary, it asked that the net revenue of the receivership should be paid to such persons or corporations as should be adjudged by the court to be entitled to it. This was in substance saying to the first mortgagee that it too had an interest in the receivership. The receiver's petitions, filed September 9 and September 30 following, respectively, were not acted on till October 3, after the first mortgagee had had ample time to appear. These petitions showed the pressing necessity of the road. The authority conferred by the order of October 3 was intended to benefit the *res* in the hands of the court, which was the entire mortgaged property, as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against the second mortgagee. Whatever may be the rule as to the rents and profits of a mortgaged estate, under a receivership, on a bill filed by a second mortgagee, where the first mortgagee is not made a party to the suit, that rule has not been applied to such a receivership where the first mortgagee was made a party, especially on a bill such as that in this case. The authorities limit the exclusive right of the second mortgagee to the income of a receivership created under a bill filed by him, to a case where the first mortgagee is not a party to the suit. *Howell* v. *Ripley*, 10 Paige (N. Y.), 43; High on Receivers, sect. 688. It is further to be observed, that, the mortgagor having defaulted in paying its interest on the first-mortgage bonds on the 1st of November, 1873, the first mortgagee was entitled, by the terms of its mortgage, to take possession of the mortgaged property and operate the road. Moreover, the cross-bill was not filed for more than a year after the receiver had been appointed, and it was, in judgment of law or in fact, fully known all the time to the first-mortgage bondholders what was being done by the receiver in creating the claims now sought to be disputed; nor was it filed for more than a year after the first mortgagee had appeared and answered in the original suit. It was at all times competent for the first mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bondholders, in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the plaintiffs in it or by other bondholders.

On these views the charge of fraud, made by the appellants, has no basis. On the other hand, it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill, that the piece of road from Clymer's Station to Logansport, and the bridge, and the land, and the rolling-stock, and the other property acquired by the receiver, and now alleged to have been acquired by him without authority, were subject to the lien of the first mortgage, and now claim the proceeds of all that property, without paying the debts incurred for acquiring it. A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him. The cross-bill alleges that the plaintiffs in it had desired for more than a year to have the first mortgage foreclosed.

The original bill set forth ample grounds for appointing a receiver promptly. The payment of interest on the second-mortgage bonds ceased Jan. 1, 1874. That mortgage gave a warrant of attorney for the appointment of a receiver forthwith, after six months' default, — a provision not in the first mortgage.

The order of Aug. 26, 1874, is questioned by the appellants because it empowered the receiver "to pay the arrears due for operating expenses for a period in the past not exceeding ninety days." They also object to the order of Oct. 3, 1874, because it authorized the receiver to purchase rolling-stock and to adjust the liens on rolling-stock, and to pay indebtedness, not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before Aug. 26, 1874, and to construct the piece of road from Clymer's Station to Logansport, and the bridge across the Wabash River, and to enter into contracts necessary

therefor, and because it provided that, as to all moneys that might be expended, and all liabilities incurred, by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road." They also object to the order of Oct. 4, 1875, because it provided that the certificates which might be issued by the receiver under that order were to be provided for by the court in its final order in the cause, unless paid by the receiver out of the income of the road. They also object to the order of Jan. 22, 1879, because it adjudged all claims allowed by it against the receiver to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale to be thereafter made, and prior in equity to any claims of the mortgagees of the railroad. They also object to the decree of July 3, 1879, because it directed the master to pay out of the proceeds of the sale of the mortgaged property the several claims against the receivership which had been allowed by the order of Jan. 22, 1879, in preference to the amount due by the mortgagor to the holders of the first-mortgage bonds and coupons; and because it directed the master to pay the claim of the Evansville Company, and all other claims against the receivership which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted, in preference to the amount due on the first-mortgage indebtedness; and because it did not order that the accounts of the receiver should be adjusted and settled before the master should pay out of the proceeds of the sale of the property any of the amounts allowed as debts against the receiver; and because it directed a sale to be made of the property covered by the first mortgage, and that acquired by the receiver, under the orders of the court, as an entire property, and did not separate the two classes of property or the funds to be realized from them respectively.

The question of the power of a court to create claims through receivers in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage, was considered by this court in *Wallace* v. *Loomis*, 97

U. S. 146. There, in a suit for the foreclosure of the first mortgage on a railroad, to which the trustees of a second mortgage were parties, the court, on notice, appointed receivers, with power to put the road in repair and operate it, and complete any unfinished portions, and procure rolling-stock, and for these purposes to raise money by loan to an amount named in the order, and to issue their certificates of indebtedness therefor, which should be a first lien on the property, payable before the first-mortgage bonds. Wallace, a holder of second-mortgage bonds, afterwards became a party to the suit. The final decree declared that the moneys raised by loan, or advanced by the receivers, and expended on the road, pursuant to their order of appointment, were a lien paramount to the first mortgage, and it directed them and such receivers' certificates or other indebtedness as might thereafter be ordered by the court to be paid, to be paid out of the proceeds of the sale of the road before paying any of the first-mortgage bonds or coupons. On an appeal by Wallace, this court, by Mr. Justice Bradley, said: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." Wallace had not become a party to the suit until several months after the order complained of was made. This court sustained the decree.

The principle thus recognized covers most of the objections here urged. The facts set forth in the petitions of Sept. 9 and 30, 1874, on which the order of Oct. 3, 1874, was based, show ample reasons for making that order, in respect to the purchase of rolling-stock, and the adjustment of liens thereon, and the construction of the Clymer Division and the bridge. The contents of those petitions have been set forth.

In respect to the $10,000 due other and connecting lines of road for materials and repairs and for ticket and freight balances, a part of which it was stated was incurred more than ninety days before the 26th of August, 1874, the first petition stated that payment of that class of claims was indispensable to the business of the road, and that, unless the receiver was authorized to provide for them at once, the business of the road would suffer great detriment. These reasons were satisfactory to the court. In the examination by the master of the accounts of the receiver, evidence was taken as to the payment by him of items due, when he took possession, for operating expenses, and of moneys due other and connecting lines for the matters named. The report of the master shows that he disallowed several items in the receiver's accounts, claimed under the above heads, where the claims were made on the ground that the creditors threatened not to furnish any more supplies on credit unless they were paid the arrears. His action, sanctioned by the court, in allowing items within the scope of the orders of the court, appears to have been careful, discriminating, and judicious, so far as the facts can be arrived at from the record. It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials

and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in *Barton* v. *Barbour*, 104 U. S. 126. The appellants furnish no basis for questioning any specific amounts allowed in respect of the arrears referred to, but object to the allowance of anything out of the sale of the *corpus* for such expenditures. Under all the circumstances of this case, we see no valid objection to the provisions of the orders complained of.

The objections made to the orders of Oct. 4, 1875, and Jan. 22, 1879, and to certain provisions in the decree of July 3, 1879, fail, for the reasons before stated.

Specific objection is made to the allowance of the claim of the Evansville Company to be paid in preference to the first-mortgage bonds. The Evansville road ran from Rockville to Terre Haute, twenty-three miles. The mortgagor had, in June, 1872, hired that road by a written lease, the term of which was for one year and until one year's notice of its termination should be given by either party, after that term. The rent was $2,012.50 per month, and the lessee was to maintain the road in as good condition as when received, and to permit the Evansville Company to use six miles of it at a stipulated price. Provision was made, in the lease, for initial and subsequent inspection of the road, to ascertain its condition, and any improvement or depreciation the lessor or the lessee was to pay the other party for, in accordance. The lessee used the road from July 1, 1872, until the receiver was appointed. He took possession of it and ran it while he was receiver, as a

continuation of his road, and so did he and Claybrook afterwards, and subsequently Claybrook, as sole receiver, did the same. The rent was paid to Sept. 1, 1874, then for a year it was not paid, then it was paid for four months, then it was unpaid to Aug. 12, 1876, and after that Claybrook, as receiver, paid it as it accrued. During all the time from Sept. 1, 1874, the successive receivers collected from the Evansville Company, every month, $262.50 for the use of the six miles. In the winter of 1876 there was found, on inspection, a depreciation of $19,346.82. The Evansville Company made a claim against the receiver for the unpaid rent, the amount of the depreciation, the value of certain supplies, and the rent of an engine. The master reported as due $56,036.21. On exceptions, the court directed the master to ascertain what would be a fair rental value for the use of the leased property by the receivers, and to take into consideration any dilapidations. On this basis a new report, for $35,318.62, was made, and this amount was allowed, with a preference. We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receivers, with the clear assent, under the circumstances, of all parties interested, which use the first-mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road, and take its income, as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property. This leads to the allowance, also, of the claims for operating supplies and materials, including steel rails, furnished for that road while so run.

As to the objection that the decree of July 3, 1879, was erroneous in not requiring the accounts of the receiver to be settled before any payment should be made, out of the proceeds

of sale, of any amounts allowed as debts against the receiver, the contention is, that items may yet be disallowed to the receiver, which will leave in the fund derived from income moneys applicable to pay debts incurred by the receiver, and so decrease the deficiency of income, and that the final decree of July 3, 1879, was erroneous in going beyond all prior orders, and not keeping the income separate from the proceeds of sale, and in directing the debts allowed to be paid wholly, at once, out of the proceeds of sale. This view rests entirely on the mistaken idea that the first-mortgage bondholders and their trustee had no interest in any income of the receivership created under the original bill. If hereafter there shall arise any receiver's net fund, the court must apply it to pay, in the same order of rank as in the final decree, the four sets of creditors therein mentioned, and which is the proper order, as we hold. The creditors having these claims against the receiver were *bona fide* creditors, and have waited long to receive their due. It was very proper, under the correct view of the law taken by the court below, that it should not compel them to wait longer for the settlement of the receiver's accounts, in which they have no interest.

Under the foregoing views, the objection that there was error in ordering the sale of the property as an entire property fails.

Many points were urged by the counsel for the appellants which are either disposed of under the views we have announced, or are not, though they have been considered, deemed of sufficient importance for special remark. The decree of the Circuit Court must be affirmed. In reaching this conclusion we have assumed that the appeal has brought before us the claims which are not over $5,000, and have not considered the question as to whether this is or is not a case in which our jurisdiction as to those claims could be successfully challenged.

Decree affirmed.

KIRK *v.* LYND.

Where, pursuant to the act of Aug. 6, 1861, c. 60, entitled "An Act to confiscate property used for insurrectionary purposes," lands were seized and condemned, the purchaser of them under the decree took an estate in fee.

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

Pasteur, the owner in fee of lands in New Orleans, remained in the possession of them until Nov. 17, 1863. A libel of information under the act of Aug. 6, 1861, c. 60, was then filed against them in the proper District Court of the United States. A decree for their condemnation and forfeiture was rendered Dec. 5, 1863, by virtue whereof they were sold, Jan. 13, 1866. Under the purchaser, the defendants, Lynd and Lewis, derive their title.

Pasteur died May 3, 1874. His widow and children then brought this suit for the lands, and for the fruits and revenues derived therefrom since his death.

The defendants demurred to the bill, setting up as the principal ground therefor that by the proceedings in the District Court, including the seizure, libel, decree of condemnation, and the sale thereunder, the fee, and not simply the life-estate of Pasteur, in the forfeited lands passed to the purchaser, and that therefore the complainants were entitled to no relief. The demurrers were sustained and the bill dismissed. The complainants thereupon appealed.

Mr. R. Stewart Dennee for the appellants.

Mr. John A. Campbell and *Mr. Thomas L. Bayne* for the appellees.

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

The single question in this case is, whether the purchaser of real property condemned under the act of Aug. 6, 1861, c. 60, entitled "An Act to confiscate property used for insurrectionary purposes," takes a fee, or only an estate for life. The act provides that if during an insurrection against the government of the United States, after the President has declared by proc-

lamation that the laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person shall purchase or acquire, sell or give, any property with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or if any person, being the owner of any such property, shall knowingly use or employ, or consent to the use or employment of the same, as aforesaid, all such property shall be lawful subject of capture and prize wherever found, and the President may cause the same to be seized, confiscated, and condemned. Provision is then made for judicial proceedings of condemnation in the courts of the United States. The seizure and condemnation in the present case were because the property had been used and employed, with the knowledge and consent of the owner, in aid of the insurrection.

Express authority is vested in Congress by the Constitution to "make rules concerning captures on land and water." Art. 1, sect. 8. The statute now in question is manifestly an exercise of that power. As was said by Mr. Justice Strong, in *Miller* v. *United States*, 11 Wall. 268, 308: "It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. It treated the property as the guilty subject." All private property used, or intended to be used, in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation; and this, not to punish the owner for any crime, but to weaken the insurrection. The offence for which the condemnation may be decreed is one that inheres in the property itself, and grows out of the fact that the property has become, or is intended to become, with the approval of its owner, an instrument for the promotion of the ends of the insurrection. To justify a judicial sentence of condemnation, the consent of the owner to the hostile use of his property must be proven; but if it be proven, condemnation is decreed, not

because the owner has subjected himself to punishment, but because the property has been devoted to the insurrection and must suffer the consequences. The property is the offending thing, and condemnation is decreed because its owner has voluntarily allowed it to become involved in the offence.

In war the capture of property in the hands of the enemy, used, or intended to be used, for hostile purposes, is allowed by all civilized nations, and this whether the ownership be public or private. The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession. The absolute title to immovable public property owned by the enemy does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the treaty of peace or otherwise, the ownership is changed if the conquest is complete. In regulating the capture of private property devoted to the use of an insurrection against the authority of the United States, Congress has provided for a judicial inquiry into the facts and a sentence of condemnation before title can pass out of the owner. When the inquiry is had, and the necessary sentence pronounced by the appropriate judicial tribunal, the title passes by reason of the capture or conquest, the lawfulness of which has been established in an adversary proceeding against the property seized under the direction of the President, and subjected to the jurisdiction of the court designated by law for that purpose. The title acquired by the purchaser in this case was of that kind. The property bought had been seized under the authority of the statute as property used in aid of an insurrection against the United States with the consent of its owner. The fact of hostile use with the owner's consent was established, and the requisite sentence of judicial condemnation entered. In this way the title of the United States by capture was perfected. That title, as against the owner and his heirs, was the fee. The defendants below, who are the defendants in error here, have succeeded to that title.

Property captured in war is not taken to punish its owner any more than the life of a soldier slain in battle is taken to punish him. The property as well as the life is taken only as

a means of lessening the warlike strength of the enemy. *Young* v. *United States*, 97 U. S. 39.

There is here no question of pardon and amnesty as there was in the case of *Armstrong's Foundry*, 6 Wall. 766, where it was held that the pardon of the owner before a sentence of condemnation relieved him from the consequences of his assent to the unlawful use of his property, so far as the United States were concerned, and might to that extent be used as a bar to further proceedings in the condemnation suit. But in that case the pardon was set up as a defence against the condemnation. Here there is nothing of the kind. The court having the property in possession, and proceeding against it, has decreed its condemnation. So long as this decree stands it affords conclusive evidence of a perfected title in the United States by a lawful capture, judicially ascertained and determined. To these proceedings the ancestor of the heirs for whose benefit this suit is prosecuted was in law a party, and both he and they are bound by the adjudication. The judgment is one that cannot be collaterally impeached.

It is true that in the case of *Armstrong's Foundry*, *supra*, it was said by Mr. Chief Justice Chase, in the opinion, that "the statute regarded the assent of the owner to the employment of his property in aid of the rebellion as an offence, and inflicted forfeiture as a penalty;" but this language must be construed in connection with the facts then under consideration. There the question was whether the pardon could be used as a bar to the pending proceedings for condemnation, and the effect of what was said was no more than to apply to that case the principle afterwards announced by the same learned Chief Justice in *United States* v. *Padelford*, 9 id. 531, 543, and declare that the law made the proof of pardon of the owner a complete substitute for proof that he gave no consent to the use of his property in aid of the rebellion. The guilty consent of the owner to the unlawful use is necessary to make the property a subject of lawful capture, and as the pardon was, under the rule in Padelford's case, equivalent to proof that no such consent was given, the lawfulness of the capture could not be established, and, consequently, as against the United States, there must be a judgment of acquittal.

The act of July 17, 1862, c. 95, proceeds upon an entirely different principle. That was, according to its title, "An Act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels." Its object was, not to authorize the capture of property used to promote an insurrection, but to confiscate the property of traitors. The seizure was to be made, not because the property was in law the offender, but because the owners were engaged in rebellion, and would not return to their allegiance to the United States. The object evidently was, not to make the property a lawful subject of capture and prize, as in the act of 1861, but to punish the owner for countenancing the rebellion. This distinction is recognized in all the cases where the matter has received consideration. The justices who dissented from the judgment in *Miller* v. *United States*, *supra*, while arguing that the act of 1862 was unconstitutional, impliedly admitted the validity of that of 1861, because it was directed against the property as the offending thing. It was, also, because the act of 1862 was in the nature of a punishment of the owner for his treason, that the explanatory resolution, No. 63, 12 Stat. 627, was passed to meet the objections which had been suggested by the President. In this way the condemnation of real property under the act of 1862 was confined to the natural life of the offending owner; but nothing was done with the act of 1861, because that had reference only to the capture and condemnation of property for its unlawful use.

It follows that the court below was right in holding that the fee passed by the condemnation, and its judgment is consequently

Affirmed.

SEYMOUR *v.* WESTERN RAILROAD COMPANY.

In an action upon a covenant, — contained in an agreement between the covenantor and "S. and such other parties as he may associate with him under the name of S. & Company," signed and sealed by the covenantor, and signed "S. & Co." by the hand of S., acting in behalf and by authority of the partnership, — to pay to "the said S. & Company, parties of the second part," for work to be done by them, all those who are partners at the time of the signing of the agreement may join.

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

The case is stated in the opinion of the court.

Mr. Samuel F. Phillips and *Mr. John W. Hinsdale* for the plaintiffs in error.

Mr. Augustus S. Merrimon and *Mr. Thomas C. Fuller* for the defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an action of covenant, brought by Silas Seymour and three other persons, describing themselves as copartners trading in the name and style of S. Seymour & Company, and prosecuted since the death of one of them by the survivors, against the Western Railroad Company, upon an agreement purporting to be made between the defendant of the first part, "and Silas Seymour and such other parties as he may associate with him under the name of S. Seymour & Company of the city of New York, of the second part;" by which "the said S. Seymour & Company, parties of the second part," agree to construct a railroad as therein specified; and, "for and in consideration of the faithful performance by the said S. Seymour & Company, parties of the second part, of all and singular the conditions herein contemplated or contained on their part proper for them to do, the Western Railroad Company of the first part" agrees to pay "unto the said S. Seymour & Company, parties of the second part," certain sums in money, stock and bonds. The agreement states that "the parties hereto have interchangeably set their hands," is duly signed and sealed in behalf of the defendant, and is also signed "S. Seymour & Co.," but is not other-

wise signed nor sealed in behalf of the plaintiffs or either of them.

At the trial the plaintiffs proved the execution of the agreement declared on, and offered evidence tending to show that Seymour executed it in behalf and by authority of the firm of S. Seymour & Company; that at its date, and until the subsequent stoppage of work under it, the plaintiffs composed that firm; that Seymour and the three others, as the persons whom he associated with himself under the name of S. Seymour & Company, immediately began and afterwards performed work upon the railroad under the agreement, the results of which had ever since been enjoyed by the defendant; and that the defendant knew that the plaintiffs composed the firm of S. Seymour & Company, and were working upon its road under the agreement as contractors. But the judge excluded the evidence, ruled that there was a variance, directed a verdict for the defendant, and rendered judgment thereon; and the plaintiffs alleged exceptions.

The court is of opinion that these rulings were erroneous. In an action upon a covenant made with two or more persons, all the covenantees must join, although only one of them seals the agreement. *Petrie* v. *Bury*, 5 Dow. & Ry. 152; s. c. 3 B. & C. 353; *Philadelphia, Wilmington, & Baltimore Railroad Co.* v. *Howard*, 13 How. 307, 337. It is not necessary that all of them should be named in the contract; it is sufficient that they are so described therein that they can be identified. Shep. Touchst. 236; *Gresty* v. *Gibson*, Law Rep. 1 Ex. 112; *Reeves* v. *Watts*, Law Rep. 1 Q. B. 412; s. c. 7 B. & S. 523; *M'Laren* v. *Baxter*, Law Rep. 2 C. P. 559. And upon a covenant with a partnership by its partnership name only, all who are partners at the time of its execution may sue. *Hoffman* v. *Porter*, 2 Brock. 156; *Brown* v. *Bostian*, 6 Jones (N. C.) L. 1; 1 Lindley on Partnership (4th ed.), 476.

The agreement declared on — by the recital that it is made between the defendant and "Silas Seymour and such other parties as he may associate with him under the name of S. Seymour & Company," by the repeated mention of "the said S. Seymour & Company, parties of the second part," and by the signature of "S. Seymour & Co."— appears to the court to

manifest the intention of both parties to the agreement to be that all the persons associated together under the name of S. Seymour & Company, at the time of the signing of the agreement, should do the work and receive the compensation therein stipulated.

It follows that the plaintiffs, upon proving to the satisfaction of a jury the facts above stated, which they offered to prove, would be entitled to maintain their action. The judgment for the defendant must therefore be reversed, and the case remanded with directions to set aside the verdict and order a

New trial.

TYLER *v.* CAMPBELL.

The court, in affirming the decree below, declines to deliver an extended opinion, as the determination of the case depends upon matters of fact, and no doubtful or difficult question of law is involved.

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

Mr. Wheeler H. Peckham and *Mr. Cortlandt Parker* for the appellant.

Mr. Charles B. Moore and *Mr. Clifford A. Hand* for the appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

Upon a careful scrutiny of the evidence by each of the judges, a majority of the court is of opinion that the proofs do not make out the breach of trust alleged, and that the view of the defendant's obligations, which the plaintiff has undertaken to assert since the loss occurred, is inconsistent with the previous conduct and mutual dealings of the parties.

As the decision involves no difficult or doubtful question of law, but a pure question of fact, depending on the weighing and comparison of varying and conflicting evidence, it can be of no value as a precedent, and the preparation of an extended

opinion would not be according to the practice of the court, and would serve no useful purpose.

Decree affirmed.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MATTHEWS, dissenting.

I am unable to assent to the decision of the majority of the court, and, as it involves an important principle, I am unwilling to let it pass in silence. I do not perceive any serious controversy as to the material facts upon which the liability of the defendant is asserted, and in my judgment there is no doubt as to the law applicable to them.

Divested of immaterial details, the case is briefly this: In January, 1865, one James Monroe, of New Jersey, applied to the complainant for a loan of money, — at first specified to be $30,000, afterwards increased to $50,000, — for use in connection with the Morris County Bank, a corporation of that State, of which Thomas E. Allen was president. The application was made through the defendant, Robert B. Campbell; and the proposition was to give as security for the loan an assignment of two mortgages on a mine, known as the Hibernia mine, in that State, then held by the bank, accompanied with a lease of the property. As the result of the negotiation the complainant agreed to loan $50,000 to Monroe upon an assignment to Campbell of the two mortgages and lease, in trust as security for the loan. In pursuance of this agreement the bank assigned the mortgages and lease to Monroe, who assigned them to Campbell, with an irrevocable power of attorney to the latter to collect the money due on the mortgages and pay the loan at its maturity. Both assignments were executed Feb. 11, 1865, and were to be void if the loan, with interest, was paid, — the one to Monroe, if payment was made by the 11th of June following, and the one to Campbell, if payment was made by the 5th of August. The complainant thereupon gave to Campbell securities, which on sale produced the $50,000, and this sum was delivered to Monroe. Of the two mortgages one was for $100,000 and the other for $75,000. Both were, at the time of the assignment, in process of foreclosure in chancery in New Jersey, and of this fact Campbell was fully aware. A decree

for the sale of the premises was made in the foreclosure proceedings on the 1st of March following. On the 20th of June the sale took place. Campbell was present and knew of it, and of the amount realized, which was $86,400. He did not, however, place the assignment on record in the office of the register of the county, though it was acknowledged so as to be entitled to registry; nor did he give any notice of it to the solicitor engaged in the foreclosure proceedings, or to the master who made the sale, but allowed all proceedings to be conducted, and the parties connected therewith to act, as though no assignment had ever been made to him. Nor was he merely passive in the matter. Though the assignment was executed expressly to take from the mortgagee, the bank, and its assignee, Monroe, the control of the mortgages, and secure an application of their proceeds to the payment of the loan, he authorized the president of the bank to receive the proceeds. His letters show this, and the only reason he assigns for it is that he supposed the president would prefer to receive them. "I know," he writes to that officer, "that you would prefer that it [the money] should be received from the master by yourself, and, therefore, I sent you the request to collect it and send it to me." The president of the bank did collect it and keep it, and subsequently became bankrupt. The complainant thereby lost $30,000 of his loan; only $20,000 of the $50,000 were ever received. To charge Campbell, by whose negligence this money was lost, and compel him to pay it, this suit was brought.

If proof of the facts thus stated depended upon uncertain and conflicting testimony, I might accede to the disposition of the case made by the majority of the court; but these facts are either not controverted, or appear in the statements of the defendant himself. After the conversion of the money by the president of the bank, a suit was brought against him by the complainant, who, to obtain an order for his arrest, made an affidavit setting forth the particulars of the loan, the assignment of the mortgages, their foreclosure, the sale of the premises mortgaged, and the receipt and use of the money by the president. In that affidavit he states — I quote his words — that when the loan was made and the assignments were received he

"instructed said Robert B. Campbell to take all necessary steps to make said assignments available to secure said loan" to him, the deponent; that Campbell, notwithstanding this instruction, instead of requiring the master to pay the proceeds of the sale into the court of chancery so that the loan might be paid out of them, did, through confidence in the honesty of the president of the bank, permit the master to pay the proceeds to its solicitor, who afterwards paid them over to the president directly, or upon his order. This affidavit is accompanied with one of Campbell, who states that he had read the complainant's affidavit and knew the contents thereof, and that the matters there set forth in relation to himself and his action in the matters referred to were true. Thus it appears from the sworn statement of Campbell that his action, which caused the loss of the money, was in direct disregard of instructions to him.

Under these circumstances, why should he not be held to make good the loss? By the assignment to him he became a trustee of the mortgages for the complainant. He did not take the assignment on his own account; it was for the lender to secure the loan. In taking it he assumed a duty towards his *cestui que trust* which he could not disregard. It was to see that the assignment effected its purpose, so far, at least, as to withdraw the control of the mortgages from the mortgagee, the bank, and its assignee, Monroe, and thus render them available to the lender.

In stating the duties of trustees, Lewin, in his work on trusts, says: —

"The first duty of trustees is to place the trust property in a state of security. Thus, if the trust fund be an equitable interest, of which the legal interest cannot be at present transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise, he who created the trust might incumber the interest he has settled in favor of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority. If the trust fund be *a chose in action* as a debt, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay

in this respect will be at his own personal risk." Lewin, c. 14, sect. 1, 6th Eng. ed.; *Jacob* v. *Lucas*, 1 Beav. 436; *Caffrey* v. *Darby*, 6 Ves. Jr. 488; *Platel* v. *Craddock*, Cooper, 481; *McGachen* v. *Dew*, 15 Beav. 84; *Wiles* v. *Gresham*, 2 Drew. 258; *Cooper* v. *Day*, 1 Rich. (S. C.) Eq. 26.

To the same effect is the language of Perry in his treatise on trusts. The trustee must take such steps as will prevent incumbrances from being placed upon the property transferred to him, and, of course, as will prevent the possibility of its destruction, as in this case, from its conversion by the original assignor or settlor. "If the trust fund," he says, "consists in part of notes, bonds, policies of insurance, and other similar *choses in action*, notice should be given to the promisors, obligors, or makers of the instruments." Law of Trusts, sec. 438.

This doctrine is supported and asserted in different forms by a great number of adjudged cases. That a trustee, by whose negligence of a plain duty the property in his hands is wasted or injured, is chargeable with the loss, is a doctrine which pervades the whole law of trusts. And it is the only doctrine which will insure fidelity in trustees and protection to the interests of *cestuis que trust*. As justly observed by counsel, the simpler and easier the act required, the clearer the duty and liability for its neglect. If any distinction can be made in liability where duties are neglected, the liability should be the more strictly enforced where, as in a case like this, the duty required was the mere observance of ordinary prudence.

I think the decree should be reversed.

UNITED STATES v. ERIE RAILWAY COMPANY.

During the period when sect. 122 of the act of June 30, 1864, c. 173, as amended by the act of July 13, 1866, c. 184, was in force, a railway company paid to alien non-resident holders of its bonds the entire interest due from time to time thereon. *Held*, that the company, no claim having been made here against it for any penalty, is liable to the United States for five per cent on the amount so paid, with interest thereon at the rate of six per cent per annum.

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

This was an action to recover taxes alleged to be due to the United States, the plaintiff, on certain interest coupons paid by the Erie Railway Company, the defendant, in the years 1866, 1867, 1868, and 1869, on bonds previously issued by it; and also certain penalties alleged to be due the plaintiff for failure of the defendant to make returns of the amount of the taxes. It was tried in the District Court upon an agreed statement of facts, of which the following are all that are deemed material to explain the question raised and decided. Prior to Sept. 1, 1866, the defendant had issued sterling coupon bonds to the amount of £800,000, dated Sept. 1, 1865, the principal of which was payable two years after date, drawing interest at six per cent per annum, payable semi-annually on the first days of March and September of each year; and the principal and interest of which were payable in London, England, at the office of Junius S. Morgan & Co., bankers, of London; after March 1, 1868, and prior to Sept. 1, 1868, the defendant had issued and sold bonds of the same class amounting to £200,000, the principal and interest of which were payable at the same place as the bonds previously issued; all the bonds with coupons for interest attached were sold directly to J. S. Morgan & Co., J. T. Mackenzie, and Stern Brothers, all foreign bankers, having their places of business in London, and were by them sold to their customers in England and on the continent of Europe; during the years 1866, 1867, 1868, 1869, the bonds and coupons were all held by non-resident aliens, and not by citizens of the United States, except bonds to the amount of £20,000, and the coupons attached, which were held

and owned by a citizen or citizens of the United States residing in Europe; the amount of interest on all the bonds was provided for, and sent forward by the defendant, in one sum or block, to J. S. Morgan & Co., who, before the dates at which it fell due, and as it fell due, paid it, at their banking-house in London, to the holders of the bonds and coupons; the amount of interest paid in the years mentioned on the above-described bonds was £186,000, of which £4,200 were paid on the £20,000 held by a citizen or citizens of the United States; the defendant made no returns to the assessor, or to any other officer of the internal revenue of the United States, of the payment of the interest, or any part thereof, nor did it ever pay to the United States, or to any one on their behalf, five per cent tax, or any tax on the interest, or any part thereof; nor did it withhold the tax, or any part thereof, from the amount of the interest, but paid the full amount to the holders of the bonds; and no assessment was ever made by the plaintiff, or by any officer of the plaintiff, on the defendant for any portion of the tax, nor was any demand ever made on the defendant for the payment of the same to the United States until Dec. 31, 1872.

The court held that the company was not liable for a tax on the £181,800 sterling paid for interest upon coupons and bonds owned and held by non-resident aliens, but was liable for the tax on £4,200 sterling paid for interest on coupons and bonds owned and held by citizens of the United States; and, also, that it was liable for only one penalty for failure to make return to the revenue officer of the amount paid. Judgment was rendered accordingly, which, on error, was affirmed by the Circuit Court. This writ of error was then brought by the United States. No claim for any penalty was made in the argument here on behalf of the United States, the only question presented for determination being whether the court below erred in holding that the company was not liable for the alleged tax of five per cent on the £181,800 sterling interest which it had paid to non-resident alien owners and holders of its coupons and bonds.

The action was founded on sect. 122 of the act of June 30, 1864, c. 173, as amended by the act of July 13, 1866, c. 184, which is as follows: "That 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 may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax, or any part thereof, as aforesaid,

the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal: *Provided*, that whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, that in such cases the tax levied by this section shall not be paid to the United States until said companies resume the payment of interest on their indebtedness."

The case was argued for the United States at the last term by *Mr. Edwin B. Smith*, Assistant Attorney-General, and at the present term by *The Solicitor-General.*

Mr. William D. Shipman, contra.

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

This judgment is reversed on the authority of *Railroad Company* v. *Collector*, 100 U. S. 595, and the cause is remanded with instructions to enter a judgment in favor of the United States, for the equivalent in lawful money of the United States of the tax of nine thousand three hundred pounds sterling, with interest at the rate of six per cent per annum from the several times when the same became due and payable according to the agreed statement of facts on which the submission was made below. As no claim was made on the argument in this court, either for a penalty or for the currency value of the pounds sterling when the taxes fell due, we have not considered the questions which would have arisen if such a demand had been made. For these reasons the judgment will be without penalties and for the present value of the pounds sterling in lawful money.

Reversed.

MR. JUSTICE FIELD dissenting.

I am not able to agree with the majority of the court in the decision of this case. The tax which is sustained is, in my judgment, a tax upon the income of non-resident aliens and nothing else. The 122d section of the act of June 30, 1864, c. 173, as amended by that of July 13, 1866, c. 184, subjects the interest on the bonds of the company to a tax of five per cent,

and authorizes the company to deduct it from the amount payable to the coupon-holder, whether he be a non-resident alien or a citizen of the United States. The company is thus made the agent of the government for the collection of the tax. It pays nothing itself; the tax is exacted from the creditor, the party who holds the coupons for interest. No collocation of words can change this fact. And so it was expressly adjudged with reference to a similar tax in the case of *United States* v. *Railroad Company*, reported in the 17th of Wallace. There a tax, under the same statute, was claimed upon the interest of bonds held by the city of Baltimore. And it was decided that the tax was upon the bondholder and not upon the corporation which had issued the bonds; that the corporation was only a convenient means of collecting it; and that no pecuniary burden was cast upon the corporation. This was the precise question upon which the decision of that case turned.

A paragraph from the opinion of the court will show this beyond controversy. "It is not taxation," said the court, "that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property. In the cases we are considering, the corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. Whether the tax is five per cent on the dividend or interest, or whether it be fifty per cent, the corporation is neither richer nor poorer. Whatever it thus pays to the government, it by law withholds from the creditor. If no tax exists, it pays seven per cent, or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax, it pays exactly the same sum to its creditor, less five per cent thereof, and this five per cent it pays to the government. The receivers may be two, or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed. In the case before us, this question controls its decision. If the tax were upon the railroad, there is no defence; it must be paid. But we hold that the tax imposed by the 122d section is in substance and in law a tax upon the

income of the creditor or stockholder, and not a tax upon the corporation." See also *Haight* v. *Railroad Company*, 6 Wall. 15, and *Railroad Company* v. *Jackson*, 7 id. 262, 269.

The bonds, upon the interest of which the tax in this case was laid, are held in Europe, principally in England; they were negotiated there; the principal and interest are payable there; they are held by aliens there, and the interest on them has always been paid there. The money which paid the interest was, until paid, the property of the company; when it became the property of the bondholders it was outside of the jurisdiction of the United States.

Where is the authority for this tax? It was said by counsel on the argument of the case — somewhat facetiously, I thought at the time — that Congress might impose a tax upon property anywhere in the world, and this court could not question the validity of the law, though the collection of the tax might be impossible, unless, perchance, the owner of the property should at some time visit this country or have means in it which could be reached. This court will, of course, never, in terms, announce or accept any such doctrine as this. And yet it is not perceived wherein the substantial difference lies between that doctrine and the one which asserts a power to tax, in any case, aliens who are beyond the limits of the country. The debts of the company, owing for interest, are not property of the company, although counsel contended they were, and would thus make the wealth of the country increase by the augmentation of the debts of its corporations. Debts being obligations of the debtors are the property of the creditors, so far as they have any commercial value, and it is a misuse of terms to call them anything else; they accompany the creditors wherever the latter go; their *situs* is with the latter. I have supposed heretofore that this was common learning, requiring no argument for its support, being, in fact, a self-evident truth, a recognition of which followed its statement. Nor is this the less so because the interest may be called in the statute a part of the gains and profits of the company. Words cannot change the fact, though they may mislead and bewilder. The thing remains through all disguises of terms. If the company makes no gains or profits on its business and borrows the money to

meet its interest, though it be in the markets abroad, it is still required under the statute to withhold from it the amount of the taxes. If it pays the interest, though it be with funds which were never in the United States, it must deduct the taxes. The government thus lays a tax, through the instrumentality of the company, upon the income of a non-resident alien over whom it cannot justly exercise any control, nor upon whom it can justly lay any burden.

The Chief Justice, in his opinion in this case, when affirming the judgment of the District Court, happily condensed the whole matter into a few words. "The tax," he says, "for which the suit was brought, was the tax upon the owner of the bond, and not upon the defendant. It was not a tax in the nature of a tax *in rem* upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor; but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States, in accordance with the obligations of the contract which he held. The power of the United States to tax is limited to persons, property, and business within their jurisdiction, as much as that of a State is limited to the same subjects within its jurisdiction. *State Tax on Foreign-Held Bonds*, 15 Wall. 300."

"A personal tax," says the Supreme Court of New Jersey, "is the burden imposed by government on its own citizens for the benefits which that government affords by its protection and its laws, and any government which should attempt to impose such a tax on citizens of other States would justly incur the rebuke of the intelligent sentiment of the civilized world." *State* v. *Ross*, 23 N. J. L. 517, 521.

In imposing a tax, says Mr. Chief Justice Marshall, the legislature acts upon its constituents. "All subjects," he adds, "over which the 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 proposition

may almost be pronounced self-evident." *McCulloch* v. *Maryland*, 4 Wheat. 316, 428.

There are limitations upon the powers of all governments, without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them, — that no rightful authority can be exercised by them over alien subjects, or citizens resident abroad or over their property there situated. This doctrine may be said to be axiomatic, and courts in England have felt it so obligatory upon them, that where general terms, used in acts of Parliament, seem to contravene it, they have narrowed the construction to avoid that conclusion. In a memorable case decided by Lord Stowell, which involved the legality of the seizure and condemnation of a French vessel engaged in the slave trade, which was, in terms, within an act of Parliament, that distinguished judge said: "That neither this British act of Parliament nor any commission founded on it can affect any right or interest of foreigners unless they are founded upon principles and impose regulations that are consistent with the law of nations. That is the only law which Great Britain can apply to them, and the generality of any terms employed in an act of Parliament must be narrowed in construction by a religious adherence thereto." *The Le Louis*, 2 Dod. 210, 239.

Similar language was used by Mr. Justice Bailey of the King's Bench, where the question was whether the act of Parliament, which declared the slave trade and all dealings therewith unlawful, justified the seizure of a Spanish vessel, with a cargo of slaves on board, by the captain of an English naval vessel, and it was held that it did not. The odiousness of the trade would have carried the justice to another conclusion if the public law would have permitted it, but he said, "That, although the language used by the legislature in the statute referred to is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave trade unlawful if carried on by them; it cannot apply in any way to a foreigner. It is true that if this were a trade contrary to the law of nations a foreigner could not maintain this action. But it is not; and as a Spaniard could not be considered as bound by the acts of the British legislature prohibiting this trade, it would be unjust to deprive

him of a remedy for the heavy damage he has sustained." *Madrazo* v. *Willes*, 3 Barn. & Ald. 353.

In *The Apollon*, a libel was filed against the collector of the District of St. Mary's for damages occasioned by the seizure of the ship and cargo whilst lying in a river within the territory of the King of Spain, and Mr. Justice Story said, speaking for the court, that "The laws of no nation can justly extend beyond its own jurisdiction, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phraseology used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislatures have authority and jurisdiction." 9 Wheat. 362.

When the United States became a separate and independent nation, they became, as said by Chancellor Kent, "subject to that system of rules which reason, morality, and custom had established among the enlightened nations of Europe as their public law," and by the light of that law must their dealings with persons of a foreign jurisdiction be considered; and according to that law there could be no debatable question, that the jurisdiction of the United States over persons and property ends where the foreign jurisdiction begins.

What urgent reasons press upon us to hold that this doctrine of public law may be set aside, and that the United States, in disregard of it, may lawfully treat as subject to their taxing power the income of non-resident aliens, derived from the interest received abroad on bonds of corporations of this country negotiable and payable there? If, in the form of taxes, the United States may authorize the withholding of a portion of such interest, the amount will be a matter in their discretion; they may authorize the whole to be withheld. And if they can do this, why may not the States do the same thing with reference to the bonds issued by corporations created under their laws. They will not be slow to act upon the example set. If such a tax may be levied by the United States in the rightful exercise of their taxing power, why may not a similar tax be levied upon the interest on bonds of the same corporations by the States within their respective jurisdictions in the rightful

exercise of their taxing power? What is sound law for one sovereignty ought to be sound law for another.

It is said, in answer to these views, that the governments of Europe — or at least some of them, where a tax is laid on incomes — deduct from the interest on their public debts the tax due on the amount as income, whether payable to a non-resident alien or a subject of the country. This is true in some instances, and it has been suggested in justification of it that the interest, being payable at their treasuries, is under their control, the money designated for it being within their jurisdiction when set apart for the debtor, who must in person or by agent enter the country to receive it. That presents a case different from the one before us in this, — that here the interest is payable abroad, and the money never becomes the property of the debtor until actually paid to him there. So, whether we speak of the obligation of the company to the holder of the coupons, or the money paid in its fulfilment, it is held abroad, not being, in either case, within the jurisdiction of the United States. And with reference to the taxation of the interest on public debts, Mr. Phillimore, in his Treatise on International Laws, says: "It may be quite right that a person having an income accruing from money lent to a foreign State should be taxed by his own country on his income derived from this source; and if his own country impose an income tax, it is, of course, a convenience to all parties that the government which is to receive the tax should deduct it from the debt which, in this instance, that government owes to the payer of the tax, and thus avoid a double process; *but a foreigner, not resident in the State, is not liable to be taxed by the State;* and it seems unjust to a foreign creditor to make use of the machinery which, on the ground of convenience, is applied in the cases of domestic creditors, in order to subject him to a tax to which he is not on principle liable." Vol. ii. pp. 14, 15.

Here, also, is a further difference: the tax here is laid upon the interest due on private contracts. As observed by counsel, no other government has ever undertaken to tax the income of subjects of another nation accruing to them at their own domicile upon property held there, and arising out of ordinary business, or contracts between individuals.

This case is decided upon the authority of *Railroad Company* v. *Collector*, reported in 100 U. S., and the doctrines from which I dissent necessarily flow from that decision. When that decision was announced I was apprehensive that the conclusions would follow which I now see to be inevitable. It matters not what the interest may be called, whether classed among gains and profits, or covered up by other forms of expression, the fact remains, the tax is laid upon it, and that is a tax which comes from the party entitled to the interest, — here, a non-resident alien in England, who is not, and never has been, subject to the jurisdiction of this country.

In that case the tax is called an excise on the business of the class of corporations mentioned, and is held to be laid, not on the bondholder who receives the interest, but upon the earnings of the corporations which pay it. How can a tax on the interest to be paid be called a tax on the earnings of the corporation if it earns nothing — if it borrows the money to pay the interest? How can it be said not to be a tax upon the income of the bondholder when out of his interest the tax is deducted?

That case was not treated as one, the disposition of which was considered important, as settling a rule of action. The opening language of the opinion is: "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." But now it is invoked in a case of great magnitude, and many other similar cases, as we are informed, are likely soon to be before us; and though it overrules repeated and solemn adjudications rendered after full argument and mature deliberation, though it is opposed to one of the most important and salutary principles of public law, it is to be received as conclusive, and no further word from the court, either in explanation or justification of it, is to be heard. I cannot believe that a principle so important as the one announced here, and so injurious in its tendencies, so well calculated to elicit unfavorable comment from the enlightened sentiment of the civilized world, will be allowed to pass unchallenged, though the court is silent upon it.

I think the judgment should be affirmed.

BEDFORD *v.* BURTON.

Where a woman, with the consent of her husband, bought land, and gave her promissory notes for part of the purchase-money, which bear ten per cent interest per annum, a rate allowed by the laws of the State when a special contract therefor is made, and the vendor reserved in the deed a lien to secure the payment of the notes, and she and her husband went into possession, erected permanent improvements, and made payments on the notes, — *Held*, 1. That she, though consenting to account for rents and profits, is not entitled, by reason of her coverture, to have the sale set aside and the purchase-money already paid refunded; nor will she or her husband be allowed anything for the improvements. 2. That for the amount remaining due upon the notes, according to their tenor and effect, the lien may be enforced by a sale of the land.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The case is fully stated in the opinion of the court.

Mr. R. McPhail Smith for the appellants.

Mr. A. A. Freeman and *Mr. John W. Burton* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises on a bill in equity filed by G. W. Burton, the appellee, alleging that in February, 1872, he sold and conveyed to America Bedford, one of the appellants, wife of John R. Bedford, the other appellant, in fee, for her separate use, free from the control of her husband, a certain tract of land in Tennessee, for the consideration of $7,500, one-third of which was paid down, and the balance secured by the promissory notes of Mrs. Bedford, drawing interest at the rate of ten per cent per annum. The deed of conveyance specified these notes, and reserved a lien on the land for the payment thereof. The notes were paid in part but not in full, and the bill was filed for the foreclosure and sale of the land to raise the balance due. The defendants, Bedford and wife, filed a demurrer, which was overruled, and thereupon they filed an answer and cross-bill, admitting the facts stated in the bill, and that they took and still had possession under the purchase; and the cross-bill alleged that the defendants had made permanent improvements on the land to the value of $500; and claimed that the sale was void because of the coverture of the grantee, and

prayed that it might be declared void, and that Burton should be decreed to refund the amount paid on the purchase, together with the value of the improvements, with interest, after deducting the value of the rents whilst the property was occupied by the defendants. Burton demurred to the cross-bill; and on final hearing the court sustained this demurrer, and made a decree for the foreclosure and sale of the property as prayed in the original bill, but declared that the complainant was not entitled to a personal judgment against America Bedford. From this decree the defendants have appealed.

The decree is sought to be reversed on two grounds: *First*, because the sale to America Bedford was void by reason of her coverture, and ought to be declared void, and the money paid by her decreed to be refunded; *secondly*, because the decree gives ten per cent interest on the notes, a rate of interest which is not allowed by the law unless there is a special contract therefor, the legal rate being only six per cent; and a *feme covert* is incapable of making such special contract.

The authorities are numerous and conclusive to the effect that a *feme covert* may, with her husband's consent, take land by purchase, and that a security given thereon by her for the purchase-money will be enforced. It was so held by this court in the case of *Chilton* v. *Braiden's Administratrix*, 2 Black, 458, where a lien for the unpaid purchase-money of land sold to a married woman was enforced by a decree for the sale of the land. Mr. Justice Grier, delivering the opinion of the court, said: "When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that courts of equity proceed as between vendor and vendee. The purchase-money is treated as a lien on the land sold, where the vendor has taken no separate security." In a well-considered case decided by the Chancellor of New Jersey, *Armstrong* v. *Ross*, 20 N. J. Eq. 109, where property was sold and conveyed to a married woman, and she and her husband executed a mortgage for the purchase-money, but the execution by the wife was void because she was not privately examined, it was nevertheless held that the vendor had a lien for the purchase-money, and also that the mortgage, being given for the benefit of her

separate estate, although void as a mortgage, might be decreed a lien on such separate estate. In the case of *Willingham* v. *Leake*, 7 Baxter, 453, it was held by the Supreme Court of Tennessee that where land was sold and a title bond given to a married woman, who gave her notes for a part of the purchase-money, the vendor's lien could be enforced, although the notes might be void as against the vendee personally. In the subsequent case of *Jackson* v. *Rutledge*, 3 B. J. Lea, 626, decided as late as December Term, 1879, the same court held that if a married woman buy land, partly for cash and partly on time, and accept a deed of conveyance to her separate use, a lien being retained for the unpaid instalments, she cannot have the money which she has paid refunded merely because of her coverture, and the lien reserved for the payment of the purchase-money may be enforced in equity. This case was nearly parallel to the present. A deed was executed to the married woman for her sole and separate use, retaining a lien on the land for the payment of the notes given for the purchase-money, and the grantee and her husband went into possession. A cross-bill was filed, as in the present case, seeking to set aside the contract as void, and for a return of the money paid, and the value of permanent improvements. A decree for the sale of the land to satisfy the unpaid purchase-money was made by the Chancellor, but no personal decree against the parties. This decree was affirmed by the Supreme Court in an elaborate judgment, in which the authorities on the subject are fully reviewed. The court concludes the examination by saying, "If the conveyance be to the sole and separate use of the married woman, there seems to be no difficulty in treating a debt contracted in the purchase as binding on the property, although not personally obligatory on the *feme*, because, where she takes possession under the conveyance, the debt is contracted for the benefit of her separate estate." Again: "Her incapacity to execute valid notes, if we treat the purchase notes as void on that ground, and because not expressly made obligatory on her separate estate, would not affect the vendor's right to subject the land to the satisfaction of the unpaid purchase-money by virtue of the vendor's equity and of the lien reserved. By the delivery and acceptance of the deed of conveyance, the

contract was executed and the title vested in her. She takes the title subject to the charge created by the terms of the deed. *Trezevant* v. *Bettis*, 1 Leg. Rep. 48; *Lee* v. *Newman*, 1 Memph. L. J. 139; *Eskridge* v. *Eskridge*, 51 Miss. 522. Under such circumstances, the married woman is not entitled to have the cash payment refunded. In making the payment, as we have seen, she exercised a right which the law concedes. . . . All she can claim is exemption from personal liability."

These cases, decided by the highest court of Tennessee, where the land lies, and where the transaction took place, are of stringent authority, and they accord with our own views of the law.

It should be added, that by the statute law of Tennessee "married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition, by will, deed, or otherwise, as are possessed by *femmes sole* or unmarried women." Code of Tennessee, sect. 2486. This provision would seem to be sufficient to confer upon a married woman, purchasing land to her own use, power to execute a mortgage upon the land to secure the purchase-money, — binding at least upon the land, if not creating any personal obligation against her.

But the present case is a stronger one than that of a mortgage. The deed by which she holds the property is qualified by expressly retaining a lien for the payment of the purchase-money. The lien goes with the estate, and affects it in a manner similar to a condition. It is, indeed, in the nature of a condition impressed upon the estate itself. It makes the deed say in effect, "I convey to you the land, but only upon the condition that you pay the notes given for purchase-money; if they are not paid, I am to hold it as security."

This peculiar character of the lien seems to be a good answer to the second ground for reversal, — the reservation of interest at the rate of ten per cent per annum on the notes. Ten per cent is not an unlawful rate of interest in Tennessee. It may be reserved, if the parties so agree. If they make no agreement, the law gives six. The agreement to pay ten per cent in this case may not be binding on the wife personally,

but it is not binding on the same ground that the principal is not binding upon her personally. Nevertheless, as it is a rate that may be lawfully stipulated for, — if it is stipulated for, and is made part of the consideration for which a lien is retained on the land, — it is as much secured by the lien as the principal is.

We see no error in the decree, and it is therefore

Affirmed.

AMES v. QUIMBY.

1. A rule of court in Michigan provides, that where a defendant pleads matter of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument or the handwriting" of the opposite party, unless an affidavit is filed "denying the same." *Held*, that the want of such affidavit does not preclude the plaintiff from showing that such an instrument, dated January 2, was executed on Sunday, January 1, or that his duplicate of an instrument executed in duplicate by him and the defendant differs in its contents from the one retained by the defendant.
2. The plaintiff, where the quality of goods which he furnished at a given time to the defendant is in question, may show the good quality of like articles furnished at the same time by him to another party, if he further shows that those he furnished to each party were of the same kind and quality.
3. Where the evidence is such that, as to a given matter, there is no question for the jury, a charge and a refusal to charge in regard to such matter are not a ground for reversing the judgment, because they work no injury to the party excepting.
4. The court charged the jury that while the plaintiff could not recover for any more goods than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have, it not appearing by the record what were the contents of the bill, but it appearing that the plaintiff claimed there was a mistake in it in that respect. *Held*, that the charge was not erroneous.
5. After a new trial has been had, pursuant to the mandate of this court, and a second judgment rendered, no errors other than those committed after the mandate was received below can be considered here.

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

The case is stated in the opinion of the court.

Mr. Michael J. Smiley for the plaintiffs in error.

Mr. Lyman D. Norris for the defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The defendant in error brought this suit against the plaintiffs in error in July, 1872, in a court of the State of Michigan. It was removed into the Circuit Court for the Western District of Michigan in August, 1872, before the declaration was filed. The action is assumpsit. The declaration claims $25,000 for goods sold and delivered, and a like amount for money had and received, and $15,000 for interest. The plea was non-assumpsit with a notice of set-off to the amount of $25,000, and a notice that the goods alleged to have been furnished by the plaintiff were furnished under a special contract that they were to be of first-class quality, and that they were not. A further notice under the plea alleged that the goods furnished were furnished under three several contracts, made Jan. 2, 1865, Jan. 27, 1866, and Dec. 25, 1866, for the furnishing by the plaintiff to the defendants of shovel-handles, and that the plaintiff did not fulfil the contracts as to the quality of the handles. In April, 1875, the suit was tried by the court without a jury. On the findings of the court a judgment was rendered for the plaintiff for $7,825.62. The defendants brought the case to this court by a writ of error, and the judgment was reversed, and the cause was remanded to the Circuit Court with directions to award a new trial. The decision of this court is reported in 96 U. S. 324. The only question there presented and determined was as to the proper construction of a written contract made between the parties, Jan. 2, 1865, in a particular not now important. The construction put by the court below upon that contract was held to have been erroneous. The case was tried a second time before a jury in April, 1879. The jury found a verdict for the plaintiff for $12,816.53, and a judgment thereon was rendered against the defendants. To review and reverse this judgment the present writ of error has been brought.

The plaintiff, to maintain the issues on his part, read in evidence a stipulation signed by the respective attorneys, whereby the defendants admitted the sale and delivery of shovel-handles shipped to the defendants' firm and received by it at North Easton, Massachusetts, at the dates and in the

quantities therein set forth, being, in 1865, 15,607 dozen, in 6 items, in May and July; in 1866, 10,188 dozen, in 13 items, in June, July, August, and September, and 2,852 dozen, in 3 items, in November and December, up to the 20th; in 1867, 33,814 dozen, in 37 items, in every month but January, November, and December; and, in 1868, 11,113 dozen, in 11 items, in April, May, July, September, and October. The stipulation stated that the dates given were the dates of the shipment by rail from Michigan and Canada; that the dates of the receipt by the defendants at North Easton were fifteen days later than the several dates of shipment; and that the plaintiff admitted payments on account of said handles, at the dates and in the sums specified thereafter in the stipulation, the payments amounting to $83,153.48. The stipulation concluded with this clause: "The question of the quality of the handles delivered as aforesaid, and all other questions of fact not stipulated, are left open to the jury and for other and further evidence." The plaintiff was then examined as a witness on his own behalf. On his cross-examination he testified that there was a contract signed by the parties for 1865 for handles. The contract being shown to him, he "identified" it, as the bill of exceptions states, and it was read in evidence by the defendants. It bore the date of Jan. 2, 1865. The plaintiff rested his case, and the defendants introduced testimony and rested their defence. One of the defendants testified that he made the contract of 1865, and it was made in the evening, and he stated who were present. Then the plaintiff, being recalled, testified, without objection, that the contract dated Jan. 2, 1865, was not signed on that day — on the evening of that day. He was then asked, "When was that contract signed?" The defendants objected to the question on the ground that "it was irrelevant and immaterial, and there had been no previous denial by affidavit or otherwise of the execution of the contract, and it was incompetent." The plaintiff replied that the fact of the execution of the contract was not denied, "but he proposes to show the time of the execution of the contract was on Sunday, which avoids the contract." The court overruled the objection, and the defendants excepted. The witness then answered that the contract was

signed and delivered on Sunday, Jan. 1, 1865, stating the hour and the place, and giving particulars as to who were present and what was done. The defendants then gave testimony by three witnesses to contradict the plaintiff. The defendants now contend that the court erred in permitting the plaintiff to testify that the contract was executed on Sunday, in view of the then situation of the case and what had transpired on the trial; that he had given evidence as to its execution and allowed it to be put in evidence without suggesting any infirmity in it; and that the defendants would necessarily be surprised by such testimony. The defendants also claim that, under a rule of court governing the pleadings and practice in Michigan, where a defendant insists on a claim by way of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument or the handwriting" of the opposite party, unless an affidavit is filed "denying the same;" that the failure of the plaintiff to file such affidavit was an admission of the execution of the instrument in manner and form as set up, and as being of the date of January 2; and that the testimony went to show that the contract set up was not executed.

The only ground alleged at the trial for the incompetency of the evidence was that the execution of the contract had not been denied by affidavit. Assuming that the rule of court referred to can be taken notice of by this court, it not being set forth in the record, and there being no statement in the record that the affidavit referred to was required by any rule of court, and assuming that it is to be inferred that there was not any such affidavit, it not being set forth in the bill of exceptions that there was not, we are of opinion that the rule cited refers only to proof of the genuineness of a seal or of handwriting, and does not refer to any matter which goes to show the invalidity otherwise of an instrument. Such a provision in a rule of court or in a statute is not uncommon, and, whenever it is expressed in language such as that now presented, it has never, that we are aware, received any other construction. In the case of *Pegg* v. *Bidleman*, 5 Mich. 26, Pegg and another were sued on a note signed "S. Pegg & Co." They appeared and pleaded the general issue, but did not deny on oath the

execution of the note. Judgment was given against them without proof that they "composed the firm of S. Pegg & Co. and executed the note." It was held that, as the defendants had appeared, and the declaration was against them as individuals and did not allege they were partners, the question was simply whether they executed the note by the name subscribed to it; and that they must be taken to have admitted that the note was executed by the parties declared against. The decision was that the admission covered the fact that the signature was that of the parties sued. If the parties be sued as partners, the admission that the signature is their signature as partners necessarily admits that they were partners. This was the principle applied in *Thomas* v. *Clark*, 2 McLean, 194, and *Pratt* v. *Willard*, 6 id. 27. In *Curran* v. *Rogers*, 35 Mich. 221, a written contract was signed in the name of a firm, the two partners in which were sued on the contract. The general issue was pleaded without any affidavit. One of the firm sought to prove that the other, who had signed the firm name, had no authority to do so. It was held that, as the declaration set out the contract *verbatim*, and alleged it to have been jointly executed, its execution was admitted as to both defendants. There is nothing in these decisions which goes to show that the plaintiff, notwithstanding anything in the language of the rule of court invoked, could not prove that the contract was in fact signed at a date different from that appearing on its face. The evidence did not go to show that it was not dated January 2 when it was signed, but went to show that, though dated January 2, it was signed on January 1. It admitted the execution of the contract, but tended to avoid it by proving a fact in regard to it which did not appear on its face, and which went to the merits. This was competent evidence, and was not irrelevant or immaterial. All questions as to surprise, or as to reopening the case, or as to the order of proof, were matters of discretion, not reviewable here.

Another written contract was shown to the plaintiff, and "identified by him," and put in evidence by the defendants, dated Dec. 25, 1866. It provided for advances by the defendants to the plaintiff, and for their acceptance of his drafts, and for his payment to them of "$2\frac{1}{2}$ per cent commission for accepting his

drafts." On the language of the contract so put in evidence a question was raised as to whether the commission was to be paid on all drafts accepted, or only on those which were in excess of shipments of handles. On his re-direct examination, when first called, the plaintiff stated, without objection, that he had had a duplicate of the contract which was destroyed by fire; that the copy so introduced was not an exact copy of the one he had, in its reference to the two and a half per cent commission; that the one he had was made by one of the defendants; that drafts for handles shipped he was to pay no commissions on; and that those for advances before shipments he was to pay commissions on. He was then asked, "What change was made in the duplicate which you had?" This question was objected to by the defendants on the ground that it was incompetent and irrelevant, "and, there having been no denial of the execution of this contract as pleaded and given notice of by the defendants, it is incompetent to vary it by parol." The objection was overruled, and the defendants excepted. The witness answered that the word "advanced" was inserted after the word "drafts," so as to read "$2\frac{1}{2}$ per cent commission for accepting his drafts advanced." The defendants contend that the evidence went to a denial of the execution of the contract, and was, therefore, incompetent under the rule of court before referred to. The remarks before made apply to this point also. The evidence went to show what the actual written contract between the parties was. It did not go to show that the defendants' copy was not actually signed by the parties. The one copy was as competent evidence of the real contract as the other was. What the plaintiff had testified to in regard to the contents of his original of the contract was admitted without objection and permitted to stand, and no motion was made to strike it out. The evidence sought by the question objected to only went to explain the previous evidence.

A question having arisen as to the quality of the handles furnished to the defendants by the plaintiff in 1867 and 1868, a witness for the plaintiff was asked as to the quality of the handles furnished by the plaintiff to the Old Colony Company in 1867 and 1868. The defendants objected to the question on the ground that it was irrelevant and incompetent, and not

admissible to show the quality of the handles furnished to the defendants. The plaintiff's counsel then stated that he proposed to show, in connection with the offered testimony, that the handles were of the same general quality as those furnished to the defendants. Thereupon the objection was overruled and the defendants excepted, and the witness answered that the quality of the handles sent to the Old Colony Company in 1867 and 1868 was good. Evidence had been given for the defendants that the quality of the handles furnished by the plaintiff to the defendants in 1867 and 1868 was inferior to the quality of those he had furnished in previous years. The plaintiff subsequently gave evidence tending to show that the handles furnished by him to the defendants in 1867 and 1868, and the handles furnished by him to the Old Colony Company in 1867 and 1868, were of the same kind and quality. After this evidence was given there was no motion to strike out the evidence so objected to, or to rule upon its admissibility. The evidence objected to was admissible.

Alleged errors in the charge to the jury, and in refusals to charge as requested, are urged by the defendants. As to the request to charge respecting the right of the defendants, under the contract of Jan. 27, 1866, to charge the plaintiff back with the full value of such handles as broke in the process of bending, it is sufficient to say that the record discloses that there was a settlement between the parties respecting the one hundred and seventy-two dozen handles charged back in 1866 under that contract, and that there was really no question for the jury as to those handles. If the charge given, and the refusal to charge as requested, had the effect to withdraw from the jury the consideration of the one hundred and seventy-two dozen, it only effected the result required by the settlement, and worked no injury to the defendants.

In regard to the refusal to charge that the plaintiff could recover $\$1.37\frac{1}{2}$ per dozen for only such handles delivered between Oct. 8, 1866, and April 20, 1867, as he had carried out at that price in his bill of particulars, and to the charge to the contrary, it is sufficient to say that the bill of particulars is not in the record, and there is no statement in the bill of exceptions as to its contents; and that when, in the course of the

evidence, the claim was made by the plaintiff for $1.37\frac{1}{2}$ per dozen for the handles delivered between those dates, the defendants objected that there were three items in April, 1867, carried out in the bill of particulars at $1.25 per dozen, and the plaintiff then and there claimed that the bill of particulars contained a mistake in that respect. The charge of the court was, that while the plaintiff could not recover for any more handles than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have. We see no error in this, under the circumstances.

The request made to charge as to the operations of 1868 was granted, and the instruction given is not open to the objection that the price for 1868 was fixed by the court and was not left to the jury to determine.

Although this court reversed the first judgment, and remanded the cause for a new trial, and a new trial has been had, with a new judgment, the plaintiffs in error now urge, without having raised the point before, that this court, instead of having awarded a new trial, should have rendered a judgment for the defendants below on the findings made by the Circuit Court at the first trial, and that it should now do so. The question is not open for this court to review on this writ of error the judgment it rendered on the former writ of error. That judgment has been carried into effect, and the parties who procured it have enjoyed the benefit of it in the new trial they have had.

Judgment affirmed.

ST. CLAIR *v.* COX.

1. The courts of the United States do not regard as valid or as importing verity a judgment *in personam* rendered by a State court for the recovery of a debt or demand, unless the defendant either entered a voluntary appearance, or he or some one authorized to receive process for him was personally cited to appear. *Pennoyer* v. *Neff*, 95 U. S. 714, cited and approved, and the doctrines announced in that case declared to be applicable to personal judgments against corporations.
2. Michigan permits foreign corporations to transact business within her limits, and when a suit by attachment is brought against one of them by a resident of the State, she authorizes the service of a copy of the writ, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the State, and declares that a personal service of a copy of the writ and of the inventory on one of these persons, shall have the force and effect of personal service of a summons on a defendant in suits commenced by summons. A., a resident, sued out of the Circuit Court of a county an attachment against a foreign corporation, and the officer to whom the writ was directed returned that by virtue of it he had seized and attached certain property, and served a copy of the writ, with a copy of the inventory of the attached property, on the defendant, by delivering the same personally, in said county, to B., agent of the said defendant. No appearance was entered by the corporation, and A. recovered a judgment *in personam* for the amount of his demand. The record of it was in another suit offered in evidence to support a plea of set-off, and an objection was made to its admissibility that the court which rendered the judgment had not jurisdiction of the parties. *Held*, 1. That the record was properly excluded, it not appearing therefrom that the corporation was doing business in the State at the time of the service of the writ on B. 2. Had that fact appeared, the corporation might have shown that his relations to it did not justify such service.

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

The facts are stated in the opinion of the court.

Mr. Charles I. Walker for the plaintiff in error.

Mr. Henry M. Duffield and *Mr. Levi T. Griffin* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of $2,500, bearing date on the 2d of August, 1877, and payable five months after date, to the order

of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of seven per cent per annum.

To the action the defendants set up various defences, and, among others, substantially these: That the consideration of the notes had failed; that they were given, with two others of like tenor and amount, to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz. $10,000, upon a judgment recovered by them in the Circuit Court of Marquette County, in the State of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defences to them.

On the trial, evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence; but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed; and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the Circuit Court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the State, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evi-

dence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for $6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent, and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sects. 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State,

government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sects. 6544 and 6550.

The courts of the United States only regard judgments of the State courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer* v. *Neff* we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of State courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the State where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary

of the State is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen* v. *Middleton Manufacturing Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another State he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham* v. *North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the Commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its

officer to reside in the State and transact business there on its account. *Libbey* v. *Hodgdon*, 9 N. H. 394; *Moulin* v. *Trenton Insurance Co.*, 24 N. J. L. 222.

This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other States, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the State where it was created.

A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co.* v. *French*, "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; *Paul* v. *Virginia*, 8 Wall. 168.

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this

court in *Lafayette Insurance Co.* v. *French*, to which we have already referred, sustains these views.

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose, — as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words "agent of such corporation within this State." They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there. The decision in *Newell* v. *Great Western Railway Co.*, reported in the 19th of Michigan Reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by

removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the State. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the State, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the State at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, *the then official, the officer then in a manner impersonating the company, should be served.* Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this State." p. 344.

According to the view thus expressed by the Supreme Court

of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the State. This representation implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former State, the Supreme Court of New Jersey said, that a law of another State which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it." *Moulin* v. *Trenton Insurance Co.*, 24 N. J. L. 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute — a member, for instance, of the foreign corporation, that is, a mere stockholder — is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co.* v. *French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular

transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

VAN WYCK *v.* KNEVALS.

1. Subject to the exceptions therein mentioned, the act of July 23, 1866, c. 212, granted, for the use and benefit of the St. Joseph and Denver City Railroad Company, the odd-numbered sections of public land within a prescribed distance on each side of the proposed road. The company duly filed in the office of the Secretary of the Interior a map showing the definite location of the line of the road. *Held*, that the grant was *in præsenti*, and attached to those sections as soon as the map was so filed. No valid adverse right or title to any part of them could be acquired by a subsequent settlement or entry.
2. On the failure of the company to complete the work, a forfeiture of the grant, if it resulted therefrom, can be enforced only by the United States through judicial proceedings, or the action of Congress. A third party cannot set it up to validate his title, nor avail himself of the fact that the company, in constructing, deviated from the original line, if the lands which he claims are within the prescribed distance from it and the road as built.
3. After the company had filed with the Secretary of the Interior its map of definite location, a party entered a portion of the sections covered by the grant, and a patent therefor was issued to him by the United States. *Held*, that the patent created a cloud upon the company's right and title, and furnishes ground for equitable relief.
4. *Quære*, Where Congress conferred upon a railway company created by a State authority to construct its road within an organized Territory, can the latter, when admitted into the Union as a State, impose any impediment to the full enjoyment by the company of all the rights resulting from the exercise of that authority.

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

The first section of the act of Congress of July 23, 1866, c. 212, is as follows: "That there is hereby granted to the State of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid shall be held by the State of Kansas for the use and purpose aforesaid."

There are several provisos to this section which have no bearing upon the matters involved in this suit.

The third section provides that the lands granted "shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the said company patents for so many sections of said land hereinbefore granted

as lie opposite to and coterminous with the said completed sections, and when certificates of the governor aforesaid shall be presented to the Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road the said Secretary shall in like manner issue to said company patents for the said sections of said lands as aforesaid for each of said sections of road until said road shall be completed: *Provided*, that if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right to the lands for said section so failing of completion shall revert to the government of the United States: *Provided further*, that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States."

The fourth section declares, "that as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The company accepted the act, and filed, March 25, 1870, with the Secretary of the Interior a map of the line of its road which the directors had approved on the 21st of that month. The Secretary sent it to the Commissioner of the General Land-Office with the following letter:—

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., March 26, 1870.

"SIR, — I transmit herewith a map of the definite location of the line of road of the Saint Joseph and Denver City Railroad Company from Elwood, in Kansas, *via* Marysville, in said State, to a connection with the Union Pacific Railroad at the southwest corner of section 36, in township 9 north, of range 16 west, in the State of Nebraska.

"You will instruct the proper local officers to withhold from sale or other disposal all odd-numbered sections falling within the limits of twenty miles on each side of the line of road.

"In thus directing the land to be withdrawn conformably to the

fourth section of the act of July 23, 1866, I deem it proper, in order to avoid any misapprehension as to the views of the department, to state that this order is made without prejudice to any existing adverse rights, whether individual or corporate, if such there be, and does not include any lands 'heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever.'

"In case of such reservation there is granted to the company only a right of way for one hundred feet on each side of its line of road, subject to the approval of the President of the United States.

"The right of the company to construct its road within the limits of the State of Nebraska may hereafter be the subject of controversy; in that event, nothing contained in this order will preclude the consideration of the question as to such right should it arise in a form to require the action of the department.

"Very respectfully, your ob't servant,

"J. D. Cox, *Secretary.*"

On the 8th of the following month the Commissioner forwarded to the land-officers at Beatrice, Nebraska, a map showing the line of such location and of the ten and twenty mile limits of the grant. He instructed these officers to withdraw from sale, location, pre-emption, or homestead entry all the odd-numbered sections falling within those limits. His letter was received on the 15th of that month, and the lands supposed to be covered by the grant were then withdrawn. The company built sections of the road from time to time, each in due time completed, and the requisite certificate filed with the Secretary of the Interior. It made a junction with the Burlington and Missouri River Railroad at Hastings, Nebraska, July 15, 1872; but never at any point on the Union Pacific, unless the said Burlington road is a branch thereof. It was constructed substantially on the line delineated on the map, and ran through Thayer and Nuckolls Counties, which are within the district of lands subject to sale at Beatrice. But, at a point about one mile east of the lands in controversy in this suit and about seventy-five miles east of Hastings, it departed from that line; at a point opposite those lands it was built from forty to sixty rods from that line, and from that

point to Hastings it deflected from the line from one to three miles. The lands in dispute are within ten miles of the road as built and of the line delineated on the map. The company, April 1, 1873, filed its articles of incorporation in the office of the Secretary of State of Nebraska, but did not otherwise attempt to comply with the laws of that State in respect of foreign railroad corporations extending their roads into that State. The lands in controversy were entered at the Beatrice land-office, April 13, 1870, by Van Wyck, who received a patent for them, bearing date Nov. 15, 1871.

Knevals, who had acquired from the company all its right to those lands, filed his bill against Van Wyck in the court below, where a decree was rendered declaring that the company, by the construction of its road and the notice given to the Secretary of the Interior, was entitled to a patent to the lands in controversy; that Van Wyck received the patent therefor and the title which it conveyed, in trust for the company and not otherwise, and that at the commencement of the suit he held them in trust for the complainant, to whom it was further decreed that he convey them.

Van Wyck thereupon appealed.

Mr. E. E. Brown for the appellant.

Mr. James M. Woolworth for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The principal question for determination in this case is, When does the grant made to Kansas by the act of Congress of July 23, 1866, c. 212, for the use and benefit of the St. Joseph and Denver Railroad Company in the construction of a railroad from Elwood in that State, to its junction with the Union Pacific Railroad, or a branch thereof, take effect so as to cut off the right of pre-emption from subsequent settlers on the land? The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it. It differs from some of the grants in that it is made to the State, and not directly to the company to be benefited. The act of Congress, however, provides, notwithstanding the designation of the State as grantee, that patents for the land shall

be issued directly to the company upon the completion of every ten consecutive miles of the road. The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is "definitely fixed," that the United States have sold any section or a part thereof, or the right of pre-emption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed." When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the Secretary of the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. The legal title under the grant goes to the State, but the equitable right vests in the company. The State cannot dispose of the lands; she simply holds them for the use and benefit of the company, the act of Congress providing how her trust shall be discharged and the legal title be conveyed to the company. The act says that the land granted "shall inure to the benefit of the said company as follows," and then proceeds to declare that when the governor of the State shall certify that a section of the road of ten consecu-

tive miles is completed "in a good, substantial, and permanent manner as a first-class railroad," the Secretary of the Interior shall issue to the company patents for the sections of land granted which lie opposite to and coterminous with the completed road, and that similar patents shall issue upon a like certificate upon the completion of every successive section of ten miles. It matters not, so far as subsequent settlers are concerned, in what manner the title, which has passed out of the United States, is transferred to the company from the State. When the route of the road is "definitely fixed," no parties can subsequently acquire a pre-emption right to any portion of the lands covered by the grant. The right of the State and of the company is thenceforth perfect as against subsequent claimants under the United States.

The inquiry then arises, When is the route of the road to be considered as "definitely fixed" so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed, within the meaning of the act of Congress, when the company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, the defendant, — the appellant here, — who acquired his interest by a subsequent entry of the lands and a patent therefor, contends that the route cannot be deemed definitely fixed, so that the grant attaches to any particular sections and cuts off the right of entry thereof until the lands are withdrawn from market by order of the Secretary of the Interior, and notice of the order of withdrawal is communicated to the local land-officers in the districts in which the lands are situated.

We are of opinion that the position of the complainant is the correct one. The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior

and accepted by that officer, the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land-officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the act of Congress, or at least seriously impair its benefit. Parties learning of the route established — and they would not fail to know it — might, between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them.

This view of the law disposes of the claim of the defendant. A map designating the route of the proposed road, made by the engineers of the company after careful surveys, and adopted by its directors, was filed on the 25th of March, 1870, with the Secretary of the Interior, who accepted it, and on the 26th of that month transmitted it to the Commissioner of the General Land-Office, with directions to instruct the proper local officers to withhold from sale, or other disposition, the odd-numbered sections within the limits of twenty miles on each side of the route. On the 8th of April following, the Commissioner forwarded a copy of the map to the register and receiver of the land-office at Beatrice, in Nebraska, but it was not received by them until the 15th of that month. On the 13th the

defendant entered at that office the land in question, at private entry, and paid the government price therefor. In November of the following year a patent for it was issued to him. His entry, as thus seen, was after the map had been filed and the route "definitely fixed," and the grant had attached to the adjoining odd sections. It could, therefore, initiate no rights to the land, and the subsequent patent issued upon that entry conferred no valid title to the defendant as against the company or parties claiming under it.

The defendant having failed to establish the validity of his own title, attacks the right of the company to the lands covered by the grant, alleging that the company never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior it changed, for part of the distance, the route of the road, and that it never complied with the conditions of the laws of Nebraska for the extension of its road within the limits of that State.

We do not deem these objections, when considered with the facts on which they are based, as having any force. There is to them a ready and conclusive answer. Assuming that the Burlington and Missouri River Railroad, with which the company's road connected, was not, as averred by the complainant, a branch of the Union Pacific Railroad, and that, therefore, the company's proposed road was not entirely completed, the fact remains that the company constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of Congress. Patents for some of the adjoining sections were accordingly issued to the company, and a right to all of them, not specially reserved by the condition of the grant, vested in it. So far as that portion of the road which was completed and accepted is concerned, the contract of the company was executed, and as to the lands patented, the transaction on the part of the government was closed and the title of the company perfected. The right of the company to the remaining odd-numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the

United States, through judicial proceedings, or through the action of Congress. *Schulenberg* v. *Harriman*, 21 Wall. 44. A third party cannot take upon himself to enforce conditions attached to the grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property.

As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the lands granted, might, perhaps, raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.

As to the want of compliance with the conditions imposed by the laws of Nebraska, allowing railroad companies organized in other States to extend and build their roads within its limits, it is sufficient to say that when the grant was made to the company Nebraska was a Territory, and it was entirely competent for Congress to confer upon a corporation of any State the right to construct a road within any of the Territories of the United States. The grant of land and a right of way for the construction of a road to a designated point within the Territory was sufficient authority for the company to construct the road to that point. It may be well doubted whether the State subsequently created out of the Territory could put any impediment upon the enjoyment of the right thus conferred. As we said in *Railroad Company* v. *Baldwin*, "it could do so only on the same terms that it could refuse a recognition of its own previously granted right, for in such matters the State would succeed only to the authority of Congress over the Territory." 103 U. S. 426, 428. It does not appear from anything before us that the State has ever attempted to interfere with the road or the company for its delay in filing its articles of incorporation with the Secretary of State, or in complying with other provisions of law. And it hardly need be added that

any such interference would not operate to divest the company of its title to lands granted by the United States.

It follows from what we have said, that when the defendant made his entry of the lands in controversy, and obtained a patent therefor, the title had passed from the United States, and consequently no right could be conferred upon him. Still, the patent gave color of title, and because of its issue the officers of the Land Department have refused to give a patent to the company embracing the lands, holding, as may be inferred, the view for which the defendant contends, that his right to enter them continued until notice of the order of the Secretary directing their withdrawal from market was received by the local land-officers. The existence of the patent, therefore, embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title which would enable him to recover possession of the premises by an action at law. The existence of the patent also creates a cloud upon the title of the land. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. *Pixley* v. *Huggins*, 15 Cal. 128.

The existence of the patent, therefore, under these circumstances, furnishes ground for equitable relief. That relief, however, should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent; but inasmuch as no objection is taken to the form of the decree as entered, which requires the defendant to execute a conveyance of the premises to the complainant, and as the execution of such a conveyance, amounting in fact to a release of his claim to the property, will accomplish all that could be legally effected, it is not considered necessary to order a modification of it. The decree is accordingly

Affirmed.

EX PARTE CURTIS.

The sixth section of the act of Aug. 15, 1876, c. 287, prohibiting, under penalties therein mentioned, certain officers of the United States from requesting, giving to, or receiving from, any other officer money or property or other thing of value for political purposes, is not unconstitutional.

PETITION for a writ of *habeas corpus*.

The sixth section of the act of Aug. 15, 1876, c. 287, entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the government," provides "that all executive officers or employés of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employé of the government, any money or property or other thing of value for political purposes; and any such officer or employé who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars."

Curtis, the petitioner, an employé of the United States, was indicted in the Circuit Court for the Southern District of New York, and convicted under this act for receiving money for political purposes from other employés of the government. Upon his conviction he was sentenced to pay a fine, and stand committed until payment was made. Under this sentence he was taken into custody by the marshal, and on his application a writ of *habeas corpus* was issued by one of the justices of this court in vacation, returnable here at the present term, to inquire into the validity of his detention. The important question presented on the return to the writ so issued is whether the act under which the conviction was had is constitutional.

The case was argued by *Mr. Edwin B. Smith* in favor of the petition, and by *The Solicitor-General* in opposition thereto.

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

The act is not one to prohibit all contributions of money or

property by the designated officers and employés of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.

That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, sect. 8. Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper.

The act now in question is one regulating in some particulars the conduct of certain officers and employés of the United States. It rests on the same principle as that originally passed in 1789 at the first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practising in the Court of Claims (id., sect. 1058);

and that passed in 1867, punishing, by dismissal from service, an officer or employé of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1546); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employé in the government of the United States shall solicit contributions from other officers, clerks, or employés for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office-holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employés. What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion.

A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this

feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor, — to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect, in some degree, those in the public service against exactions through fear of personal loss. This purpose of the restriction, and the principle on which it rests, are most distinctly manifested in sect. 1546, *supra*, the re-enactment in the Revised Statutes of sect. 3 of the act of June 30, 1868, c. 172, which subjected an officer or employé of the government to dismissal if he required or requested a workingman in a navy-yard to contribute or pay any money for political purposes, and prohibited the removal or discharge of a workingman for his political opinions; and in sect. 1784, the re-enactment of the act of Feb. 1, 1870, c. 63, "to protect officials in public employ," by providing for the summary discharge of those who make or solicit contributions for presents to superior officers. No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and employés provided for from being compelled to make contributions for such purposes through fear of dismissal if they refused. It is true that dismissal from service is the only penalty imposed, but this penalty is given for doing what is made a wrongful act. If it is constitutional to prohibit the act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of Congress, provided it be not cruel or unusual.

If there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would, in our opinion, be clear; but there are others, to our minds, equally

good. If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republican form of government; and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment.

We deem it unnecessary to pursue the subject further. In our opinion the statute under which the petitioner was convicted is constitutional. The other objections which have been urged to the detention cannot be considered in this form of proceeding. Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by which the prisoner is held. We have no general power to review the judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted. *Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604.

The commitment in this case was lawful, and the petitioner is, consequently,

Remanded to the custody of the marshal for the Southern District of New York.

MR. JUSTICE BRADLEY dissenting.

I cannot concur in the opinion of the court in this case. The law under which the petitioner is imprisoned makes it a penal offence for any executive officer or employé of the United States, not appointed by advice of the Senate [an unimportant distinction, so far as the power to make the law is concerned], to request, give to, or receive from any other officer or employé of the government any money, or property, or other thing of value, for political purposes; thus, in effect, making it a condition of accepting any employment under the government that a man shall not, even voluntarily and of his own free will, contribute in any way through or by the hands of any other employé of the government to the political cause which he desires to aid and promote. I do not believe that Congress has any right to impose such a condition upon any citizen of the United States. The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties: but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. Such a condition I regard that imposed by the law in question to be. It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. To take an interest in public affairs, and to further and promote those principles which are believed to be vital or important to the general welfare, is every citizen's duty. It is a just complaint that so many good men abstain from taking such an interest. Amongst the necessary and proper means for promoting political views, or any other views, are association and contribution of money for that purpose, both to aid discussion and to disseminate information and sound doctrine. To deny

to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs. The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammelled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question. Every person accepting any, the most insignificant, employment under the government must withdraw himself from all societies and associations having for object the promotion of political information or opinions. For if one officer may continue his connection, others may do the same, and thus it can hardly fail to happen that some of them will give and some receive funds mutually contributed for the purposes of the association. Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects, and a prohibition of all conversation thereon between government employés. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes. In former times, when the slavery question was agitated, this would have been a very convenient law to repress all discussion of the subject on either side of Mason and Dixon's line. At the present time any efficient connection with an association in favor of a prohibitory liquor law, or of a protective tariff, or of greenback currency, or even for the repression of political assessments, would render any government official obnoxious to the penalties of the law under consideration. For all these questions have become political in their character, and any contributions in aid of the cause would be contributions for political purposes. The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way. The truth is, that public opinion is oftentimes like a pendulum, swinging

backward and forward to extreme lengths. We are not unfrequently in danger of becoming purists, instead of wise reformers, in particular directions; and hastily pass inconsiderate laws which overreach the mark they are aimed at, or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind.

The legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such offices. That is quite another thing.

The legislature may make laws ever so stringent to prevent the corrupt use of money in elections, or in political matters generally, or to prevent what are called political assessments on government employés, or any other exercise of undue influence over them by government officials or others. That would be all right. That would clearly be within the province of legislation.

It is urged that the law in question is intended, so far as it goes, to effect this very thing. Probably it is. But the end does not always sanctify the means. What I contend is, that in adopting this particular mode of restraining an acknowledged evil, Congress has overstepped its legitimate powers, and interfered with the substantial rights of the citizen. It is not lawful to do evil that good may come. There are plenty of ways in which wrong may be suppressed without resorting to wrongful measures to do it. No doubt it would often greatly tend to prevent the spread of a contagious and deadly epidemic, if those first taken should be immediately sacrificed to the public good. But such a mode of preventing the evil would hardly be regarded as legitimate in a Christian country.

I have no wish to discuss the subject at length, but simply to express the general grounds on which I think the legislation in question is *ultra vires*. Though as much opposed as any one to the evil sought to be remedied, I do not think the mode adopted is a legitimate or constitutional one, because it interferes too much with the freedom of the citizen in the pursuit of lawful and proper ends. If similar laws have been passed before, that does not make it right. The question is, whether

the present law, with its sweeping provisions, is within the just powers of Congress. As I do not think it is, I dissent from the opinion of the majority of the court.

GEEKIE *v.* KIRBY CARPENTER COMPANY.

1. Under section 5 of chapter 138 of the General Laws of Wisconsin, of 1861, providing that "no action shall be commenced by the former owner or owners of any lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed," land is to be regarded as having been sold for non-payment of taxes, although the sum to raise which it was sold included five cents for a United States revenue stamp, to be put, and which was put, on the certificate issued to the purchaser on the sale.
2. A deed on a tax sale recites that "S. A. Coleman, assignee of Oconto County," has deposited certificates of sale showing that five parcels, each of which sold for so much, were sold "to the said Oconto County, and by its treasurer assigned to S. A. Coleman" for so much "in the whole," the total being the sum of the five several sums. The statute, c. 50, sect. 22, of the General Laws of Wisconsin, of 1859, prescribes a form of deed, and provides that it shall be "substantially" in that or "other equivalent form," showing that the land was sold for a sum named "in the whole." *Held*, that the deed is in substantial compliance with the form prescribed.
3. A sheriff having possession of property under a writ of attachment is not bound by the judgment in a replevin suit to which he was not a party, and in which he was not served with process, and did not appear, and which he did not defend, although his under sheriff, as an individual, was a party to the suit.
4. *Quære*, Are the waters of the Menominee River, which is the boundary between Michigan and Wisconsin, within the concurrent jurisdiction of both Wisconsin and Michigan.
5. Although there was no general verdict in this case, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding of the court below upon the facts as is provided for by sect. 649 of the Revised Statutes, this court, on a written stipulation filed here by the parties, agreeing upon the facts, reviewed the case on a writ of error, reversed a judgment below for the defendant, and directed a judgment for the plaintiff.

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

The facts are stated in the opinion of the court.

Mr. Samuel D. Hastings, Jr., for the plaintiff in error.

Mr. Luther S. Dixon and *Mr. B. J. Brown* for the defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought in a court of the State of Wisconsin, by Peter W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass, citizens of Wisconsin, against the Kirby Carpenter Company, an Illinois corporation, and was removed into the Circuit Court of the United States for the Eastern District of Wisconsin, before answer. The cause of action set forth in the complaint was, that the plaintiff Klass was the owner of certain saw-logs lying in the waters of the Menominee River, in Oconto County, Wisconsin; that in April, 1876, the plaintiff Geekie, as such sheriff, levied on and attached said logs under a writ of attachment issued against said Klass by the Circuit Court of said county; that the defendant, by its employés, took, in Wisconsin, a large quantity of saw-logs from the sheriff, and converted them to its own use, to the value of $8,500; and that the sheriff expended $940 in endeavoring to safely keep the logs so wrongfully taken, and as increased expense in keeping what logs the defendant did not succeed in taking. The claim made is for treble damages, with interest.

The answer sets up that the logs were not the property of Klass, but were the property of the defendant; that whatever the defendant did in regard to the logs was done under a writ of replevin issued in a suit brought by it, as plaintiff, in the Circuit Court for Menominee County, Michigan, to the sheriff of that county, commanding him to take said logs and deliver them to it; and that said sheriff took said logs into his custody under said writ in said county of Menominee, in the State of Michigan, and delivered them to said company.

The case was tried before a jury. The record states that the jury "rendered a special verdict in answer to the questions propounded by the court, said questions and the answers of the jury thereto being as follows." There is no other or further special verdict than the eight questions and answers which

then follow, and there is no general verdict for either party. Afterwards the plaintiffs moved the court "upon the special verdict" and on "the records and evidence in said cause" "for judgment in their favor for $6,791.56, with interest at the rate of seven per cent per annum from April 24th, 1876, and costs." The defendant also moved for judgment in its favor on the "special verdict," "and because in law the plaintiffs established no cause of action." The court ordered judgment in favor of the defendant and overruled the motion of the plaintiffs for judgment in their favor. Judgment was rendered for the defendant, against the plaintiffs, for $186.02, costs. This writ of error is brought by the plaintiffs to review and reverse this judgment.

At the trial, as appears by the bill of exceptions, the plaintiffs, to show title in Klass to the logs, offered in evidence a tax deed from the State of Wisconsin and Oconto County to one S. A. Coleman, dated and acknowledged April 27, 1867, and the certificate of its record indorsed on it, showing that it was recorded in the office of the register of deeds for said county, on the same day. The defendant objected to the reception of the deed in evidence (1) because it was not in the form prescribed by statute; (2) because it was not executed and acknowledged as required by law; (3) because it was void upon its face. The court reserved its rulings on said objections, and received said deed and certificate in evidence subject to said objections. Like objections and a like ruling were made in respect to a certified copy of the record of said deed, showing the date of its recording. The deed covered $79\frac{58}{100}$ acres of land, in section 13, in town 33, of range 22, and 120 acres in section 14, in town 33, of range 22, being five several tracts, all in Oconto County. The sale was for $12.20, which was the amount of the taxes and costs of sale. The plaintiffs then proved that Klass purchased from Coleman the timber standing on the premises described in the deed; that all the logs in controversy were cut by Klass from the premises during the winter of 1875 and 1876, and put into the river; that the premises remained vacant and unoccupied during the whole of the three years next after the recording of the deed; that the logs were held by Geekie, as sheriff, under a regular and

valid attachment and levy; and that the company claimed to own the logs and sought to take them from the custody of Geekie. After the plaintiffs had rested, the defendant offered to show, by certified copies of the records from Oconto County, that the county treasurer of that county, in making the sale of the lands on which the said tax deed to Coleman was based, added to the amount of all legal taxes and charges for which each of said tracts was liable to be sold the sum of five cents to pay for a United States revenue stamp to be placed on the certificate issued to the purchaser on such sale; that said illegal excess of five cents was included in the amount for which each one of said tracts was sold; and that a five-cent United States internal revenue stamp was affixed to each one of said certificates of sale. The plaintiffs objected to the reception of said evidence, as incompetent and immaterial, because said tax deed was regular and valid on its face, and had been recorded more than three years before the commencement of the action and the cutting of the timber. The court reserved its ruling on said objection until the close of the case, and received said testimony subject to said objection. It was then admitted by the plaintiffs that the facts relative to said sale were as the defendant offered to show them to be, but not waiving their objection to said evidence, or consenting to its being received. The defendant then gave evidence showing that it owned in fee-simple, at the time the tax deed to Coleman was executed and recorded, the premises from which said timber was cut. After the close of the evidence the questions to be answered by the jury were submitted to them by the court, and they were answered by the jury. The bill of exceptions states as follows: "Both said plaintiffs and said defendant filed motions for judgment on the pleadings, records, and evidence in said cause, and, upon the argument of said counter-motions and said objections to testimony reserved, the court overruled said defendant's objections to the admissibility of said tax deed in evidence, and said plaintiffs' objection to said defendant's testimony showing the illegal excess of five cents in the amount for which each of said tracts of land was sold by said county treasurer, and overruled said plaintiffs' motion for judgment, and ordered judgment for said defendant; to each of which

said rulings against said plaintiffs said plaintiffs then and there duly excepted."

To obviate any objection that this court could not review the judgment in this case because there was no general verdict of the jury, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding by the court below upon the facts as is provided for by sect. 649 of the Revised Statutes, the parties have filed in this court a written stipulation, agreeing "that the facts appearing from the special verdict and stated by the bill of exceptions to have been proved, shall be taken and considered as the facts in this case for all purposes, and as fully as if they had been specifically found by the Circuit Court;" and "that the Circuit Court submitted certain questions to the jury by agreement of the parties, and that the other facts were to be found and stated as shown by the bill of exceptions, and that upon the whole case, as thus shown, judgment was to be pronounced by the court below, as they should determine the law."

The ground upon which the Circuit Court overruled the objection of the plaintiffs to the testimony on the part of the defendant to show the illegal excess of five cents in the amount for which each of the tracts of land was sold was, that, in being sold to raise the five cents, the land was sold for that which was not a tax; that the amount assessed against the land for a tax was less than the amount for which it was sold; that, although a tax was included in that amount, there was also included in it that for which the land could not be sold; and that this fact deprived the officer of the power to sell and made the tax deed void.

The statute of Wisconsin applicable to this subject is found in chapter 138 of the General Laws of 1861, sects. 5 and 6:—

"SECT. 5. No action shall be commenced by the former owner or owners of any lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed.

"SECT. 6. The limitation for bringing actions prescribed in the

last preceding section shall not apply . . . where the taxes for the non-payment of which the land was sold and the tax-deed executed were paid prior to the sale, or where the land was redeemed from the operations of such sale, as provided by law, nor where the land was not liable to taxation."

The sole question presented under these provisions is, whether the land in this case can be said not to have been sold for non-payment of taxes, because in the $12.20 for which it was sold was included twenty-five cents for the five stamps, in addition to $11.95 for taxes proper. It is admitted that the land could not properly be sold to raise the five cents as a tax, and that, if the question had been raised on behalf of the original owner of the land in a suit commenced within three years next after the recording of the deed on the sale, he could have had relief against the sale; but it is contended for the plaintiffs in error that the lapse of the three years prevented the questioning of the validity of the deed because of the irregularity complained of. We are of opinion that the Circuit Court erred in its construction of the statute. The exceptions in sect. 6 do not apply to this case, and the land was sold for non-payment of taxes, although an improper item was included in the amount for which the sale was had. It matters not whether such item was five cents for a revenue stamp, or an illegal excess for fees, or any other illegal excess. The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed the statute puts at rest all objections raised, after the time specified, against the validity of the tax proceeding, from and including the assessment of the land to and including the execution of the deed. If the deed is valid on its face, and purports to convey the land on a sale for the non-payment of taxes, it is, during the three years, *prima facie* evidence of the regularity of the tax proceeding, and, after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The general authority of the taxing officers and the liability of the land to taxation having existed, there was no want of authority to put the taxing power in motion. That being so, the lapse of time establishes conclusively the validity of the tax and of the sale, as

against the irregularity in question. There having been jurisdiction, all error was conclusively barred by the statute. This construction is that held by the Supreme Court of Wisconsin in regard to this statute, in *Oconto County* v. *Jerrard*, 46 Wis. 317, and *Milledge* v. *Coleman*, 47 id. 184. It is said, and correctly, in the latter case, that that is the view which has been uniformly taken of that statute by that court, and that to adopt a contrary view would disturb numerous titles. Such construction was, therefore, always a rule of property, in respect to land, in Wisconsin, and is one which this court will follow. *Suydam* v. *Williamson*, 24 How. 427. In *Milledge* v. *Coleman*, the illegality alleged was the including of five cents for a United States revenue stamp in the amount for which the land was sold. That case was decided some four months after the decision in the present case was made by the court below.

The deed in question was not open to the other objections taken to it at the trial. One of those objections was that the deed was not substantially in the form prescribed by statute, or any equivalent form, and was void upon its face. The form is given in c. 50, sect. 22, of the General Laws of Wisconsin, of 1859; and the statute says that the deed "shall be substantially in the following or other equivalent form." There is no doubt that the form must be substantially pursued, or the deed will be invalid. Part of the form is a recital that the purchaser or his assignee has deposited a certificate, whereby it appears that certain lands, describing them, were, for the non-payment of taxes, sold by the officer named, at public auction, at a place and time named, to the said purchaser, for a sum named, "in the whole, which sum was the amount of taxes assessed and due and unpaid" on said tracts of land, &c. The deed in the present case recites that "S. A. Coleman, assignee of Oconto County," has deposited five certificates, whereby it appears that five certain parcels of land, describing them, three containing 40 acres each, each sold for $2.43, one containing $39\frac{58}{100}$ acres, sold for $2.43, and one containing 40 acres, sold for $2.48, were, for the non-payment of taxes, sold by the officer named, at public auction, at a place and time named, "to the said Oconto County, and by its treasurer assigned to S. A. Coleman, for the sum of twelve dollars and twenty cents, in

the whole, which sum was the amount of taxes assessed and due and unpaid" on said tracts of land, &c. The objection made is, that the recital is not that the lands were sold for so much in the whole, but that they were sold "to the said Oconto County, and by its treasurer assigned to S. A. Coleman" for so much in the whole; that the words, "the sum of," in the recital, relate to the word "assigned"; that the meaning is, that the lands were assigned to Coleman for the $12.20 in the whole, or were sold and assigned for that sum in the whole, and not that they were sold for that sum in the whole. The Circuit Court held that it clearly enough appeared, taking the whole deed together, for what sum in dollars and cents the land was sold in the whole, as required by the statute; and that, taking the statement as to the $12.20 with the preceding statement as to the sum for which each parcel of land sold, the inference was irresistible that the $12.20 was the amount for which the land was sold in the whole, for the non-payment of taxes. We think this view was correct. A like construction was given to a recital in the same language, by the Supreme Court of Wisconsin, in *Milledge* v. *Coleman*, *ubi supra*. It is manifest that the words, "and by its treasurer assigned to S. A. Coleman," are to be read as if they were in a parenthesis. In connection with the prior words, "Whereas S. A. Coleman, assignee of Oconto County, has deposited," &c., they are put in to indicate that Oconto County was the purchaser, and Coleman was its assignee, of the purchase, by assignment from the treasurer of the county. Everything required by the statute as to form is found in the deed, with added facts as to the assignment.

The objection as to the form of the acknowledgment of the deed does not seem to be insisted on by the defendant in error. We think the Circuit Court was correct in its ruling that the acknowledgment was in proper form. The same form was upheld as proper by the Supreme Court of Wisconsin, in *Milledge* v. *Coleman*, *ubi supra*.

The defendant offered in evidence at the trial a copy of a judgment in an action in the Circuit Court for the county of Menominee, Michigan, in which the Kirby Carpenter Company "was plaintiff and the Menominee River Manufacturing

Company, Charles J. Ellis and Millard F. Powers, were defendants, in which action a writ of replevin was issued to the sheriff of said county, commanding him to forthwith take into his custody the goods and chattels therein mentioned, which were the logs in controversy, and deliver them to said Kirby Carpenter Company, which action was commenced on the thirty-first day of May, 1876, and process therein served on said parties therein named as defendants on said day, and in which action judgment was entered as by default against the defendants therein named, on the twenty-fourth day of September, 1878, adjudging the title to said logs to be in said Kirby Carpenter Company." The plaintiffs objected to the admission of said record in evidence, as incompetent and immaterial, "because neither of the plaintiffs in this action was a party to said action." The court reserved its ruling upon said objection, and received said testimony subject to said objection. The record does not show that the objection was afterwards either overruled or sustained. As the court held that Coleman acquired no title under the tax deed, it was unnecessary for it to make any ruling as to the effect of the judgment in the replevin suit. But, under the stipulation so made in this court, the question is here to be passed upon.

The bill of exceptions states that the defendant showed that the Millard F. Powers named as one of the defendants in said replevin suit was the under sheriff of Oconto County; that process in said suit was served on said Powers on an island in the Menominee River, near its mouth, on the Michigan side of the main channel of said river, near the head of which island are situated what are called the dividing piers; and that at the time of the service of said process upon said Powers he was on said island assisting the plaintiff Geekie in his endeavors to retain said logs under said writ of attachment under which they were levied on by said Powers; that all of said logs that were taken from said plaintiffs, after the issuing of said writ of replevin, were taken by said sheriff and his posse, acting under the authority of said writ; that not to exceed twenty of said logs came to the possession of said defendant before the issuing of said writ of replevin; and that the point in said Menominee River at which said dividing piers are located, and at which

said defendant took from said Geekie said logs, was on the Michigan side of the main channel of said river.

The bill of exceptions states that the plaintiffs showed that Geekie, by and through Powers, his under sheriff, levied on said logs on April 24, 1876, in the Menominee River about one mile above said piers; that the piers were managed and controlled by the Menominee River Manufacturing Company, a corporation; that Powers, after making the levy, remained in charge of the logs for some days, and then turned the writ over to Geekie, the sheriff, on or about May 9, 1876, it not being shown on the trial that the defendant had notice of that fact; that the defendant claimed to own said logs and sought to take them from the custody of said sheriff, as they passed through said dividing piers; that from the time they commenced running through said piers until they had all passed through, said Geekie, and others acting for and under him, and parties acting for and under the direction of the defendant, were struggling with each other for the possession of the logs; that the Menominee River runs between the States of Michigan and Wisconsin; that when said logs were levied upon by said sheriff they were in a bend in said river and on the Wisconsin side of the channel; and that the expense of executing said writ of attachment by said sheriff, if he had not been interfered with by said defendant, would have been not more than $240.

The questions and answers forming the so-called special verdict were as follows: "1st. Did the defendant take, or cause to be taken, from the possession of the plaintiffs, and convert to its own use, the logs in question, or any part thereof? Answer. Yes. 2d. If you answer the preceding question in the affirmative, then when were said logs so taken from the possession of the plaintiffs? Answer. On the twenty-fourth day of April, 1876. 3d. What quantity of logs, if any, were so taken and converted to its own use by the defendant? Answer. 1,040,238 feet. 4th. What was the value of the logs so taken and appropriated by the defendant? Answer. Six dollars per thousand feet. . . . 6th. What was the amount of expenses necessarily incurred and paid by the plaintiff Geekie in endeavoring to retain possession of said logs? Answer. $538.14. 7th. What number of days was the plaintiff Geekie necessa-

rily engaged in endeavoring to keep possession of said logs, and what was the value of his services per day? Answer. Forty-nine days, at three dollars per day, $147.00. 8th. What number of days was M. F. Powers necessarily engaged in attempting to keep possession of said logs, and what was the value of his services per day? Answer. Fifteen days, at three dollars per day, $45.00."

It is contended for the defendant in error that Geekie was concluded by the judgment in the replevin suit, and that, although he was not a party to it, the judgment against Powers, his under sheriff, bound him. But it clearly appears from the foregoing facts that Powers did not have possession of the logs when the replevin suit was commenced, and that Geekie did. Powers was sued as an individual. Geekie was not served with process in the suit, nor did he appear in it or defend it; and, so far as appears, no defence was made to it.

It is further contended for the defendant in error that the conversion by the defendant took place in Michigan, and not in Wisconsin, as alleged in the complaint, because it is shown that the place where the defendant took the logs from Geekie was on the Michigan side of the main channel of the river. This is not equivalent to a finding that the taking was wholly or exclusively in Michigan, so as to make, as against Geekie, a taking at a place where the lien of the attachment did not exist. It is contended that the Menominee River being, as found, the boundary between Michigan and Wisconsin at the *locus in quo*, Wisconsin has, by sect. 3 of the act of Congress of Aug. 6, 1846, c. 89, concurrent jurisdiction with Michigan over the waters of the Menominee River. But it is not necessary to determine this question.

Klass having the general property in the logs, and Geekie a special property in them, and the logs having been taken by the defendant from the possession of Geekie, who held them as sheriff, under the attachment against Klass, it was proper for both to join in the suit. The damages found to have been sustained by each may be added together and awarded to them as plaintiffs. The damages to Klass are the value of the logs, 1,040,238 feet at $6 per thousand feet, being $6,241.42. The damages to Geekie are the $538.14 expenses, less the $240, be-

ing $298.14, extra expenses, and the $147 and the $45. The sum of the whole to Klass and Geekie is $6,731.56. The date of the conversion, found by the jury, was April 24, 1876. There appears to be some confusion in the record. It is stated that the replevin suit was commenced May 31, 1876; that all of the logs which were taken from the plaintiffs after the issuing of the writ of replevin were taken by the sheriff under that writ; and that not to exceed twenty of such logs came to the possession of the defendant before the issuing of said writ. Yet the jury found that the defendant took all the logs or caused them to be taken from the possession of the plaintiffs, and converted them to its own use, on the 24th of April, 1876. But the attachment levy was made on the 24th of April by Powers, and the record states that he remained in charge of the logs for some days, and turned the writ over to Geekie on May 9. The bill of exceptions states, however, that there was other evidence tending to show the time of the conversion of the logs by the defendant, and the manner in which the defendant and the sheriff of Menominee County took possession of them. On the whole, we think, that as to the damages to Klass interest should be given from the 24th of April, 1876, the date of conversion found by the jury, and as to those to Geekie, interest should be given from the bringing of this suit, Nov. 21, 1876.

The judgment of the Circuit Court will be reversed with costs, and the case remanded to that court, with directions to it to enter a judgment for the plaintiffs for $6,731.56, with lawful interest on $6,241.42 thereof from April 24, 1876, and with lawful interest on $490.14 thereof from Nov. 21, 1876, with costs; and it is

So ordered.

LANDSDALE *v.* SMITH.

A bill is bad on demurrer when it appears therefrom that there have been unreasonable delay and laches on the part of the complainant, or those under whom he claims, in asserting the rights which he seeks to enforce.

APPEAL from the Supreme Court of the District of Columbia.

By duly recorded deed of July 18, 1818, signed by John P. Van Ness (his wife uniting in the conveyance) and by Noah Stinchcomb, the former conveyed to the latter, at a fixed annual rent, lot 3, square 455, in the city of Washington, to have and to hold, &c., unto Stinchcomb, his executors, administrators, and assigns, for the term of ninety years, renewable forever. Stinchcomb entered under the deed, made valuable improvements upon the lot, and remained in possession until the year 1833 or 1834, when Van Ness repossessed himself of the premises, in virtue of a clause in the deed in these words: "*Provided always*, that if the said rent or any part thereof shall be in arrear and unpaid for the space of thirty days next after the time at which the same is reserved to be paid, as above, being first lawfully demanded, that then it shall and may be lawful to and for the said John, his heirs and assigns, into the demised premises or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, occupy, and enjoy, as in his or their former estate, until all such arrearages of rent, with legal interest from the time at which said rent shall have become payable, and all and every cost, charge, and expense incurred by reason of the non-payment of said rent shall be lawfully satisfied and paid, or make distress therefor, at his or their option."

Stinchcomb died on the 11th of February, 1841, without, so far as the bill discloses, making any effort to repossess himself of the property. Van Ness died in 184–, and, upon the division of his estate, the lot in question was assigned to Matilda E. Van Ness, one of his heirs-at-law, under whom and her assigns the defendants hold it.

The complainant, as administratrix of Stinchcomb, having offered, and now offering, to pay all rents, interest, charges, and

costs, which may have accrued upon the property, filed her bill, wherein she asks a decree permitting her to redeem the same, and ordering an account, which will show, as well the principal and interest of rents in arrear due defendants as the rents and profits received by the latter since they entered into possession, setting off the one against the other.

Such is, substantially, the case made, and such the relief asked, notwithstanding forty-five years have elapsed since the re-entry of Van Ness, "as in his . . . former estate," and more than thirty since his death and the assignment of the lot in question to one of his heirs-at-law.

The court dismissed, on demurrer, the bill, and the complainant appealed here.

Mr. H. O. Claughton, with whom were *Mr. C. P. Culver* and *Mr. Thomas Jesup Miller*, for the appellant.

Mr. Job Barnard and *Mr. James S. Edwards* for the appellees.

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

It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Piatt* v. *Vattier*, 9 Pet. 405; *Maxwell* v. *Kennedy*, 8 How. 210; *Badger* v. *Badger*, 2 Wall. 87; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1; 2 Story, Eq. Jur., sect. 1520. In *Wagner* v. *Baird*, 7 How. 234, it was said that long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused except by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor.

And, contrary to the view pressed in argument, a defence grounded upon the staleness of the claim asserted, or upon the gross laches of the party asserting it, may be made by demurrer, not, necessarily, by plea or answer. A different rule has been announced by some authors, and in some adjudged cases; generally, however, upon the authority of the case of *The Earl*

of Deloraine v. *Browne*, 3 Bro. C. C. 633. Lord Thurlow, who decided that case, is reported to have declared, when overruling a demurrer to a bill charging fraudulent representations as to the value of an estate, and praying an account of rents, profits, &c., that his action was based upon the ground that length of time, *proprio jure*, was no reason for a demurrer; that it was only a conclusion from facts, showing acquiescence, and was not matter of law; and that he could not allow a party to avail himself of an inference from facts on a demurrer. But in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, decided in 1806, Lord Redesdale expressed his disapproval of the decision of Lord Thurlow, as reported by Brown, and said that it was rendered in a hurry, when the latter was about to surrender the seals, and when much injury might have been done to parties had judgments not been given before the latter retired from office. The rule, as announced in *Hovenden* v. *Lord Annesley*, was, "that when a party does not by his bill bring himself within the rule of the court, the other party may by demurrer demand judgment, whether he ought to be compelled to answer. If the case of the plaintiff, as stated in the bill, will not entitle him to a decree, the judgment of the court may be required by demurrer, whether the defendant ought to be compelled to answer the bill." That, the court said, was matter of the law of a court of equity, to be determined according to its rules and principles.

Such is, undoubtedly, the established doctrine of this court as announced in many cases. In *Maxwell* v. *Kennedy*, *supra*, the court, speaking by Mr. Chief Justice Taney, approved the rule as announced by Lord Redesdale. After referring to *Piatt* v. *Vattier*, *supra*, and to *McKnight* v. *Taylor*, 1 How. 161, and *Bowman* v. *Wathen*, id. 189, it was said, that "the proper rule of pleading would seem to be that when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in asserting his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court." In the more recent case of *Badger* v. *Badger*, *supra*, the court, speaking by

Mr. Justice Grier, said, that a party, who makes an appeal to the conscience of the Chancellor, "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiry whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer." p. 95.

These principles are decisive of the case before us. It is plainly one of gross laches on the part of Stinchcomb and those claiming under him. His right under the deed of 1818, to repossess himself of the premises by paying rents and charges in arrear, accrued the moment Van Ness re-entered. But the assertion of it could not be safely neglected for an unreasonable length of time. The bill discloses no plausible, much less sufficient, explanation of the long delay ensuing, after 1833, without an attempt by Stinchcomb, his representatives or his heirs, to recover the property, by discharging the rents and charges in arrear, and re-entering, as might have been done, in pursuance of the provisions of that deed. On the contrary, the facts set out in the bill justify the conclusion either that he elected in his lifetime to abandon his claim, or that it was, in some way, satisfactorily arranged or discharged. The complainant and those whom she represents have slept too long upon their rights. The peace of society and the security of property demand that the presumption of right, arising from a great lapse of time, without the assertion of an adverse claim, should not be disturbed. In such cases, sound discretion requires that the court should withhold relief.

Some reference has been made to the decisions of the Supreme Court of Maryland, the laws of which State, as they existed on the 27th of February, 1801, except as since modified or repealed by Congress, continue in force in this District. It is only necessary to say that the principles to which we have referred have been steadily upheld by that court, not upon the ground of any changes in the law of the State since 1801, but in deference to the established doctrines governing courts of

equity in giving relief to those who seek the enforcement of antiquated demands. *Hepburn's Case*, 3 Bland (Md.), 95; *Hawkins* v. *Chapman*, 36 Md. 83; *Nelson* v. *Hagerstown Bank*, 27 id. 51; *Syester* v. *Brewer*, id. 288; *Frazier* v. *Gelston*, 35 id. 298.

For the reasons given, we are of opinion that the court below properly sustained the demurrer, and dismissed the bill for want of equity.

Decree affirmed.

KING *v.* CORNELL.

1. Where a citizen of a State sues in a court thereof a citizen of the same State and an alien, the latter is not entitled to remove the suit to the Circuit Court.
2. The act of March 3, 1875, c. 137, repealed the second clause of section 639 of the Revised Statutes.

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

The facts are stated in the opinion of the court.

Mr. William M. Evarts and *Mr. Joseph H. Choate* for the appellant.

Mr. Samuel H. Wilcox for the appellees.

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

This is a suit begun in the Supreme Court of New York by a citizen of that State against other citizens of the same State and Henry Seymour King, an alien, and a subject of the Queen of the United Kingdom of Great Britain and Ireland. King, claiming that there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants, as parties in the cause, filed his petition for a removal to the Circuit Court of the United States. It was granted. In the Circuit Court a motion was made to remand the cause, and, an order to that effect having been entered, this appeal therefrom was taken.

It is conceded that the case was not removed under the second section of the act of March 3, 1875, c. 137, and that the jurisdiction of the Circuit Court rests solely on the second subdivision of section 639 of the Revised Statutes. It was said at the last term, in *Hyde* v. *Ruble*, 104 U. S. 407, that this subdivision was repealed by the act of 1875; but as that was a case between citizens of different States, and no question arose as to the right of an alien defendant to a removal when there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants, we have now considered the matter in that aspect.

While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal. This subject was fully considered in *United States* v. *Tynen*, 11 Wall. 88, where the early authorities are cited and reviewed at considerable length. This rule, we think, is decisive of the present case. Section 639, in its first subdivision, provides for a removal by the defendant, where the suit is against an alien, or is by a citizen of the State in which the suit is brought against a citizen of another State. The petition for removal was to be filed by the defendant at the time of entering his appearance in the State court. This is a reproduction of the provisions of sect. 12 of the act of 1789, c. 20.

The second subdivision relates to suits against an alien and a citizen of the State in which the suit was brought, and to suits by citizens of such State against a citizen of the same and a citizen of another State. In such suits the defendant, who was an alien, or a citizen of another State, might have a removal, if the suit, so far as it related to him, was brought for the purpose of restraining or enjoining him, or was one where there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause. The petition for such a removal could be filed at any time before trial or final hearing, and the removal did not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State

court, as against the other defendants. This subdivision is a substantial reproduction of the act of July 27, 1866, c. 288, which was amended by the act of March 2, 1867, c. 196; so that in a suit between a citizen of the State in which the suit was brought and a citizen of another State, the latter, whether plaintiff or defendant, might obtain a removal if he had reason to and did believe that from prejudice or local influence he would not be able to obtain justice in the State court. Here, too, the petition for removal could be filed at any time before trial or final hearing. This act of 1867 appears as the third subdivision of section 639.

The twelfth section of the act of 1789 remained in force, without amendment or material alteration, except by the acts of 1866 and 1867, until the revision of the statutes in 1873. Then the whole legislation was embodied in section 639 of the Revised Statutes, which was subdivided so as to present separately the different grounds of removal, depending on the citizenship of the parties.

In this condition of the law, only aliens and citizens of States other than that in which the suit was brought could obtain a removal in any case. Save in cases of local prejudice, only defendants could petition, and in cases of local prejudice no provision was made for aliens. No provision was made in any law for the removal of cases arising under the Constitution or laws of the United States, if the necessary citizenship of the parties did not exist. In 1875 the subject of removals seems to have been brought specially to the attention of Congress, and the act of that year passed. Many important new provisions were introduced, and the act was evidently intended as a substitute for much that had been enacted before. Removals of suits arising under the Constitution and laws of the United States were authorized without regard to the citizenship of the parties, and instead of confining the privileges of removal to defendants or citizens of States other than that in which the suit was brought, either party was allowed to move in that behalf. Instead of requiring the petition for removal to be filed in some cases when the defendant entered his appearance, and in others at any time before trial or final hearing, all petitions to which that act applied were to be presented at or before the

term at which the cause could be first tried. Provision for citizens and subjects of foreign States must have been in the mind of Congress at the time, because in the first clause of the second section, which relates to the removal of a controversy that is not separable, they are specially named. In the second clause, which relates to separable controversies, they are not, and, as in the local prejudice subdivision of section 639, that privilege is confined to citizens of the United States. In the law of 1866 an alien defendant, having a separable controversy, could remove. When that law was extended in 1867 to cases of local prejudice, only citizens were included in the extension. In the act of 1875 the removal in cases of separable controversies was not confined to defendants, but either party could apply. Congress then, as it seems to us, manifested its intention to exclude aliens from the privileges of such a removal, just as it did in 1867, in cases of local prejudice. The whole subject was evidently up for consideration. The first and second subdivisions of section 639 were thoroughly revised and radically modified. There cannot be a shadow of doubt that, except as to aliens in the second subdivision, both these subdivisions were repealed; and we cannot believe, if Congress had intended to continue in force that part of the second subdivision which allowed an alien defendant to remove a cause, so far as it related to him, and gave his adversary no corresponding right, it would have been left to inference alone. So thorough a revision implies, as we think, an intention to make the new law a substitute for all that those subdivisions contained. The last clause relating to separate controversies needed only the addition of the word "alien" to make it cover everything in the second subdivision. Had it been added, the law would have been uniform, and allowed removals by both parties in all cases where the right was dependent on citizenship. With it out, if we hold that the old law is unrepealed, an alien defendant will be allowed to remove his separate controversy as against a citizen, while the citizen will not have the same privilege against him. This, we are satisfied, it was not the intention of Congress to do. It follows that the whole of the second subdivision of section 639 was repealed by the act of 1875, and that the cause was not removable on the separate petition of the

alien. This makes it unnecessary to consider whether there was in the suit such a separate controversy as would have entitled him to a removal if the law had been otherwise.

The order of the Circuit Court remanding the cause to the State court is

Affirmed.

HEMINGWAY *v.* STANSELL.

1. A board of commissioners, one from each of five counties, having been incorporated by a State statute to construct and maintain levees, with authority to make contracts for the doing of the work, and having made such a contract, and been sued in equity thereon, in the district in which the domicile of the board was established by its act of incorporation, by persons residing out of the district, a subsequent statute of the State abolished the offices of the commissioners, and constituted the treasurer and the auditor of accounts of the State *ex officio* the levee board, with the declared purpose "to substitute the treasurer and auditor in place of the board of levee commissioners now in office;" and a bill of revivor was filed against them by leave of the court. *Held*, that the suit might be prosecuted against the new board, although both the treasurer and the auditor resided out of the district; and that an appeal from a final decree for the complainant might be taken by the treasurer and auditor, describing themselves by their individual names, and as such officers, and as *ex officio* the levee board.
2. A board of commissioners, authorized by statute to make contracts for the building of levees, and to borrow money, issue bonds, and sell and negotiate them in any market, but not at a greater rate of discount than ten per cent, may make a contract for the work at certain prices by the cubic yard, payable in such bonds; and may afterwards amend that contract by inserting "at the rate of ninety cents on the dollar," and issue bonds to the contractors accordingly, upon being satisfied that such was the agreement actually made between the parties; although the work is actually done by sub-contractors for lower prices in cash.
3. A board of levee commissioners made a settlement with contractors employed to do the work on certain levees, by which it paid them a certain sum and took a receipt in full of all demands. The parties afterwards executed an agreement under seal, reciting the settlement and receipt in full of all demands, a complaint of the contractors that injustice had been done them in that settlement, and the desire of the board to do full justice; and stipulating that two engineers, one designated by each party, should measure the work done, and render to the parties an estimate of the amount due to the contractors for such work according to the original contract; that if this should differ from the amount already paid, the difference should be paid or refunded accordingly; and that these two engineers and a third, to be agreed on by them, should be arbitrators for the adjustment of all questions of difference; that, in the adjustment of questions pertaining to the meas-

urement, the contractors should have the privilege of introducing all proper evidence, and the board of rebutting that evidence; and that, before proceeding with the measurement, the contractors should give written notice to the board of the points to be proved and the character of the evidence to be offered. The contractors thereupon gave notice of their intention to introduce proof of several matters, some of which did not concern the measurement; to which the engineer of the board objected; and the arbitration fell through. *Held*, that the settlement and receipt bound the contractors as an accord and satisfaction, and they could not maintain a suit upon the original contract to recover further compensation for the work.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. H. P. Branham for the appellants.

Mr. Henry T. Ellett for the appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an appeal by "William L. Hemingway, Treasurer of the State of Mississippi, and Sylvester Gwinn, Auditor of said State, and *ex officio* the Levee Board of Mississippi District Number One," from a final decree of the District Court of the United States for the Northern District of Mississippi upon a bill in equity for the specific performance of a contract filed in that court on the 23d of February, 1873, by Hiram A. Partee, a citizen of Tennessee, and Jephthah W. Stansell, a citizen of Arkansas, copartners under the name of Partee & Stansell (of whom the appellee is the survivor), against the Levee Board of Mississippi District Number One, and the five persons constituting that board.

By an act of the legislature of the State of Mississippi of March 17, 1871, entitled "An Act to redeem and protect from overflow from the river Mississippi certain bottom lands herein described," this board, consisting of commissioners to be appointed by the supervisors of Tunica and four other counties respectively, was incorporated for the purpose of constructing, repairing, and maintaining levees along a part of the Mississippi River; its domicile was fixed at the county seat of Tunica County, in the Northern District of Mississippi; and it was authorized to appoint a secretary and treasurer, and to let out and contract for the construction of the works, and to issue

negotiable bonds to the amount of $1,000,000, and to sell and negotiate them in any market, but not at a greater rate of discount than ten per cent.

This suit was brought upon a contract made by the board with the plaintiffs for the construction of certain levees. While it was pending, on the 11th of April, 1876, the legislature of Mississippi passed an act, entitled "An Act to abolish the Levee Board of District Number One and to pay the debts of said board;" and enacting that the offices of commissioners, secretary, and treasurer of Levee District Number One, as existing under the statute of 1871, be abolished; and that the Auditor of Public Accounts and the Treasurer of the State be constituted and appointed the Levee Board of District Number One, *ex officio*, and discharge all the duties of the Levee Board and of the secretary and treasurer of the same; "it being the intent and purpose of this act to substitute the Auditor of the State and the Treasurer thereof, *ex officio*, as such commissioners, secretary, and treasurer, in place and stead of the Board of Levee Commissioners, secretary, and treasurer of Levee District Number One, now in office;" and that "the auditor and treasurer shall have full power to settle up, under the laws now in force, the unfinished business of the said Levee Board of District Number One, and to pay any outstanding liabilities of the same in such funds as may be applicable to the same."

The defendant thereupon moved to dismiss the bill, because by this statute the levee board had been abolished, and was no longer capable of suing or being sued. The court overruled this motion, and allowed the plaintiffs to file a bill of revivor against the auditor and treasurer (both of whom resided at Jackson in the Southern District of Mississippi), as constituting the Levee Board of District Number One, and, after due pleadings and proofs, entered the final decree against the levee board, from which this appeal is taken.

The appellee now moves to dismiss the appeal, because it is the appeal of Hemingway and Gwinn only, and not of the levee board. But we are of opinion that this motion, and the motion made in the court below to dismiss the bill, are equally groundless.

The statute of 1876, while it abolished the offices of the commissioners who previously constituted the corporation of the levee board, did not dissolve or extinguish the corporation, but merely substituted the State Treasurer and the Auditor of Accounts as the members of that corporation. The suit might therefore be prosecuted against the levee board as a corporation, notwithstanding the change in its members; and a bill of revivor having been allowed to be filed for that purpose, it need not be considered whether any revivor was requisite. The fact that the new members reside in another district is immaterial. A court which has once acquired jurisdiction of a suit does not lose it by a change of domicile of the parties, and may, when the suit is of a nature that survives, bring in the representatives or successors of a party who has died or ceased to exist, without regard to their domicile.

The levee board, being the defendant in the suit, might appeal from the final decree; and the appeal taken by Hemingway and Gwinn, describing themselves not only by their individual names and as treasurer and auditor respectively, but also as *ex officio* the levee board, is the appeal of the board.

It follows that the motion to dismiss the bill because of the passage of the statute of 1876 was rightly denied by the court below; and that the motion to dismiss the appeal must be overruled by this court.

The evidence shows that the board, under the authority conferred by its act of incorporation, advertised for written bids for contracts to do the work; that the plaintiffs made a bid accordingly for the work on certain parts of the levees at specified prices by the cubic yard, payable in bonds at ninety cents to the dollar, or ten per cent discount; that this bid was accepted by the board, and on the 28th of September, 1871, a contract in writing was signed by the parties, by which the plaintiffs agreed to do the work according to the specifications, and to the satisfaction and acceptance of the chief engineer of the board; the board agreed to pay them in bonds the prices named in the bid, four-fifths on monthly estimates by its engineer of the relative value of the work done, and the rest on the final completion of the work, the engineer's acceptance thereof, and estimate of the quantity, character, and value of

the work done, and the plaintiffs' release under seal of all demands arising under the contract; and it was mutually agreed that the decision of the chief engineer should be final and conclusive in any dispute which might arise between the parties to this contract. It further appears that afterwards, and to carry out the intention of the parties at the time of signing the contract, the board, at the plaintiffs' request, caused to be interlined therein, after the word "bonds," the words "at the rate of ninety cents on the dollar;" and that monthly, during the progress of the work, four-fifths of the engineer's estimates of the amount of work done were paid for, at the prices stipulated in the contract, in bonds at that rate.

The board, in its answer and by a cross-bill, contended that the plaintiffs had been largely overpaid, because the prices agreed on greatly exceeded the prices at which the work could be done, and was done by sub-contractors, for cash; and because the issue of bonds at ninety cents on the dollar in payment of those prices was in effect a negotiation of the bonds at a greater rate of discount than ten per cent. But the board had authority to make contracts, and consequently to agree upon the compensation for the work; being authorized to issue bonds, it might issue them directly to the plaintiffs; and the prices agreed to be paid, as well as the rate at which the bonds should be taken, corresponded to the original bid made by the plaintiffs and accepted by the board, as well as to the terms deliberately adopted in the formal contract. The suggestion that this course was pursued with the purpose of fraudulently evading the restriction of the statute is unsupported by proof; and there is no evidence that the funds necessary to repair the levees could have been obtained in any other manner. This position of the levee board therefore cannot be maintained, and to that extent the decree of the District Court must be affirmed.

But the remaining question in the case presents greater difficulties. The facts, as disclosed by the record, appear to us to be as follows: —

After the plaintiffs had completed the work, W. R. Kirkpatrick, the chief engineer of the board, who had superintended the work, made a final estimate of its quantity, character, and

value. The board, being dissatisfied with his estimate, discharged him, and caused the work to be remeasured by B. Mickle, a special engineer (afterwards appointed chief engineer), whose estimates showed a much smaller sum to be due to the plaintiffs. The board thereupon refused to pay the amount due according to Kirkpatrick's estimates, and, after some controversy and negotiation, settled the claim by paying the plaintiffs $47,800, the amount found due by Mickle, and the plaintiffs signed and gave them a receipt in these terms: "Memphis, June 18, 1872. Received of A. R. Howe, Treasurer Mississippi Levee Board District Number One, forty-seven thousand eight hundred dollars on account of work on levee, the same being in full of all demands to date."

The plaintiffs in their bill allege that this receipt was fraudulently and oppressively extorted by the levee board, and was signed by the plaintiffs under protest. But the only evidence to support their allegation is the testimony of Stansell himself, and he on cross-examination admitted that he did not know much about the matter, as Partee attended to the money transactions of the firm; and his testimony is met and controlled by the explicit denial in the answer of the board upon the oath of two of its members, as well as by the recitals of an agreement under seal, made between the board of the first part and the plaintiffs of the second part on the 4th of October, 1872, the important portions of which are as follows: "Whereas said party of the first part have heretofore made full and complete settlement for all work done on said levee by said party of the second part, as evidenced by their receipt acknowledging the same; and said party of the second part do now come forward and complain that injustice was done them in said settlement; and it being the desire of the party of the first part to do full justice to all men, it is hereby agreed that the party of the second part shall designate an engineer, who shall proceed with the chief engineer of this board to measure all work done by said party of the second part on said levee, and render to the parties to this agreement an estimate of the amount due to the party of the second part for such work, according to the contracts entered into for the completion of the same. And it is further agreed that, should said estimate exceed the estimate

made by the special engineer of this board in the month of June, 1872, the party of the first part shall pay to said Partee and Stansell, party of the second part, the amount of such excess, and all the expenses of this measurement shall be borne by the board. But if the said estimate shall be less than the estimate of the said special engineer in June, 1872, then said party of the second part shall refund to said party of the first part the amount of such deficit, and pay all the expenses of this measurement." "It is further agreed that the party of the second part shall designate an engineer, which engineer shall suggest a third engineer, who shall be acceptable to the chief engineer of this board, and the said engineers so selected shall, with the chief engineer of this board, constitute a board of arbitrament for the adjustment of all questions of difference, the agreement of any two to be final. In the adjustment of questions pertaining to this measurement, the contractors shall have the privilege of introducing all proper evidence, oral or written, of notes, profiles, or other evidence; which testimony may be rebutted by the president of the board. This testimony being allowed to give the engineer information as to the fills or any other fact not perceptible to the engineers; to which testimony the engineers shall give such weight as they may think the same entitled to receive."

On the 12th of December, 1872, the parties signed a further agreement, stating that Mickle on the part of the levee board, George B. Fleece on the part of the plaintiffs, and R. L. Cobb, designated by Fleece with the consent of Mickle, constitute the board of arbitrament referred to in the agreement of Oct. 4, 1872; and establishing rules to govern that board in adjusting all matters brought before them, one of which rules was as follows: "Inasmuch as by the terms of said agreement the first party can only rebut the testimony introduced by the second party, it is agreed that the said second party shall, before further proceeding with the measurement, notify the first party in writing what points they expect to prove and the character of the evidence proposed, so that the said first party may be ready with the rebutting evidence."

On the same day, the plaintiffs gave notice in writing to the levee board that they would introduce proof before the board

of arbitration upon twelve different matters, including these three: "4th. The clause in the contract touching shrinkage, its meaning, and the adjudication of that question by the chief engineer of your board prior to and about simultaneous with the signing of the original contract." "9th. The damage done to us by the repeated refinishing of work under orders of your engineers." "11th. The delay of a final estimate, of various payments, and the damage to us arising therefrom."

On the next day, Mickle wrote a letter to Fleece, beginning thus: "In arranging the preliminaries to our organization as a board of arbitrament on the question of difference between the levee board of this district and Messrs. Partee and Stansell, I am notified that claims will be made and testimony offered clearly in contravention of the terms of the agreement from which our authority is to emanate, and as such proceeding would render our decision unsatisfactory and void, I cannot proceed further in the matter unless it is distinctly understood that the following provisions of the contracts and agreements entered into by the said parties, and on which our authority is understood to be based, shall be strictly observed." He proceeded to point out that the agreement of Oct. 4, 1872, did not permit any evidence to be introduced except in relation to the measurement of levees; and also stated the substance of the following provisions in the specifications annexed to the original contract: "Nothing will be paid for settling, but its cost will be included in the price paid for the levee, as estimated up to true grade. If the levee be found deficient in height, slopes, or base, or not to have the full settling on top and slopes, the contractor must go over it immediately and correct all deficiencies, when the engineer in charge will run a test-level over it to see that all is right." "All damage or injury to the work, resulting from flood or other cause, shall be sustained by the contractor until finished and received by the chief engineer; and no work shall be received until fully and completely finished in accordance with the above specifications."

To this letter Fleece immediately replied, contending that the board of arbitrament was already organized, and declining to discuss in advance any point likely to come before it. A

correspondence of six weeks ensued between Mickle and Fleece, in the course of which, after much dispute upon the question whether Cobb had been in due form accepted as one of the arbitrators, Fleece designated him anew in writing. Mickle declined to accept him, Fleece offered Mickle the choice of either of several other persons in Cobb's stead, and the correspondence ended in Mickle's insisting on the objections made in his letter of Dec. 13, 1872, and in the plaintiffs' abandoning the arbitration.

The court below was of opinion that the receipt in full of the 18th of June had been wholly set aside by the agreement of the 4th of October, and that the arbitration under this agreement had failed by the fault of the defendant; and entered a decree for the plaintiffs according to the final estimate of Kirkpatrick.

We cannot concur either in the reasons or in the result. In our view, the effect of the agreement of the 4th of October, 1872, was to recognize that there had been a settlement in full between the parties, of the amount due from the levee board to the plaintiffs, which bound both parties as an accord and satisfaction; and to agree to open that settlement to this extent only: Three engineers, to be appointed as therein provided, should measure the work done by the plantiffs. If their estimate should differ from the estimate of Mickle, according to which the settlement had been made, the difference should be paid by the board or refunded by the plaintiffs. The stipulation that the three engineers should "constitute a board of arbitrament for the adjustment of all questions of difference" was necessarily limited to questions of difference in relation to the subject to be referred to them. If such measurement by the arbitrators should not modify the estimate of work done, or if the arbitration should fail without fault of the levee board, the settlement stood.

The evidence, the substance of which is above recited, satisfies us that the arbitration did not fail by any fault on the part of the levee board, but by reason of the persistent attempts of the plaintiffs, against the steady opposition of the levee board, to introduce evidence before the board of arbitrament, not limited to the question of measurement, which was the

only matter to be submitted to this board, but touching other matters which had been concluded by the contracts executed and the settlement made between the parties.

The result is, that the decree below must be reversed, and the case remanded with directions to enter a decree

Dismissing the bill.

HODGES v. EASTON.

Certain questions, covering only a part of the material issues of fact, were propounded to the jury, who returned them with the answers thereto, as a special verdict. The judgment against the defendant recites that it was rendered "upon the special verdict of the jury, and facts conceded or not disputed upon the trial." The record does not disclose the evidence, and no general verdict was rendered. *Held*, that the judgment, not being sustained by the special verdict, must be reversed and a new trial ordered.

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

The facts are stated in the opinion of the court.

Mr. Luther S. Dixon for the plaintiffs in error.

Mr. Henry M. Finch for the defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was a suit by Easton and Bigelow against Hodges and Smith to recover damages for the alleged conversion of certain wheat, stored, in separate bins, in the warehouse of William H. Valleau, in Decorah, Iowa.

The complaint contains two counts. The first proceeds upon the ground that the wheat, when so converted, was the property of the plaintiffs. The second avers that, during the winter and spring of 1876, the First National Bank of Decorah, Iowa, discounted notes and drafts for, and loaned money to, said Valleau, upon the security of a large quantity of wheat delivered to the bank, of which he, Valleau, was then the owner and had the possession, and which was stored, in separate bins, in a warehouse in Decorah, Iowa; that thereby the wheat became the property of the bank; that subse-

quently, in April and May, 1876, Valleau, without repaying such loans and discounts, and without the knowledge and consent of the bank, wrongfully and tortiously took and removed the wheat from the warehouse and from the possession of the bank, shipped it to the defendants, at Milwaukee, by whom it was wrongfully and tortiously received and sold, and the proceeds converted to their own use; that no part of the moneys, so loaned and advanced, has ever been paid by Valleau, or by any one for him; that, prior to this suit, the bank sold, assigned, and transferred its right, title, and interest in the wheat, and all right of action to recover the same or its value, of which assignment the defendants had notice before this action; and lastly, that, prior to the commencement of the action, the bank and the plaintiffs had each demanded from the defendants the delivery of the wheat, but they had refused to deliver it, or any part thereof, either to the bank or to plaintiffs.

The answer denies, generally, "each and every allegation, statement, matter, fact, and thing in the complaint, set forth, alleged, and contained."

The record states that the jury, impanelled and sworn to try the issues, "rendered a special verdict in answer to the questions propounded by the court." The questions so propounded, with the answers thereto, were made the special verdict. The jury having been discharged, the plaintiffs, by counsel, moved for judgment upon the special verdict for the value of the wheat wrongfully converted by defendants, or for such damages as the court should adjudge, and for such other and further relief as might be granted in the premises. On a later day the defendants moved to set aside the special verdict and grant a new trial, upon the ground, among others, that the special verdict "does not contain findings upon the material issues in the case."

These motions were heard together, and it was ordered by the court "that the motion of defendants for a new trial be, and is hereby, overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury, and *facts conceded or not disputed upon the trial*, be, and is hereby, granted." The damages were assessed by the court at $12,554.89, for

which sum judgment was entered against the defendants. From that judgment this writ of error is prosecuted.

Under the Code of Practice of Wisconsin the answer in this case puts in issue every material allegation in the complaint. 2 Taylor's Stat. Wis., 1871, p. 1439. And since, by sect. 914 of the Revised Statutes, the practice, pleading, forms, and modes of proceeding, in civil causes, other than equity and admiralty causes, in the Circuit and District Courts of the United States, must conform, as near as may be, to the practice, pleadings, forms, and modes of proceeding existing at the time in like causes in the courts of record in the State within which such Circuit or District Courts are held, it was, as conceded in argument here, incumbent upon the plaintiff to prove at the trial, among other things, that the bank had sold, assigned, and transferred all title and interest in the wheat, and thereby, also, a right to recover it or its value. No bill of exceptions was taken showing the evidence introduced by either party, nor was there a general verdict. Having regard alone to the questions and answers propounded to the jury, it is clear that the plaintiffs did not prove their case, as made by the first count, which proceeded upon the ground that the wheat was their property. It is equally clear that there was no finding upon the issue, raised by the second count, as to the alleged assignment by the bank to them. No question was propounded upon that subject, nor was that point covered by the written stipulation as to the amount of freight and the value of the wheat. We infer from the oral statement of counsel for the plaintiffs, that, at the trial below, the assignment by the bank was conceded, and that the final judgment was based, in part, upon that concession. But in that representation, counsel who appeared in this court for the defendants — but who did not participate in the trial — did not feel authorized to concur. Looking, therefore, as we must, to the case as disclosed by the record, we are constrained to hold that the answers to the special questions propounded by the court, being silent as to the assignment by the bank, did not furnish a basis for judgment in favor of the plaintiffs. Without proof upon that point, they were not entitled to judgment upon the second count. In *Patterson* v. *United States*, 2 Wheat. 221, it was

said, that if it appeared to the court of original jurisdiction, or to the appellate court, that the verdict was confined to a part only of the matter in issue, no judgment could be rendered upon it. In *Barnes* v. *Williams*, 11 Wheat. 415, the claim of the plaintiff being founded upon a bequest of certain slaves, it was essential to a recovery, at law, that the assent of the executor to the legacy should be proved. This court, speaking by Mr. Chief Justice Marshall, said: "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff."

But it is suggested that the final judgment, upon its face, shows that it was not based exclusively on answers to the special questions, and the stipulation by the parties as to the amount of freight and value of wheat; but also "upon facts conceded or not disputed upon the trial." Although this court is not informed by the record as to what those conceded and undisputed facts are, it is insisted that we should presume, in support of the judgment, that they were, in connection with the facts specially found, sufficient to justify the action of the court below. This position, it is contended, is sustained by numerous decisions of the Supreme Court of Wisconsin, upon the subject of general and special verdicts, as defined and regulated by the laws of that State in force when this action was tried.

It is not necessary, in this opinion, to enter upon an examination of those decisions, or to consider how far the local law controls in determining either the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no material facts consid-

ered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the State court, it should be presumed that the "facts conceded or not disputed at the trial" were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury. by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, "the trial of issues of fact" — that is, of all the material issues of fact — "in the Circuit Courts shall be by jury," unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. Rev. Stat., sects. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed.

One other point discussed by counsel for defendants in error must be noticed. He insisted that the order of reversal, if one

be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions. In support of this position, we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact; and it is

So ordered.

WALKER'S EXECUTORS *v.* UNITED STATES.

On the 12th of April, 1865, A., a resident of Memphis, purchased, in Mobile, from B., a resident of that city, — both cities being then in the occupancy of the national forces, — cotton, which was then in the military lines of the insurgent forces, in Alabama and Mississippi, the inhabitants whereof had been declared to be in insurrection. Between June 30 and December 1 of that year a portion of the cotton — while it was in the hands of the planters from whom it had been originally purchased by the Confederate government, the agent of which had sold it, in Mobile, to B. on the 5th of April — was seized by treasury agents of the United States and sold. The proceeds were paid into the treasury, and A. sued to recover them. *Held*, that his purchase being in violation of law, no right arose therefrom which can be enforced against the United States.

APPEAL from the Court of Claims.

In this action, brought under the act of March 12, 1863, c. 120, commonly known as the Captured and Abandoned Property Act, the appellants seek to recover from the United States the net proceeds (alleged to be at least $600,000) of certain cotton, seized and sold by the agents of the Treasury Department in the year 1865. The petition having been dismissed by the Court of Claims, this appeal was taken.

The facts as found by that court are substantially these: Prior to the year 1865, John Scott, the chief agent for produce-loan for the Confederate government in Alabama and East Mississippi, purchased there at different times, and of different planters 3,405 bales of cotton, taking from the planter, on each purchase, a receipt and agreement in the following form: —

"STATE OF MISSISSIPPI,

"*County of* , *town or post-office* :

"NOVEMBER 27, 1862.

"The undersigned, having sold to the Confederate States of America, and received the value of the same in bonds, the receipt whereof is hereby acknowledged, one hundred and thirty-five bales of cotton, marked, numbered, and classed as in the margin, which is now deposited at plantation, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same, at his own expense, at , in the State of Mississippi, to the order of the secretary of the treasury, or his agents or their assigns."

In each instance he delivered to the planter a certificate in the following form: —

"ABERDEEN, Nov. 27, 1862.

"The undersigned, as agent of the government, certifies that the within cotton has been examined by him or by a competent judge, and that its character will rank, according to the commercial scale, as middling; and also, that the weights and marks are as described — the cotton being in good merchantable order, marked with the name of the planter, and on one end the initials C. S. A., and safely stored in a covered building.

"The undersigned certifies that the price agreed upon is a fair market price at the present time.

"*Ag't.*"

There were thirty-seven such certificates, upon which appeared the number, weight, and marks of the bales purchased.

The Confederate government, being in need of large sums of money for its military department, and in order to pay debts incurred and to be incurred, authorized and directed Scott to sell this cotton, and all other cotton purchased by him in like manner. Accordingly, on the 6th of April, 1865, at Mobile, Ala., the place of his residence and business, he,

as such Confederate produce-loan agent, sold to one O'Grady, a citizen and resident of the same place, the 3,405 bales of cotton, at the price of one dollar per pound in Confederate States currency, transferring to him the planter's receipts, as above described, and attaching to each a certificate in the following form: —

"CONFEDERATE STATES OF AMERICA,
"TREASURY DEPARTMENT, April 6, 1865.

"This is to certify that the within and above-described cotton has been sold to D. O'Grady, bales, and delivery is hereby ordered to be made to him, or his order, with license to export the same from the Confederate States to any neutral port, on complying with the requisitions of the law.

"Given under my hand and the seal of the Treasury Department, on the year and day above mentioned.

"JOHN SCOTT,
"*Chief Ag't Produce Loan for Ala. and East Miss.*
"P'r J. G. ULRICK, *Ag't.*"

On the 6th of March, 1865, President Lincoln gave to Samuel P. Walker (whose executors are claimants in this case) an order, of which the following is a copy: —

"EXECUTIVE MANSION, March 6, 1865.

"Whereas Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States near Grenada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrectionary States, all which he proposes to sell and deliver to agents authorized to purchase for the United States the products of the insurrectionary States, under the act of Congress of July 2, 1864, and the regulations of the Secretary of the Treasury, it is ordered that all such products which a purchasing agent of the government has agreed to purchase, and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing agent, authorized by Regulations VIII., Form No. 1, appended to regulations attached hereto by such agent, and being transported, or in store awaiting transportation, for fulfilment of stipulations and in pursuance of the regulations of the Secretary of the Treasury, shall be free from seizure, detention, or forfeiture to the United States; and officers of the army and navy and civil officers of the government

will observe this order, and will give to the said Walker and his agents, means of transportation, and to said products, free and unmolested passage through the lines (other than blockade lines), and safe conduct within the lines while going for or returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid.

"ABRAHAM LINCOLN."

On the 12th of April, 1865, the city of Mobile, which had been continuously invested from 1862, was captured by the Union forces. On that day, at Mobile, Walker, who was a resident and citizen of Memphis, Tenn., purchased from O'Grady the 3,405 bales of cotton referred to (and which was still in the hands of the planters under their arrangement with Scott), taking from him a bill of sale, which was attached to a list specifying the number of bales, weight, and the names of the counties where the cotton was originally purchased from planters. The bill of sale was as follows: —

"For value received of Sam'l P. Walker, I hereby transfer, sell, and assign the above lots of cotton, amounting to 3,405 bales, without recourse upon me, and the holders thereof will please deliver the same to the said Walker or his authorized agent.

"April 12, 1865. D. O'GRADY."

At the same time O'Grady delivered and indorsed to Walker the planters' certificates, which the former had received from Scott. The cotton remained on the plantations, and the only delivery to Scott, O'Grady, or Walker was by the planters' certificates, and their transfer by indorsement, as hereinbefore stated.

On the 5th of May, 1865, by the surrender of General Taylor, commanding the Confederate forces in Alabama and Mississippi, the counties in which this cotton was held passed under the military control of Gen. E. R. S. Canby, commanding the Union forces at Mobile. The United States military authorities seized all the lines of railroads and steamboats in that section, and on May 10, 1865, the following order was issued by General Canby: —

"HEADQUARTERS ARMY AND DIVISION OF WEST MISSISSIPPI,
"MOBILE, ALABAMA, May 10, 1865.

"(General Field Orders, No. 39.)

"The cotton belonging to the Confederate government in East Louisiana, Mississippi, Alabama, and West Florida having been surrendered to the government of the United States, its sale to private individuals, or its transfer to any persons except the officers or agent of that government, is prohibited. This order applies to all cotton procured by subscriptions to the cotton loan, by the sale of Confederate bonds or notes, by the tax in kind, or by any other process by which the title was vested in the Confederate government, whether in the possession of the agents of that government or still in the hands of the producers; and all persons in whose charge it may be will be held accountable for its delivery to the agents of the United States. Commanders of districts will be furnished with a transcript from the records of the cotton agents showing the quantity and location of the cotton within the limits of their commands, and will give the agents of the Treasury Department, appointed to receive it, such facilities as may be necessary to enable them to secure it.

"Any sale of this property in violation of this order will be treated as the embezzlement of public property.

"By order of Major-General E. R. S. Canby."

On the 1st of June, 1865, F. W. Kellogg, agent of the United States for the purchase of cotton in insurrectionary States, entered into an agreement with Walker, of which the following is a copy: —

"MOBILE, ALABAMA, June 1, 1865.

"I, Francis W. Kellogg, agent for the purchase of cotton of insurrectionary States, on behalf of the government of the United States, at Mobile, Alabama, do hereby certify that I have agreed to purchase from Samuel P. Walker, Esq., of Memphis, Tennessee, thirty-five hundred bales of cotton, which, it is represented, are or will be stored at Green, Pickens, & Marengo Co.'s, in the State of Alabama, and with planters in the counties of Lauderdale, Noxubee, Lowndes, and Monroe, in the State of Mississippi, and which he stipulates shall be delivered to me, unless prevented from so doing by the authority of the United States.

"I therefore request safe conduct for the said Samuel P. Walker and his means of transportation, and said cotton from where it is

stored to Mobile, where the cotton so transported is to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

"F. W. KELLOGG,
"*United States Purchasing Agent.*

"NOTICE.— Cotton arriving at Mobile under this permit must be promptly reported to the United States purchasing agent."

Between June 30 and Dec. 1, 1865, 1,922¾ bales of this cotton (on plantations in Lowndes and other counties in Mississippi) were, by treasury agents appointed by the Secretary of the Treasury to collect cotton which had been sold to the Confederate States, seized and sent to New York. They were sold there, and the net proceeds covered into the treasury of the United States.

The territory embracing the counties in Mississippi where the cotton was stored, and where it was when seized by the treasury agents, was occupied by the Confederates on and prior to April 12, 1865, while Mobile and Memphis, at that date, and until the close of the war, were occupied by the Union forces.

The negotiations for the sale of this cotton to O'Grady took place in the early part of the year 1865. The final conveyance was delayed until April 6, 1865, and finally completed on that day, by reason of the ill-health of Scott, and for other reasons.

In making sales of cotton in that section of the country, during Confederate control, the custom was to transfer the planters' certificates, as if negotiable. That was the usual, and generally the only, mode of delivery made or required.

The Court of Claims found, as conclusions of law, that the order of President Lincoln of March 6, 1865, was not a license or permit which authorized Walker to purchase the cotton in question in Mobile at the time and under the circumstances set forth in the findings; that Walker acquired no title as against the United States by his alleged purchase from O'Grady; and that the claimants consequently had no cause of action against the government.

Mr. Warner M. Bateman, with whom were *Mr. Quinton Corwine* and *Mr. John Pool*, for the appellants.

The Solicitor-General for the United States.

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

By the proclamation of the President of the United States, issued, on the sixteenth day of August, 1861, in pursuance of authority given by the act of July 13, 1861, c. 3, the inhabitants of Tennessee, Alabama, Mississippi, and other States, — except that part of Virginia west of the Alleghany Mountains, and of such other parts of that and the other States named as might maintain a loyal adhesion to the Union, or might, from time to time, be occupied and controlled by the Union forces, — were declared to be in a state of insurrection against the United States; and "all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States," was made unlawful until the insurrection ceased or was suppressed. The fifth section of the act provides that "The President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

By the proclamation of April 2, 1863, the territorial exceptions made in the former proclamation were revoked, except as to West Virginia and the ports of New Orleans, Key West, Port Royal, and Beaufort.

By the fourth section of the act of July 2, 1864, c. 225, the prohibitions and provisions of the said act of July 13, 1861, and of the acts amendatory thereof or supplementary thereto, were made to apply "to all commercial intercourse by and between persons residing or being within districts within the present or future lines of national military occupation, in the States or parts of States declared in insurrection, whether with

each other or with persons residing or being within districts declared in insurrection and not within those lines."

The eighth section of the same act makes it lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, at such places as shall be designated by him. And the ninth section provides: —

"That so much of section five of the act of thirteenth of July, eighteen hundred and sixty-one, aforesaid, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section, the inhabitants of which are declared in a state of insurrection, is hereby repealed, except so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, except so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States any products which they shall have produced with their own labor or the labor of freedmen or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares, or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places, and to such monthly amounts, as shall have been previously agreed upon in writing by the commanding general of the department in which such places are situated, and an officer designated by the Secretary of the Treasury for that purpose."

From these acts, — in force on the 12th of April, 1865, when Walker purchased from O'Grady, — it is quite clear that persons residing or being in Memphis, then occupied by the national forces, were forbidden, unless authorized by competent authority, to have commercial intercourse with persons residing or being in Mobile, which was at that time likewise occupied by the national forces; this, because both cities were within States the inhabitants whereof were declared to be in insurrection, and neither within the territorial exceptions made in the proclamation of President Lincoln.

But it is contended that the order of President Lincoln, given on the 6th of March, 1865, fully authorized Walker to proceed from Memphis, his place of residence, to Mobile, after that city had surrendered to the Union forces, and there contract with O'Grady for the purchase of the cotton in question, then but recently the property of the Confederate States (at least as between them and the original owners), and within the district actually occupied and controlled by the insurgent forces. A portion of the argument of counsel is addressed to the question whether, notwithstanding the repeal of the fifth section of the said act of July 13, 1861, authorizing the President, in his discretion, to license or permit commercial relations in any State or section in insurrection, he could not, in virtue of his power as commander-in-chief of the army, license trade with insurgents within the lines of Confederate military occupancy. If this question has not been distinctly concluded by the former decisions of this court, we deem it unnecessary now to consider or determine it. For, plainly, the order of March 6, 1865, was not a license to trade or have commercial intercourse with the enemy, without limit as to amount, or without restriction as to persons and territory. The order proceeds solely upon the ground that Walker *then* owned products of the insurrectionary States, near Grenada and Canton in Mississippi, and Montgomery and Selma in Alabama, and that he *then* had arrangements with parties in the vicinity of those places for other products of the insurrectionary States. It was in reference to *such* products — those he then owned, and those as to which he then had arrangements with other parties — that the President ordered that they should be free from seizure, detention, or forfeiture to the United States. Now, the finding of the facts, upon which alone this court can act, shows that Walker did not, on the 6th of March, 1865, own any part of the cotton in question. It was then in the possession of the planters, who held it for the Confederate government; and if it ever was, as against the United States, — after its sale to the Confederate government, to be used in aid of the rebellion, — the property of O'Grady, from whom Walker purchased, it did not become so until April 5, 1865. Nor does it appear that this cotton constituted, at any time, a part of the cotton with reference to which Walker had

"arrangements" at the time President Lincoln gave the order of March 6, 1865. It is true that the court below finds that "the negotiations for the sale of the cotton to O'Grady took place in the early part of the year 1865, and the final conveyance delayed until April 6, 1865, and finally completed on that day, by reason of the ill-health of Scott (the Confederate produce-loan agent), and for other reasons." But the negotiations here referred to were, manifestly, not the arrangements which Walker claimed to have had, on March 6, 1865, for products of the insurrectionary districts. There is nothing to show that he ever had any communication upon the subject of this cotton with the Confederate produce-loan agent, or with O'Grady, until after the capture of Mobile. The negotiations, which were not completed until April 6, 1865, by reason of Scott's ill-health, and "for other reasons," were evidently those by which Scott proposed to sell *to* O'Grady, and with which Walker, it must be assumed, had no connection whatever. The case, as it stands, seems to be one in which the claimants seek to bring within the operation of the order of March 6, 1865, a transaction in cotton not covered, nor intended to be covered, by it. The contract, upon the finding of facts, must be regarded as one made between Walker and O'Grady, in palpable violation of the laws of the United States forbidding commercial intercourse between persons respectively residing in places occupied by the national forces, within districts the inhabitants whereof were declared to be in insurrection. It is, therefore, according to the settled doctrines of this court, a contract from which could arise, in favor of Walker, no right to the cotton, as against the United States, which could be enforced in the courts of the Union.

Without, therefore, giving other reasons, quite apparent upon the record, and which would make it our duty to sustain the judgment of the Court of Claims, we content ourselves with affirming it upon the grounds indicated.

Judgment affirmed.

MOFFITT *v.* ROGERS.

Reissued letters-patent No. 6162, granted to John R. Moffitt for an "improvement in the manufacture of heel stiffeners for boots and shoes," are void, inasmuch as they cover a contrivance essentially different from that described in the specification of the original letters.

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

This is a suit in equity brought by John R. Moffitt against Rogers and Moore for their alleged infringement of reissued letters-patent No. 6162, granted, Dec. 8, 1874, to him for an improvement in the manufacture of heel stiffeners for boots and shoes. The original letters No. 127,090 bear date May 21, 1872.

Heel stiffeners, or counters, as they are sometimes called, were formerly made by hand, the leather while wet upon the last being shaped by the blows of the shoemaker's hammer. Previously, however, to the date of the complainant's original letters-patent, ready-made moulded counters were manufactured by placing the counter-blank across the opening of the mould and forcing it into the mould by a plunger or former, or by placing the blank upon the back of the stationary former, and forcing it around the former by the pressure of the mould. Counters had also been shaped on machines by which a rolling pressure was applied. As early as 1853 machines known as the Nichols were employed. This machine had a rotating "former" circular in cross-section, which was applied by pressure to another circular roller, conforming to this "former" longitudinally, the object being to set leather into the proper shape either for soles or heel stiffeners.

In the specification of his original patent, Moffitt declared: "In 'moulding' to shape ready-made counters or stiffeners for heels of boots and shoes made of various materials, but usually of waste bits of leather, a difficulty exists, by reason of the peculiar shape required in getting an equal or sufficient pressure upon all parts of such counter so as to get uniform hardness throughout; and also a further difficulty in getting a true and proper permanent form throughout all parts, because the mate-

rial will differ in character in different parts of the same counter, some of it, especially in leather, being of a more spongy nature than other parts. This difference or lack of homogeneity prevents a uniform solidity, and precludes the true preservation of the shape which a mould may impart.

"The object of my invention is not only to make more perfect ready-made shaped counters than can be made by any 'moulding' process, but also to make a new article of manufacture, viz. a 'rolled' counter, prepared, solidified, and uniformly hardened and set to shape by a rolling pressure, such rolling action producing a new as well as better article, and admitting of producing the same from material hitherto found too intractable, such as leather board, sheet metal, &c. Instead, therefore, of shaping the stiffener in a mould, I employ no mould of any kind, but use a moving former, A, devised by me, of a shape adapted to give the desired shape to the counters, and set eccentrically on a shaft, B, the shaft being arranged to have a continuous or reciprocating rotary movement, either by hand or by power as desired. Beneath this 'former' I place a roller, C, having a profile as shown, the converse of and conforming to that of the 'former,' the shaft of the roller having its bearings in the main frame, D. The shaft of the 'former' has its bearings in a swing-frame, E. F is a treadle-strap, whereby the swing-frame may be pulled down to give any required degree of pressure, and which also permits the eccentric 'former' to rise and fall, as in its movements it rides and rolls over the surface of the counter, the counter-piece being placed centrally upon the 'former,' and being rubbed and rolled as well as squeezed between them while being brought into shape. . . .

"The 'former,' as will be seen, projects further from its axis on one side than on the other, so as to conform nearly to the general form of the curves of the inside of a shaped counter. This gives a rolling action in addition to the squeezing over the whole body of the counter."

The cross-section of the "former," as shown by the drawings and model, was elongated, with one or both ends semicircular.

The specification proceeds: "The end *g* of the 'former' need

not be a plane, as shown in Fig. 1, but instead may be rounded at its opposite end, as shown in Fig. 3, so that it may be continuously revolved and in either direction. In such case I prefer to place the shaft in its centre or equally distant from both ends.

"Instead of a single roll a pair of auxiliary rolls may be used, as shown in Fig. 4, one on each side of the single one."

The claims are thus stated: "I claim —

"1. The described apparatus for rolling to shape heel stiffeners or counters.

"2. I also claim as a new article of manufacture heel stiffeners or counters shaped and compacted by a rolling action, as described.

"3. I also claim the process herein described of shaping and setting to shape heel stiffeners or counters by rolling, as distinguished from moulding."

The specification of the reissued letters is substantially the same as that of the original, with the following exceptions: —

For the term "rollers" in the original specification the words "supports or rollers" are substituted in the reissued specification, and the word "mechanism" in the first claim of the reissue.

In the reissued specification the requirement that the "former" should be set eccentrically on a shaft, and the statement that the former projects further from the axis on one side than the other, are omitted.

The claims of the reissued patent are as follows: —

1. In a machine for making counters or stiffeners for boots and shoes, a turning or revolving former, in combination with mechanism for holding and shaping the blank over it.

2. The revolving or turning counter-former A, in combination with a supporting roll or rolls for rolling, or for rolling and flanging blank stock into heel stiffeners, substantially as shown and described.

3. The process described of forming the heel-seat of a counter by means of a former having a motion about a centre, and which gives to the heel-seat a drawing or rubbing action against a flange or bearing surface, in addition to the rolling action.

The infringement charged against the defendants was in their use of the device described in reissued letters-patent No. 5896, granted to Louis Coté, June 2, 1874, for an "improvement in machines for forming boot and shoe stiffeners."

The specification of this patent declares: "The invention or machine consists of a rotary head of a spherical, spheroidal, or sphero-cylindrical shape, fixed upon and concentrically with a rotary shaft, in combination with a stationary mould correspondingly or approximately so concaved, whereby, by the revolution of the said rotary head within the mould, a piece of leather of suitable form introduced between them may be drawn into and through the concavity of the mould, and receive a curved form lengthwise and withdrawn, and thereby be adapted for use as a stiffening for a boot or shoe."

A clear idea of the contrivance covered by the Coté patent may be derived from the drawings which illustrate the specification.

On final hearing the court dismissed the bill, and the complainant appealed.

Mr. George Harding and *Mr. William A. Macleod* for the appellant.

Mr. Chauncey Smith and *Mr. Thomas L. Wakefield* for the appellees.

MR. JUSTICE WOODS delivered the opinion of the court, and, after stating the case, proceeded as follows: —

The evidence leaves no doubt in our minds that the first claim of Moffitt's reissued patent is broader than any claim of his original patent. The original patent covered an elongated heel-shaped former, set eccentrically upon its shaft. This was an essential part of the invention described in the original patent. The specification declares: "I use a 'former,' A, of a shape adapted to give the desired shape to the counter, and set eccentrically on the shaft B." The "former" shown by the drawings is elongated and heel-shaped in cross-section. The specification further declares: "The 'former,' as will be seen, projects further from its axis on one side than on the other, so as to conform nearly to the general form of the curves of the inside of the shaped counter. This gives a rolling

action in addition to the squeezing over the whole body of the counter."

The specification of the reissued patent omits both of these statements, and thus allows a "former" to be made, if desired, with a circular cross-section, and to be set concentrically on its shaft. It is, therefore, clear that it covers a contrivance essentially different from that described in the original specification and claim.

The first claim of Moffitt's reissued patent differs materially from the specification and first claim of the original patent in another particular. The original specification thus describes the means by which the blank stock is pressed against the "former:" "Beneath the former I place a roller, C, having a profile, as shown, the converse of and conforming to that of the former, the shaft of the roller having its bearings in the main frame, D." It is also stated that "instead of a single roll a pair of auxiliary rolls may be used, as in Fig. 4, one on each side of the single one." In the first claim of the reissued patent the device of one or three rolls is expanded to cover "any mechanism for holding and shaping the blank over" the "former."

It, therefore, appears that the specification and first claim of the original patent were intended to cover an elongated heel-shaped former, eccentrically set upon its shaft, against which the material of which the counter was to be made was pressed by a revolving roller or rollers, and that the first claim of the reissued patent was expanded so that it might cover a 'former' circular in cross-section, concentrically set, and revolving in the semi-circular groove of a stationary mould, by which the material was pressed against the former.

The difference between the device covered by the specification and first claim of the original patent, and the device which might be embraced by the specification and first claim of the reissued patent, is essential and palpable.

If the evidence proves any infringement, it is of the first claim only of the complainant's reissued letters-patent by the use of the machine covered by the patent granted to Louis Coté June 2, 1874.

The purpose of the complainant to cover by his reissued

patent the invention described in the Coté patent is clear and is not denied. It is evident that the Coté machine does not infringe the original patent of Moffitt. The "former" described in the original specification of Moffitt being elongated in cross-section and eccentrically set upon its shaft, could not have either a rotating or reciprocating movement in the semi-circular grooved mould of the Coté patent, and by no stretch of construction could the stationary grooved mould of the latter patent be considered the equivalent of the cylindrical revolving rollers of Moffitt's original patent.

The specification and first claim of the reissued patent are a plain attempt to include a device which was not and could not be fairly covered by the original patent. That claim is, therefore, for that reason void. *Gill* v. *Wells*, 22 Wall. 1; *The Wood Paper Patent*, 23 id. 566; *Powder Company* v. *Powder Works*, 98 U. S. 126; *Ball* v. *Langles*, 102 id. 128; *Miller* v. *Brass Company*, 104 id. 350; *James* v. *Campbell*, id. 356; *Heald* v. *Rice*, id. 737; *Bantz* v. *Frantz*, 105 id. 160; *Johnson* v. *Railroad Company*, id. 539. And the evidence shows no infringement of any other claim of the reissued patent.

The decree of the Circuit Court dismissing the bill was therefore right, and must be

Affirmed.

SCHOOL DISTRICT OF ACKLEY *v.* HALL.

A writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors, pursuant to the requirements of sect. 997 Rev. Stat.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the District of Iowa, with which is united a motion to affirm.

Mr. Walter H. Smith and *Mr. Alexander T. Britton* in support of the motions.

Mr. Galusha Parsons, contra.

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

A failure to annex to or return with a writ of error an assignment of errors, as required by sect. 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, Rule 21, it will ordinarily be enough.

There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm. *Whitney* v. *Cook*, 99 U. S. 607.

Motions denied.

GRANT *v.* PHŒNIX INSURANCE COMPANY.

A decree is not final within the meaning of the act conferring appellate jurisdiction, unless upon its affirmance nothing remains but to execute it. The court therefore dismisses an appeal by the defendant in a foreclosure suit from the decree therein rendered, which neither finds the amount due nor orders the sale of the mortgaged property, although it overrules his defence, declares the complainant to be holder of the mortgage, and, in order to ascertain the amount due him and other lien creditors, and for taxes, refers the case to a master, and appoints a receiver to take charge of the property.

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

This is an appeal from the following decree in a suit for the foreclosure of certain deeds of trust in the nature of mortgages to secure the payment of money : —

"The cause came on to be heard upon the pleadings and proofs therein, and having been submitted by the counsel of the respective parties and duly considered by the court, and it appearing to the court that said defendant, Albert Grant, is not entitled to any relief under his cross-bill in this cause ; that the plaintiff is the holder and owner of the several obligations of said Grant, secured by the deeds of trust on the real estate prayed in the original bill of complaint herein to be sold for the payment of the indebtedness thereon, and mentioned

and set forth in the 3d, 4th, 5th, 6th, 7th, and 8th paragraphs of said bill; that said Grant has made default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money, with long arrearages of interest; that said Grant has not paid taxes on said real estate for a number of years, and the same are in arrears for upwards of twenty thousand dollars; that said indebtedness of said defendant Grant to the plaintiff largely exceeds the value of said real estate, and that the plaintiff has no personal security for its said debt; it is this second day of March, A. D. 1882, ordered, adjudged, and decreed that this cause be, and the same hereby is, referred to the auditor of the court to state the account between the plaintiff and the defendant Albert Grant; the amount due under said several deeds of trust on said real estate prayed to be sold in said bill; the amounts due said judgment and mechanic's lien creditors referred to in said bill; whether the same are liens upon any of said real estate; the relative priorities of the claims of said creditors and the plaintiff, and the value of the said real estate, — all from the proofs in this cause, except as to said mechanic's lien, and report the same to this court. And said auditor shall further ascertain and report to this court the amount due for taxes in arrears on said real estate, and whether the same or any part thereof has been sold for taxes, and if so, when, for what taxes, for what amount, and to whom."

To this was added an order appointing a receiver to take possession of the property, make leases, &c.

A motion is now made to dismiss, because the decree appealed from is not final.

Mr. Richard T. Merrick and *Mr. William F. Mattingly* in support of the motion.

Mr. William A. Meloy, *contra*.

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

The rule is well settled that a decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that if there should

be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered. This subject was considered at the present term in *Bostwick* v. *Brinkerhoff*, *ante*, p. 3, where a large number of cases are cited. It has also been many times decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal. *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Bronson* v. *Railroad Company*, 2 Black, 524; *Green* v. *Fisk*, 103 U. S. 518. But in *Railroad Company* v. *Swasey*, 23 Wall. 405, it was held that "to justify such a sale, without consent, the amount due upon the debt must be determined. . . . Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged." In this the court but followed the principle acted on in *Barnard* v. *Gibson*, 7 How. 650; *Crawford* v. *Points*, 13 id. 11; *Humiston* v. *Stainthorp*, 2 Wall. 106; and many other cases.

The present decree is not final according to this rule. It does not order a sale of the property. It overrules the defence of the appellant as set forth in his cross-bill, and declares that the appellee is the holder and owner of the debt secured by the deeds of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens, and the claims for taxes. It is true that the court finds the amount due the appellee largely exceeds the value of the property, but this is only as a foundation for the order appointing the receiver. If in point of fact it is not true, the finding will not conclude the parties in the final closing up of the suit. The order for the delivery of the property is only in aid of the foreclosure proceedings, and to subject the income, pending the suit, to the payment of any sum that may in the end be found to be due. If anything remains, either of the income or of the proceeds of the sale after the mortgage or trust debts are satisfied, it will go to the appellant, notwithstanding what has been decreed. There is no order as in *Forgay* v. *Conrad*, 6 How.

201, *Thomson* v. *Dean*, 7 Wall. 342, and other cases of a like character, adjudging the property to belong absolutely to the appellee, and ordering immediate delivery of possession. In *Forgay* v. *Conrad*, *supra*, which is a leading case on this question, it was expressly said by Mr. Chief Justice Taney (p. 204) that the rule did not extend to cases where property was directed to be delivered to a receiver. The reason is that the possession of the receiver is that of the court, and he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it.

Appeal dismissed.

MR. JUSTICE MILLER dissented.

WOODEN-WARE COMPANY *v.* UNITED STATES.

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is: 1. Where he is a wilful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense. 2. Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. 3. Where he is a purchaser without notice of wrong from a wilful trespasser, the value at the time of such purchase.

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

The facts are stated in the opinion of the court.

Mr. Samuel D. Hastings, Jr., for the plaintiff in error.

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

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error, founded on a certificate of division of opinion between the judges of the Circuit Court.

The facts, as certified, out of which this difference of opinion arose appear in an action in the nature of trover, brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wooden-ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or $60.71 for the whole, and at the town of Depere, where defendant bought and received it, three dollars and fifty cents per cord, or $850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. *Martin* v. *Porter*, 5 Mee. & W. 351; *Morgan* v. *Powell*, 3 Ad. & E. N. S. 278; *Wood* v. *Morewood*, 3 id. 440; *Hilton* v. *Woods*, Law Rep. 4 Eq. 432; *Jegon* v. *Vivian*, Law Rep. 6 Ch. App. 742.

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in

the case of *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*."

There seems to us to be no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the State courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin. *Weymouth* v. *Chicago & Northwestern Railway Co.*, 17 Wis. 550; *Single* v. *Schneider*, 24 id. 299.

On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. *Craig*, 33 Mich. 205, contains a full examination of the authorities on the point. *Heard* v. *James*, 49 Miss. 236; *Baker* v. *Wheeler*, 8 Wend. (N. Y.) 505; *Baldwin* v. *Porter*, 12 Conn. 484.

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion

of the property to his own use. In such case, if the first taker of the property were guilty of no wilful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the wilful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth $850, and he wants to satisfy the claim of the government by the payment of $60. He founds his right to do this, not on the ground that anything *he* has added to the property has increased its value

by the amount of the difference between these two sums, but on the proposition that in purchasing the property he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Institutes of Justinian, Lib. II. Tit. I. sect. 34.

After speaking of a painting by one man on the tablet of another, and holding it to be absurd that the work of an Appelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, *or any other*, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of *Nesbitt* v. *St. Paul Lumber Co.*, 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the wilful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defence

against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the government finds its own property in hands but one remove from these wilful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the Circuit Court is

Affirmed.

MINTURN v. UNITED STATES.

1. An importer of sugars having entered them at the custom-house by a warehouse entry, under sect. 12 of the act of Aug. 30, 1842, c. 270, as amended by sect. 1 of the act of Aug. 6, 1846, c. 84, gave, with sureties, a bond, conditioned to be void if he or his "assigns" should, within a specified time, withdraw them from the warehouse in the mode prescribed by law, and pay to the collector a sum specified, "or the true amount, when ascertained, of the duties imposed." The act required the sugars to be kept subject to the order of the importer, "upon payment of the proper duties," to be ascertained on entry, "and to be secured by his bond," with surety. He afterwards sold the sugars in bond, and gave to the purchaser, who agreed to pay the duties as part of the purchase price, a written authority, on which the sugars were withdrawn; but the full amount of the proper duties, which was less than the sum specified in the condition of the bond, was not paid. In a suit on the bond, to recover the unpaid duties, — *Held*, that the obligors are liable.
2. Although it is the usage of trade to sell goods in bond, and deliver them by an order for their withdrawal, the purchaser withdrawing them and paying the duties, the obligors do not become merely sureties, with the goods as the primary security for the duties, nor are they released because the officers of the United States unlawfully part with the goods without exacting payment of the duties chargeable thereon.
3. The negligence of the officers does not affect the liability of either the principal or the surety in a bond to the United States.

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 M. Evarts and *Mr. Joseph H. Choate* for the plaintiff in error.

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

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On Aug. 2, 1865, the firm of Grinnell, Minturn, & Co., being the owners of five hundred and eighty packages of sugar, imported from abroad, entered them at the custom-house in New York by a warehouse entry, and thereupon the members of that firm, as principals, and one Clark, as surety, executed under their hands and seals and delivered to the collector a warehouse bond, conditioned that the bond should be void if the principals, "or either of them, their or either of their heirs, executors, administrators, or assigns," should, "on or before the expiration of one year from the date of the importation" of the said goods, withdraw them, "in the mode prescribed by law, from the public store or bonded warehouse" where they might be deposited at the port of New York, and pay to the collector for that port $23,787.99, "or the true amount, when ascertained, of the duties imposed," by laws then existing, or thereafter to be enacted, upon the said goods, &c. On the giving of the bond, the sugars were placed in the public store and in the custody of the collector, as provided by the warehousing statutes. On Aug. 8, 1865, the owners sold to Gibson, Early, & Co. all the sugars, the same being still in warehouse, and held by the collector for duties, under said statutes. By the terms of the sale, the goods were sold expressly subject to the payment of all duties thereon by Gibson, Early, & Co., who assumed the payment of the duties as part of the agreed price of the goods on the sale, the price, less the duties so assumed, being paid in cash on delivery. The sellers made delivery of the goods in bond, subject to the duties, by writing and signing, on Aug. 9, 1865, at the foot of the warehouse entry, the following consent: "We hereby authorize Gibson, Early, & Co. to with-

draw the sugars described in this entry. Grinnell, Minturn, & Co." It was not the custom to give any formal notice to the collector or any other officer of the customs of such sales in bond, nor was any such notice given in this case. The authority to withdraw, in the form above stated, would be and was presented to the collector in due course before the withdrawal could be made by the purchaser. The total weight of the sugars, as returned by the government weighers, was 755,621 pounds, upon which the proper duty, at three cents per pound, was liquidated at $22,668.63. On Aug. 11, 1865, Gibson, Early, & Co. withdrew for transportation to Cincinnati, under the said authority from Grinnell, Minturn, & Co., 325,011 pounds of the sugar, and paid $9,750.33 duties thereon. On Aug. 29, 1865, they withdrew for consumption, in like manner, 48,618 pounds, and paid $2,058.42 duties thereon. Afterwards, and before Sept. 4, 1865, they sold to one Camp the residue of the sugars, the same being then in warehouse, and being, by the terms of the sale, sold in bond, expressly subject to the payment of all duties thereon by Camp, who assumed the payment of said duties as part of the agreed price of the goods on the sale. A firm of custom-house brokers, Wylie & Wade, was employed by Camp to withdraw the sugars and to pay the duties thereon, and for that purpose was furnished by Camp with the amount of the duties, $10,859.88, in gold. On Sept. 4, 1865, Gibson, Early, & Co. made delivery to Camp of the residue of the sugars in bond, by writing and signing at the foot of the withdrawal entry made thereof by his said brokers the following consent: "We authorize Wylie & Wade to withdraw the goods described in this entry. Gibson, Early, & Co." No formal notice of this sale to Camp was given to the collector or any other officer of the customs. This last authority to withdraw was presented in due course by said brokers when they desired to withdraw the goods. This was done on Sept. 4, 1865, when they made a withdrawal entry of the residue of the sugars, the weight of which was 361,996 pounds. The duty at three cents per pound was $10,859.88. But the collector demanded as duties only $9,352.89, being at the rate of three cents per pound on 311,763 pounds, leaving due, as duties, $1,506.99. The goods were delivered to the brokers,

and were of greater value than the duties chargeable on them. This was done without the knowledge or consent of Grinnell, Minturn, & Co. The first knowledge or notice they had of the withdrawal without the payment of full duties was a notice from the collector, Dec. 6, 1867, as to the amount so remaining unpaid. Before that time the brokers had become insolvent, and Gibson, Early, & Co. became insolvent before the trial of this suit. The United States having brought suit on the bond against the obligors in it, to recover the $1,506.99, with interest, a jury was duly waived, and the court, having found the foregoing facts, found the following conclusions of law: 1, That the facts constituted no bar to a recovery; 2, that, if the defendants were to be regarded as sureties, after the transfer of the title to the property in bond, instead of principals, they stood in no better position; 3, that the laches of the custom-house officers, in delivering the goods without collecting the whole of the duties, could not affect the plaintiffs, as the United States were never bound by the laches of their agents, nor could the defendants set up such laches as a discharge of their obligation; 4, that the plaintiffs were entitled to judgment. The defendants excepted to each of said conclusions of law, a judgment was rendered for the plaintiffs for $3,096.11, and the defendants brought this writ of error.

The court below also found, as facts, "that it was the established and uniform usage of trade in New York, at the times of said sales and deliveries, and long before, for importers to make sales of imported goods which were in warehouse, in bond, the purchaser on such sales assuming the payment of the duties thereon, and being allowed and credited by the seller with the amount of the duties so assumed, as so much paid on account of or deducted from what would otherwise have been the purchase price, and for the seller to make delivery of said goods in bond, by signing a written consent to the withdrawal of said goods by the purchaser, and it was also in accordance with such usage and custom for successive sales and deliveries of goods in bond to be made, on similar terms and in the same manner, so long as any of such goods remained in warehouse, the last purchaser withdrawing the goods under the written consent so received by him upon and as the delivery thereof, and paying

the duties thereon on such withdrawal; that the said custom and usage were, at the times aforesaid, well known and understood, and the established and settled practice at the custom-house in New York was to treat the party holding such consent for withdrawal, and him only, as the person entitled to withdraw and receive the goods on payment of the duties, and upon the payment by him of the duties remaining due thereon, and not otherwise, to issue a written permit for the actual delivery to him of said goods out of warehouse; and that, during the period covered by the transactions hereinbefore set forth, the following regulations of the Treasury Department were in force, to wit: 'Art. 442. The entry for withdrawal of merchandise from warehouse for consumption, at port of original importation, shall be made by the party in whose name the merchandise was warehoused, or by some person duly authorized for the purpose by him, and in either case shall be signed by the party making the withdrawal. This entry shall exhibit the marks and numbers of the packages, the description and quality of the goods, and the dutiable value of the same. On presentation to the proper officer in the collector's office, it shall be compared with the record, on the warehouse books, of the original warehouse entry, and, if found correct, be properly entered therein, the warehouse-bond number indorsed thereon, and the amount of duties payable estimated. From the collector's office it shall then be taken by the importer to the naval office, where a similar comparison shall be made with the warehouse records of that office, and the estimate of duties verified and indorsed upon the duplicate entry. The amount of duties thus ascertained having been paid, a permit will be issued for the delivery of the goods. Art. 443. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper, and other articles bought and sold by weight, when withdrawn for export or transportation, must be entered for such destination at the actual quantities on which duties were estimated at the time of arrival in the United States; and, to secure this, weighers, measurers, and gaugers will be required to mark on each package its contents, as determined by them on its entry for warehouse. On these quantities the duties on export and transportation entries will be estimated. Goods withdrawn for

consumption may be taken at average valuations, care being had that on the last withdrawal the entire balance of duty be collected. Art. 444. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption, and the deficiency, if any, collected on amendment to said entry.'"

The contention for the plaintiffs in error is, that, by the substitution for a credit system, in the payment of duties, of a deposit of the goods in warehouse, subject to a withdrawal for consumption only on the payment of duties, involving the holding by the United States of possession of the goods in the mean time, such possession became the primary security for the duties, and the obligors in the bond were thereafter merely sureties, and were wholly released because the officers of the United States parted with the possession of the goods without exacting payment of the duties.

Section 1 of the act of Aug. 6, 1846, c. 84, amendatory of sect. 12 of the act of Aug. 30, 1842, c. 270, provides that, on an entry of goods for warehousing, the goods shall be taken possession of by the collector, and deposited in the public stores, there to be kept subject at all times to the order of the owner, importer, consignee, or agent, "upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety or sureties to the satisfaction of the collector, in double the amount of said duties, and in such form as the Secretary of the Treasury shall prescribe." It is contended by the plaintiffs in error that a private creditor, standing in the same relation to them and to the goods which the United States occupied under the warehousing system as provided for by the statute and as practically administered, could not have voluntarily surrendered the goods which had been placed in his hands as security for the payment of the debt, and which were available for that purpose, without requiring payment of the debt, otherwise than with the consent of the plaintiffs in error, without discharging them from their liability; that the United States are entitled to no other or

higher right than a private creditor would be entitled to in the same case; and that the consent of the importers to the withdrawal of the goods by Gibson, Early, & Co. was not a consent unconditionally to their delivery, or to their delivery without the payment of duties, but only to their withdrawal from warehouse in the manner and upon the terms and conditions prescribed by law and by the treasury regulations and by usage, namely, after all duties thereon had been first paid, and not otherwise.

The warehousing statute, above cited, provides that warehoused goods shall be subject to the order of their owner on payment of the duties. Therefore, no order of the plaintiffs in error could become operative to affect any rights of the United States, unless the duties on the goods to be affected by the order were paid. Moreover, the provision as to the deposit of the goods, and their retention till the duties on them are paid, is coupled with the provision for the securing of the duties by the bond. Evidently, the intention of the statute was to superadd to the security of the holding of the goods the security of the bond, so that, in case of a delivery of the goods by fraud, or mistake, or negligence in the officers of the government, the security of the bond should remain. The form of the bond taken was such, that while, in connection with the regulations and the usage, commerce was favored by the privilege of dealing in warehoused goods, it was clearly intended to hold the obligors responsible if any purchaser from the importers should obtain the goods on their order without paying full duties. The condition is, that the bond shall be void if they or their "assigns" shall withdraw the goods and pay the "true amount" of duties. The bond is not to become void on any other condition, and it is not to become void unless, in addition to the withdrawal of the goods, the true amount of duties is paid. This view shows that the parties have contracted to be and remain principal debtors to the United States until the true amount of duties is paid, whatever fraud or negligence there may be in parting with the possession of the goods without the payment of the true amount of duties. There was no power in any officer of the government to alter the terms or effect of this contract, and destroy the obligation of the bond,

by giving up the goods without the payment of the duties. The same statute required the holding of the goods and the taking of the bond. The cases in which it has been held that the United States had parted with rights, by reason of acts done to the prejudice of persons who had contracted with them, have all been cases where there was authority of law to do such acts. In *United States* v. *Admrs. of Hillegas*, 3 Wash. C. C. 70, it was held, by Mr. Justice Washington, that acts of officers of the United States acting within their proper spheres, and to be imputed to the United States and considered as the acts of the United States, in extending the time for the payment of the debt due from a principal in a bond, discharged the sureties in the same bond, they not having known of or consented to the extension. The same principle was applied by Mr. Justice Thompson, in *United States* v. *Tillotson*, 1 Paine, 305, to the case of the alteration of a contract by the United States without the consent of the sureties for its performance. But, in the present case, the giving up of the goods without the payment of the duties was an act not only not authorized, but forbidden by the statute.

The question presented by this case is not a new one in this court. In *Hart* v. *United States*, 95 U. S. 316, in a suit brought by the United States against the principal and sureties, on a distiller's bond, to recover taxes on spirits distilled by the principal, the sureties pleaded that the taxes were a lien on the spirits, and that the collector, without the knowledge or assent of the sureties, and without first requiring the payment of the taxes thereon, permitted the principal to remove from the distillery warehouse distilled spirits more than sufficient in value to pay the demand. This court held, that as, under the statute, no distilled spirits could be removed from the warehouse before payment of the tax, and no officer of the United States had authority to dispense with the requirement of the law, the United States were not bound by the acts of the collector; and the prior cases of *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 id. 184; *United States* v. *Nicholl*, 12 id. 505; *Gibbons* v. *United States*, 8 Wall. 269; and *Jones* v. *United States*, 18 id. 662, were cited as establishing that the government is not responsible for

the laches or the wrongful acts of its officers; and it was said by the Chief Justice, delivering the opinion of the court: "Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but if, by neglect or misconduct, they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss, by reason of the liability he assumed." These views are conclusive to show that the importers as well as their surety are liable on the bond in this case. If the importers could be regarded as having always been, or as having at any time become, sureties only in respect of the duties, with the goods as the primary security (a position shown to be wholly untenable), it is well settled, by the decisions of this court, that the negligence of the officers of the government does not affect the liability of a surety in a bond any more than it does that of his principal. *Dox* v. *Postmaster-General*, 1 Pet. 318; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 id. 184.

Judgment affirmed.

DODGE *v.* FREEDMAN'S SAVINGS AND TRUST COMPANY.

Where a mortgage of lands in the District of Columbia, or a deed of trust in the nature thereof, to secure the payment of money, is foreclosed, sect. 808, Rev. Stat., relating to the District, authorizes a decree *in personam* against the debtor for the balance remaining due after the proceeds of the sale of the lands have been applied to the satisfaction of the debt.

APPEAL from the Supreme Court of the District of Columbia.

The Freedman's Savings and Trust Company, the holder of

certain notes of Dodge, secured by his deed of trust in the nature of a mortgage upon lands in the District of Columbia, filed its bill in the court below, and obtained a decree, which was affirmed here at the October Term, 1876, 93 U. S. 379. A sale of the lands was then made, and, after the application of the proceeds to the satisfaction of the debt, the court, pursuant to its adjudication that the complainant recover the balance remaining due, and that he "have execution thereof as at law," ordered that a writ be issued.

Dodge thereupon appealed.

Mr. Reginald Fendall and *Mr. John D. McPherson* for the appellant.

Mr. William A. McKenney and *Mr. Enoch Totten* for the appellee.

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

Section 808 of the Revised Statutes relating to the District of Columbia is as follows: —

"SECT. 808. The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law."

This statute applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money, and authorizes a decree in favor of the plaintiff against the debtor defendant for the payment of the balance of the debt that may remain due after the application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law. This is such a decree in such a suit, and it is consequently

Affirmed.

STEEL *v.* SMELTING COMPANY.

1. A patent executed in the required form and by the proper officers, for such a portion of the public domain as is by law subject to sale or other disposal, passes the title thereto, and the finding of the facts by the Land Department, which authorize its issue, is conclusive in a court of law. *Smelting Company* v. *Kemp*, 104 U. S. 636, cited upon this point and approved.
2. A party who claims to be aggrieved by such issue, although he cannot have the patent vacated or limited in its operation where it comes collaterally in question in an action for the recovery of possession, may obtain relief in a Court of Chancery, if he has such an equitable right as will estop the patentee or those claiming under him from asserting the legal title to the land. Otherwise such party must apply to the officers of the government, who, although not clothed with power to set the patent aside, may for that purpose bring suit in the name of the United States.
3. Mineral lands belonging to the United States, although lying within a town site on the public domain, are subject to location and sale for mining purposes, and a title to them is acquired in the same manner as to lands of that description which are elsewhere situate.
4. In ejectment for mineral lands by a party claiming under the patentee, the defendant asserted that he owned the demanded premises "by superiority of possessory title and priority of actual possession" of them as part of a town site; that the patentee was not a citizen; and that frauds, bribery, and subornation of perjury had been used to obtain the patent. *Held*, that it was the province of the Land Department to pass upon such matters before the patent was issued, and that they could not be set up to defeat the action.
5. A party cannot invoke the doctrine of estoppel against the owners by reason of improvements which, with their knowledge, he put upon the land, if he was aware at the time that it belonged to them, and that he had no title to it.

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

The case is stated in the opinion of the court.

Mr. Thomas A. Green for the plaintiffs in error.

Mr. Alexander T. Britton, *Mr. Walter H. Smith*, and *Mr. Jonas H. McGowan* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action by the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri, against Steel and others, to recover the possession of certain real property in the city of Leadville, Colorado.. It was com-

menced in one of the courts of the State, and on motion of the defendants was removed to the Circuit Court of the United States. The complaint is in the usual form in actions for the recovery of land, according to the practice prevailing in Colorado. It alleges that the plaintiff was duly incorporated, with power to purchase and hold real estate; that it is the owner in fee and entitled to the possession of the premises mentioned, which are described, and that the defendants wrongfully withhold them from the plaintiff to its damage of $1,000. The plaintiff, therefore, prays judgment for the possession of the premises and for the damages mentioned.

The defendants filed an answer to the complaint, which appears to have been amended several times, the questions presented for our consideration having arisen upon the demurrer to the third amended answer. That answer denied the material allegations of the complaint and set up several special defences, and a counter-claim for the value of the improvements put on the premises. The plaintiff demurred to these defences and to the counter-claim. The demurrer was sustained to the defences and overruled to the counter-claim. The defendants elected to stand on their defences, and final judgment was accordingly entered on the demurrer for the plaintiff for the possession of the premises. To review this judgment the case was brought by the defendants to this court.

The amended answer averred that the defendants were the owners of the land in controversy "by superiority of possessory title and priority of actual possession" of the premises as part of a town site on the public domain of the United States, located and occupied since June, 1860; that the title of the plaintiff was derived from one Thomas Starr, to whom a patent was issued by the United States, bearing date on the 29th of March, 1879, embracing the premises in controversy; and the special defences set up were that the patent was void; that fraud, bribery, perjury, and subornation of perjury were used to obtain it; and that Starr, the patentee, was estopped by his conduct from asserting title to the premises.

The patent, which is subsequenly stated to be a mineral patent, by which is meant that it was issued upon a claim for mineral land, is averred to be void on these grounds: that the

land which it embraces was part of the town site of Leadville when the claim originated, and was thus reserved from sale by the laws of Congress; that the land included in the town site was neither mineral nor agricultural; and that the patentee, Starr, was not a citizen of the United States, and had not declared his intention to become one when the patent was issued. These grounds are accompanied with a detail of the facts upon which they are founded, but they are sufficiently stated for the disposition of the questions arising upon them.

Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, on its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members. Exploration in the vicinity for other mines is pushed in such case by new-comers with vigor, and is often rewarded with the discovery of valuable claims. To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness, removed from all settlements, and he is equally entitled to a patent for them.

It is the policy of the country to encourage the development of its mineral resources. The act of July 26, 1866, c. 262, declared that all mineral deposits on lands belonging to the United States were free and open to exploration, and the lands in which they are found to occupation and purchase by citizens of the United States and those who had declared their intention to become such, subject to regulations prescribed by law, and to the rules and customs of miners in their several mining districts, so far as the same were applicable and not inconsis-

tent with the laws of the United States. This declaration of the freedom of mining lands to exploration and occupation was repeated in the act of Congress of May 10, 1872, c. 152, and is contained in sect. 2319 of the Revised Statutes. Both acts provided for the acquisition of title, by patent, to mineral lands, — the first act, to such as constituted lode claims; the second, to such as constituted placer claims.

The acts of Congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired. Rev. Stat., sects. 2386, 2392.

Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with. Whether there are rights thus interfered with which should preclude the location of the miner and the issue of a patent to him or his successor in interest, is, when not subjected under the law of Congress to the local tribunals, a matter properly cognizable by the Land Department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld, and also as to the citizenship of the applicant.

We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the

United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *Johnson* v. *Towsley*, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine, "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and said, speaking by Mr. Justice Miller, "that the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." 13 Wall. 72, 83.

In *French* v. *Fyan*, a patent had been issued to the State of Missouri for swamp and overflowed land, under the act of Sept. 28, 1850, c. 84. In an action of ejectment by a party claiming title under a grant to a railroad company, which would have carried the title if the land were not swamp and overflowed, parol testimony was offered to prove that it was not land of that character, and thus to impeach the validity of the patent. The court below held that the patent concluded the question, and rejected the testimony. The case being brought here, the ruling was sustained. This court, speaking through Mr. Justice Miller, said: "We are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent

to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey." 93 U. S. 169, 172.

In *Quinby* v. *Conlan*, decided at the last term, we said: "It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised necessarily affecting their judgment, that the courts can, *in a proper proceeding*, interfere and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis, expressed our opinion, and the matter should be deemed settled." 104 U. S. 420, 426. See also *Vance* v. *Burbank*, 101 id. 514.

It is among the elementary principles of the law that in actions of ejectment the legal title must prevail. The patent of the United States passes that title. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be, they constitute no defence in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others having mere equitable rights can gain or hold possession of the lands it covers. This is so well established, so completely embedded in the law of ejectment, that no one ought to be misled by any argument to the contrary.

It need hardly be said that we are here speaking of a patent issued in a case where the Land Department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the prop-

erty of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale. And, of course, in both cases it is always open to show that the instrument was never executed by the parties whose signatures are attached to it, but is a simulated document. Where ejectment is founded upon either of these instruments, — the patent of the government or the deed of an individual, — the question being which of the parties has the legal title, it is irrelevant to introduce evidence to show that one of them ought to have had it, and might be able to get it, by a proceeding in some other tribunal or in some other form of action.

As to the allegations that fraud, bribery, perjury, and subornation of perjury were used to obtain the patent to Starr, only a few words need be said. The bribery and subornation of perjury are alleged to have been committed by him in inducing parties to make false affidavits respecting the claim patented to be laid before the Land Department; and the perjury alleged consisted in his own affidavit as to his citizenship, the possession and working, by himself or grantors, of the claim for which the patent was issued, and the absence of a town site, embracing the land, and of improvements thereon. The fraud alleged is not a specific charge by itself, but is made in connection with the affidavit of the patentee and his procurement of the false affidavits of others. The charges amount to this: that false and perjured testimony was used to influence the officers of the Land Department. There is no allegation of improper conduct on the part of those officers. The answer to this ground of defence is that it is not admissible in an action at law. The validity of a patent of the government cannot be assailed collaterally because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground. If a judgment has been obtained by such means, the remedy of

the aggrieved party is to apply for a new trial, or take an appeal to a higher court; and if the testimony was accompanied with acts which prevented him from presenting to the court the merits of his case, or by which the jurisdiction of the court was imposed upon, he may also institute some direct proceeding to reach the judgment. *United States* v. *Flint*, 4 Sawyer, 42; *United States* v. *Throckmorton*, 98 U. S. 61; *Vance* v. *Burbank*, 101 id. 514. Until set aside or enjoined, it must, of course, stand against a collateral attack with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose.

It does not follow that the officers of the government would take such proceedings even if the charges of fraud and of the use of false testimony in obtaining the patent were true. They might be satisfied that the patentee was entitled to the patent upon other testimony, or, that further proceedings would result in a similar conclusion, and that therefore it would be unwise to reopen the matter. In any event, whether the officers of the government have been misled by the testimony produced before them, or not, the conclusions reached by them are not to be submitted for consideration to every jury before which the patent may be offered in evidence on the trial of an action. As we said in the case of *Smelting Company* v. *Kemp*: "It is this unassailable character [of the pat-

ent] which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence." 104 U. S. 636, 641.

It remains to notice the defence of estoppel. The answer of the defendants alleges that Starr, the patentee, was living in Leadville from 1860 until the patent was issued to him in 1879, and was cognizant of the improvements made and of the large sums of money expended on the premises; that he and his grantors fraudulently remained quiet in respect to their ownership of mining claims there, and, from August, 1870, to the time of their application for a patent, never made known, either to the city of Leadville or to the defendants, that he or they claimed a right to any portion of the land; that other parties who made similar claims, and united with him in securing the patent, also stood by and remained quiet; that the defendants expended the sum of $5,000 in making improvements on the premises in controversy under the claim that they constituted part of a town site on the public domain; that there was no mining on the land, and that no notice was given that would lead the defendants to suppose that there had been any mineral location made by him and his associates; that Starr published the notice of his application for a patent only in a weekly paper of Leadville, and that the description of the consolidated claim was so defective that only a skilled engineer could tell where the land was situated; and that after the defendants discovered that the notice of the patent em-

braced lands in the city, they were assured that they should not be disturbed in their possessions, and that only a nominal sum would be demanded from them, not exceeding twenty-five dollars a lot, and that, relying upon said assurance, the defendants continued making improvements.

These allegations are very far from establishing such an equity in the defendants as to estop the patentee and those claiming under him from asserting the legal title to the premises. These matters could not operate to estop the government in any disposition of the land it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a vested interest in the land, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed to use or dispose of the property, freed from any claim of the defendants, it could pass to its grantee.

The principle invoked is, that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none. *Brant* v. *Virginia Coal and Iron Co.*, 93 U. S. 326; *Henshaw* v. *Bissell*, 18 Wall. 255. It will not be pretended that the defendants did not understand all about the title to the land; they knew that it was vested in the United States. And we must presume that the patentee gave notice of his purpose to acquire it, — such as the law required. The mode and manner of obtaining a patent for mining lands are minutely prescribed

by the acts of Congress. Among other things, the applicant must file his application under them, in the proper land-office, showing a compliance with the laws, together with a plat and the field notes of his claim or claims in common, made by or under the direction of the surveyor-general of the United States, showing their boundaries; and he must also, and previously to the filing of the application, post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land. It is a conclusion, from the issuing of the patent, that this requirement was complied with, and, therefore, it cannot be said here that the patentee did not give notice of his purpose. This notice, as justly observed by the court below, was, of itself, a warning to all who were upon the land and were about to erect improvements upon it, that the patentee was applying for a patent, and thus seeking to obtain the title. And the answer admits that the defendants did ascertain the fact of the application, for they aver a subsequent promise of the applicant to give them a title when the patent was acquired. Under these circumstances the alleged estoppel, like the other matters urged to defeat the action, must fail.

Though the various matters of fraud, perjury, and subornation of perjury, alleged as a defence, are to be taken as true, for the purpose of this decision, they are not to be taken as true for any other purpose. What we decide is, that, if true, they are not available in this form of action, and that any relief against the patent founded upon them must be sought in another way, and by a direct proceeding.

We have thus considered the propositions of law presented by the record, and the matters urged by counsel in his argument, so far as we have deemed them entitled to notice. They disclose nothing which would justify interference with the action of the court below. Its judgment, therefore, is

Affirmed.

GEORGIA *v.* JESUP.

In a foreclosure suit, pending when the lands and property were in possession of a receiver, the State of Georgia, whilst declining to become a party, presented a petition asking that he be required to withdraw from the possession of a part of the property whereon executions for State taxes had been levied prior to his appointment. The petition was denied and dismissed. *Held*, that the action of the Circuit Court cannot be reviewed upon the appeal of the State, for the reason, if there were no other, that the order did not conclude the rights which she acquired by virtue of the executions, or of the levies made thereunder.

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

The suit, out of which this appeal arises, was commenced on the 15th of February, 1877, in the court below, by Jesup, a citizen of New York, and the surviving trustee in a mortgage, or deed of trust, executed on the 20th of December, 1867, by the Atlantic and Gulf Railroad Company, a Georgia corporation, conveying to trustees and the survivor of them its main line and certain branches, together with their appurtenances, rolling-stock, equipment, &c., respectively, in trust to secure the payment of bonds, in a large amount, made by the company, and payable on the first day of July, 1897, with interest semi-annually, at the rate of seven per cent per annum. The deed contained the usual provisions requiring the trustees, upon default in the payment of the stipulated interest, to enforce the security for the benefit of the bondholders. The bill asked for the appointment of receivers, and, accordingly, on the 20th of February, 1877, an order was made at chambers, appointing receivers of the entire property and effects embraced in the deed of trust or mortgage, who were invested with power, and charged with the duty, to manage and operate the same, subject to the orders and directions of the court. The receivers took possession, and the order of Feb. 20, 1877, was renewed and confirmed by an order of court entered on the 20th of April, 1877.

A supplemental bill was afterwards filed enlarging the scope of the suit and asking a decree of foreclosure and sale.

On the 3d of June, 1879, — the railroad and its branches,

with their respective appurtenances, being then in the actual possession of, and operated by, the receivers, under the direction of the Circuit Court of the United States, — the State of Georgia, by its attorney-general, presented a petition, stating that, prior to the appointment of the receivers, executions had issued from the office of its comptroller-general against the railroad company for taxes, alleged to be due the State, the validity of which taxes was contested by the company, and the issue arising thereon was then pending before the courts of the State; that two of such causes — those involving the validity of the taxes for the years 1874 and 1875 — were taken by the corporation upon writ of error to the Supreme Court of the United States, in which court, at its [then] last term, a judgment was rendered sustaining the right of the State to the taxes in question; that executions were also issued by the State against the company for the years 1876, 1877, and 1878, but as the grounds of defence were the same in each, the latter were allowed to rest and abide the decision in the two former causes, except that the execution for 1876 was in the hands of the sheriff, and had been levied upon certain property of the company before the appointment of the receivers in the foreclosure suit.

The prayer of the petition was that the State be allowed to establish these facts by reference to the records and proceedings in this cause, and also by the records and proceedings in the State courts and the Supreme Court of the United States, "for the purpose, and the purpose alone, of showing, as the State claims, that this honorable court has no jurisdiction under the law, by its process of the appointment of receivers or otherwise, to hinder, delay, or prevent the execution of the process provided by the law of the State for the collection of its revenue." "The said State of Georgia," the petition proceeds, "in obedience to that comity and respect that should govern her courts towards those of another concurrent jurisdiction, and to promote that harmony, which should ever prevail between herself, as one of the members of this Union, and the Federal government, respectfully insists that she cannot be required, in order to obtain her rights in the premises, to become a party complainant or defendant in the litigation now

pending before this honorable court, because, as she maintains: 1. This court has no jurisdiction, by the powers of injunction or otherwise, to hinder, delay, or prevent the collection of her revenue. 2. As the record shows that certain executions had been levied by the sheriff in obedience to process from the State courts, upon which issues had been joined by the defendant corporation, their jurisdiction could not be affected by a suit filed subsequently in the courts of the United States, [and] the appointment of receivers and a sale by the latter jurisdiction would be inoperative and void. 3. It is against public policy to require a State, in the collection of her revenue, to await the slow and tedious process necessary to determine the numerous issues made in this cause between private litigants." The prayer of the State was that the court pass such an order as would fully protect its rights in the premises.

The record contains no part of the proceedings in the causes in the State courts to which the State's petition referred. All that it contains in the way of documents or papers relating to taxes against the company are certain executions from the office of the Comptroller-General of Georgia, with the returns thereon, viz.: An execution for the taxes of 1874, amounting to $32,764.10, returned by the sheriff, levied Oct. 6, 1874, "upon lots number 23 and 24, Atlantic ward, city of Savannah, county and State aforesaid, and will sell the said described property on the first Tuesday in November, 1874, before the court-house door, in terms of the law;" an execution for the taxes of 1875, amounting to $8,754.55, returned levied Nov. 15, 1875, "upon the buildings known as the machine-shop, locomotive-house, and car-shop, situate, lying, and being at the Atlantic and Gulf Railroad depot in the city of Savannah, county and State aforesaid, and will advertise and sell the same, in terms of the law, the property of the defendant;" the execution for the taxes for 1876 for $9,080.31, $18,160.62 penalty for default in paying the tax, returned, as levied, Jan. 8, 1877, upon lots 23, 24, 33, and 36 in Savannah; the execution for taxes for 1877, amounting to $9,333.12, and $27,990.36 as a penalty for non-payment of taxes and costs, the last execution being returned, "property, by order and decree of the United States court, in the hands of receivers;" and execution

for taxes of 1878 for $7,070.26, and $21,228.78 as penalty for non-payment of taxes and costs. Upon this last execution no return appears to have been made.

On the sixth day of June, 1879, this order was made in the court below: —

"The State of Georgia, having petitioned for leave to proceed with certain executions for taxes, after argument and consideration, it is ordered and decreed that the said petition of the State of Georgia be denied, and the same is hereby dismissed."

On the same day a final decree of foreclosure was made, by which, among other things, it was, in substance, declared that the company was indebted to the State in the following principal sums for taxes: for 1874, $32,764.71; for 1875, $8,754.55; for 1876, $9,080.31; for 1877, $12,441.16; for 1878, $7,076.26; in all, the sum of $70,116.99, — the sums specified in the several executions for taxes, omitting the penalties claimed in those for 1876, 1877, and 1878. It was further declared that the company was liable for the principal of such tax as might be assessed by the comptroller-general of the State for the year 1879; that such taxes were prior to all other liens, except judicial costs, and should be paid out of the proceeds of sale and any balance of money and assets in the hands of the receiver, next after the payment of such costs; and that neither penalties nor interest was due on the taxes for any of the aforesaid years.

Afterwards, on the 22d of August, 1879, the State presented to the court its petition for appeal, as follows: "The State of Georgia having filed a petition denying the jurisdiction of said Circuit Court of the United States, and claiming the right of said State to proceed with said executions, notwithstanding the property of said defendant corporation was in the possession and control of said court, through receivers appointed thereby, and the said Circuit Court having passed a decree, so far as the rights and claims of said State in the premises were concerned, denying and refusing said claim set up, and said State of Georgia, being advised that she has a good and valid cause of appeal, now comes . . . and prays this honorable court to grant an appeal in said cause to the Supreme Court of the

United States, on such terms and conditions as required by law." The appeal thus prayed was allowed.

Mr. Clifford Anderson, Attorney-General of Georgia, *Mr. Robert N. Ely*, and *Mr. Robert Toombs* for the appellant.

Mr. Walter S. Chisholm and *Mr. Robert Fallegant*, *contra.*

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

It does not seem incumbent upon this court to determine some of the questions, however important or interesting as abstract propositions, which counsel have pressed upon its attention. The case, as presented by the record, is within a very narrow compass, as is evident from the statement, already made, of the history and nature of the litigation out of which the present appeal arises.

The action of the court below is assailed by the State upon numerous grounds, separately stated in the assignment of errors. They are, however, all comprehended in the general proposition that the court erred in denying and dismissing the State's petition, filed June 3, 1879, thereby, it is claimed, adjudging that the sheriff could not, pending the possession and control by the receivers of the property, rightfully proceed with the executions for taxes; and in decreeing that the State is not entitled to penalties on its taxes for the years named in the final decree of foreclosure.

Touching the first of these propositions, it may be observed that if it was not a matter wholly within the discretion of the Circuit Court to permit the State to become a party to the foreclosure suit, it is clear that the State did not ask to become, nor was it in any form made, a party to that suit. It is equally clear that it could not have been made a party without its consent. While questioning with great distinctness of language the jurisdiction of the Circuit Court to take possession, by its receivers, of the property previously levied on in satisfaction of the several executions for taxes, the State avowed its unwillingness to submit its rights, in the matter of taxes, to the adjudication of any court of the United States. It, therefore, assumed such a position with reference to the foreclosure suit, that, while asking an order to be entered discharging the re-

ceivers as to the property levied on, and as to that proposed to be levied on for taxes, it would not be bound by any ruling the court might make. Still, a proper respect for the State seemed to require that the court should, in some form, indicate its opinion touching the formal suggestion that it had overstepped the limits of its jurisdiction, accompanied by a request that the court would revise its proceedings, and not allow the sheriff, having in his hands executions for taxes, to be embarrassed by the actual possession and control, by the receivers of the Circuit Court, of the property of the railroad company. The court below was of opinion that it had jurisdiction to do what had been done, and that it ought not to make any such order as that suggested by the State. But it nevertheless directed that the principal sums, claimed by the State for taxes, should be paid out of the proceeds of the sale of the mortgage property, next after paying judicial costs. It declined to make any provision for the payment of penalties or interest upon taxes. The record shows that the principal sums declared to be due the State have been received by it. The action of the Circuit Court was based in part upon what were regarded as the settled doctrines of the Supreme Court of Georgia, in respect of the right, under execution, in the ordinary form, and not specially moulded for that purpose, to seize and sell, at different sales, separate portions of a railroad, operated under franchises conferred by the State for purposes of travel and transportation. Without stopping to consider those or any other questions of law supposed to be raised by the State's petition, it is sufficient to say that the order, denying and dismissing that petition, is not one which the State can ask this court to review upon its appeal; this, for the reason already indicated, if there were no other, that the order did not conclude the State — it being no party to the suit — as to any right acquired in virtue of the executions for taxes. It was not an adjudication or judicial determination of those rights as between the State and the parties to the foreclosure suit. If, by law, the levies, in behalf of the State, were valid to the extent of creating a prior lien in its favor for taxes, or for the penalties or interest thereon, — as to which questions we express no opinion, — that priority was not affected or displaced by the subsequent possession of the prop-

erty by the receivers in the foreclosure suit. In no legal sense has the State been injured by the order dismissing its petition. It may not, therefore, claim, as matter of right, that this court shall, upon this appeal, review the action of the court below in declining to surrender possession of the property covered by the levies under the executions for taxes.

In reference to that part of the final decree of foreclosure, declaring, as between the parties before the court, that the State was not entitled to penalties or interest on its taxes, we remark, that if the State, not being a party to the suit, could have appealed therefrom, it has not done so. The petition of Aug. 22, 1879, plainly imports that the appeal prayed for was only from the order of June 6, 1879, denying and dismissing the petition of June 3, 1879. It is, therefore, not competent for this court, upon the present appeal, to review that portion of the final decree relating to penalties and interest on taxes. Whether the State is concluded by any action subsequently taken by it under that decree, or whether the State was, or is, entitled to penalties and interest on its taxes, are questions which do not arise upon this appeal, and are not intended to be decided.

For these reasons the decree must, on this appeal, be

Affirmed.

CLARK *v.* KEITH.

Whatever was determined here on a writ of error cannot be re-examined upon a subsequent writ brought in the same suit.

ERROR to the Supreme Court of the State of Tennessee.

Mr. Benjamin J. Lea, *Mr. Henry Cooper*, and *Mr. Horace H. Harrison* for the plaintiff in error.

Mr. R. McPhail Smith and *Mr. Sparrel Hill* for the defendant in error.

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

When this case was here on a former writ of error it was

decided that Keith, the collector, was bound in law to receive the genuine notes of the Bank of Tennessee, issued after May 6, 1861, in payment of taxes due the State of Tennessee, unless he showed in defence that the notes tendered were issued for the purpose of aiding the rebellion. The affirmative of this issue was put on the collector. *Keith* v. *Clark*, 97 U. S. 454. That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. This rule was distinctly stated in *Supervisors* v. *Kennicott*, 94 id. 498, where numerous authorities are cited, beginning as early as *Himely* v. *Rose*, 5 Cranch, 313.

On the trial of an issue framed to meet the case as it was sent back from here for further proceedings, the court instructed the jury as follows: —

"If a part of the Torbett issue (that after May 6, 1861) was made and signed by the proper officers of the bank to aid the rebellion, and the other part of said issue was made, signed, and issued for the purpose of doing a legitimate banking business, and you cannot say from the evidence in the case that the notes here sued on were issued in aid of the rebellion, or were signed and issued for legitimate banking business, then you should find for the plaintiff. In other words, the law presumes that the notes here sued upon were issued for a lawful purpose, and the burden of proof is upon the defendant to show otherwise before this defence can be sustained."

The ruling of the Supreme Court of Tennessee sustaining this instruction is the only error assigned on the record brought up with the present writ. As the instruction was in exact conformity with our former decision, we cannot re-examine it in the present case.

Judgment affirmed.

MORRILL *v.* JONES.

1. Animals, specially imported from beyond the seas for breeding purposes, are not subject to duty.
2. The Secretary of the Treasury has no authority to prescribe a regulation requiring that, before admitting them free, the collector shall "be satisfied that they are of superior stock, adapted to improving the breed in the United States."

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

Section 2505 of the Revised Statutes provides, among other things, that "Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free [of duty], upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." Article 383 of the Treasury Customs Regulations provides that before a collector admits such animals free he must, among other things, "be satisfied that the animals are of superior stock, adapted to improving the breed in the United States."

Jones imported certain animals, which were entered at the port of Portland, Maine, and he claimed that they should be admitted free, as they were "specially imported for breeding purposes." Morrill, the collector, though the importation was for breeding purposes, demanded the duties because he was not satisfied that the animals were of "superior stock." The duties were accordingly paid under protest, and this suit was brought to recover the amount so paid.

On the trial the court instructed the jury "that, under the statute, animals, whether of superior or inferior stock, if, in fact, imported specially for breeding purposes, are entitled to be admitted free of duty," and "that the law does not give to the Secretary of the Treasury power to prescribe in the regulations what classes of animals imported for breeding purposes shall be admitted free of duty." To this instruction an exception was taken. The jury returned a verdict against the collector, upon which judgment was rendered. To reverse that judgment this writ of error was brought.

The error assigned relates to the instruction as to the effect of the treasury regulation.

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

Mr. Charles P. Mattocks for the defendant in error.

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

The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of "superior stock." This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation.

It has been argued here, that as it appears from the testimony, which has been incorporated into the bill of exceptions, that the importation in this case was from Prince Edward Island, it was not from "beyond the seas," and therefore that the judgment below was right. It is a sufficient answer to this objection that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated in some form into the record, "an authenticated transcript" of which is returned with our writ of error.

Judgment affirmed.

BRANCH *v.* JESUP.

1. The South Georgia and Florida Railroad Company having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany and Gulf Railroad Company to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany and Gulf Railroad Company. The latter had the same general power, except that of incorporating its stock with the stock of other companies, and had the right under its charter to construct a railroad from Thomasville to Georgia. *Held*, that the contract was not *ultra vires*, and that the latter company could lawfully make the purchase, and pay for the same by issuing its own stock therefor; which was delivered to and accepted by the contractors in lieu of the stock of the other company, which latter stock they had subscribed for and agreed to take in payment for the work of construction.
2. A railroad company having the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same.
3. As a general rule, a corporation cannot transfer its franchises, nor a railroad company its road, without legislative authority.
4. Prior to the purchase, the Albany and Gulf Railroad Company had executed a trust deed by way of mortgage upon all its railroad and property acquired or to be acquired. *Held*, that inasmuch as the road purchased was within the chartered limits of the company, and might have been constructed if it had not been purchased, the mortgage extended to and covered it as effectually as if the company had constructed it.
5. The contractors who built the road and accepted in payment therefor the stock, and the assignees and purchasers of the stock, after the transaction between the two companies had been carried into effect and the road possessed and operated by the Atlantic and Gulf Railroad Company for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia and Florida Railroad Company, or as preferred creditors as against the road. Having voluntarily accepted the position of stockholders of the purchasing company, they cannot question the validity of the transaction adversely to it, or to the mortgage given by it, covering the road in question.
6. The stock thus issued and accepted was preferred stock, on which interest was payable. *Held*, that the holders thereof, and their assigns, having accepted it, and received interest on it for several years, are estopped from questioning the power of the company to issue it.
7. The South Georgia and Florida Railroad Company having received the stipulated consideration, and incorporated its stock with that of the Albany

and Gulf Railroad Company, by accepting the stock of that company, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by that company. It has lost nothing; and the liability which it incurred is protected by first liens on the road, the priority of which is conceded by all parties.

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

The facts are stated in the opinion of the court.

Mr. William W. Montgomery for the appellants.

Mr. Walter S. Chisholm and *Mr. Alexander R. Lawton* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a bill filed by Morris K. Jesup, as surviving trustee, for the foreclosure of a deed of trust in the nature of a mortgage, bearing date Dec. 20, 1867, given by the Atlantic and Gulf Railroad Company of Georgia to said Jesup and one Gardner (since deceased) to secure the payment of certain bonds of the company to the amount of $2,000,000 payable in 1897 with interest. The bill was filed Feb. 15, 1877, and on the 19th of the same month receivers were appointed to take charge of the mortgaged property, being the railroad of the company with its rolling-stock and machinery. A supplemental bill was filed on the 20th of April, 1877. The only defendant named in either bill was the Atlantic and Gulf Railroad Company. The premises sought to be foreclosed and sold were, *first*, the main line of the company's road, extending from Savannah southwesterly and westerly to Bainbridge, in Georgia, a distance of about two hundred and thirty-seven miles; *secondly*, a branch road, extending from Dupont to the Florida line, about thirty-two miles, connecting, *thirdly*, with a short road in Florida, extending to Live Oak in that State, which the company held and operated under a lease; *fourthly*, a branch road about fifty-eight miles in length, extending from Thomasville, on the main line, northerly to Albany, Georgia; *fifthly*, two other small branches at Savannah, one connecting the main line with wharves on the Savannah River, and the other connecting it with the Savannah and Charleston Rail-

road. The Thomasville branch was purchased from the South Georgia and Florida Railroad Company in 1868 (shortly after the giving of the mortgage in suit) for the purpose of extending the line to Albany; which branch was subject to certain bonds and mortgages issued by the latter company, having a lien paramount to the mortgage in suit. The other branches were, in like manner, severally subject to certain prior mortgages, given for purchase-money or construction, and having a paramount lien. The bill conceded the priority of these several liens.

The defendant answered, specifying the liens on its property prior to that of the mortgage, and insisting that it would be inequitable to foreclose and sell at that time, although consenting to the appointment of receivers.

On the 22d of April, 1878, Branch, Sons, & Co. and others (who are appellants here) petitioned for, and obtained, leave to intervene *pro interesse suo*, claiming to be preferred creditors of the Atlantic and Gulf Railroad Company as to the proceeds and earnings of the South Georgia and Florida Railroad; that is, the branch from Thomasville to Albany. By amendment to the petition the South Georgia and Florida Railroad Company was also made a party, and a prayer was added to have declared void the sale of the said branch road, and for its restoration to the South Georgia and Florida Railroad Company.

By their petition of intervention the appellants insisted that the lien of the mortgage sought to be foreclosed does not cover the branch aforesaid: that the petitioners and others are holders of certificates of special guaranteed seven per cent stock of the Atlantic and Gulf Railroad Company to the amount of some $300,000, of which the petitioners own $56,100; that these certificates were issued by the Atlantic and Gulf Railroad Company under a contract with the South Georgia and Florida Railroad Company, dated January, 1869, for the construction of its road from Thomasville to Albany; a copy of which contract and certain modifications of it, and a copy of one of the certificates, were annexed to the petition. The petitioners further contended that the earnings of that branch road, if kept by themselves, would be sufficient, not only to pay the

interest on the preferred bonds of the South Georgia and Florida Railroad Company, but to pay the interest on said certificates; that the guaranteed scrip was given for the purchase of the South Georgia and Florida Railroad, and was distributed among the contractors who built it in payment for their labor; that it is in effect the promissory notes of the Atlantic and Gulf Railroad Company, and that the holders could proceed by attachment if the property of that company were not in the hands of receivers; and, after making further averments as to the solvency of the South Georgia and Florida Railroad Company, if it stood alone, unconnected with the Atlantic and Gulf Railroad Company, the petitioners prayed, for themselves and the other holders of certificates, to be examined *pro interesse suo*, touching their alleged paramount claim upon the proceeds of the South Georgia and Florida Railroad after payment of interest on its bonds, and for an order directing such examination before the master, and for other directions.

In the amended petition the petitioners averred that the original holders of the certificates of preferred stock before mentioned were subscribers to the capital stock of the South Georgia and Florida Railroad Company, and paid their subscriptions by work done on the road, for which they received the said certificates of preferred stock in the Atlantic and Gulf Railroad Company, and that the present holders are *bona fide* purchasers of said scrip, except in some instances where the original holders have not parted with their scrip; and they alleged that when the contracts between the two companies were executed it was supposed that they had power to enter into the same; but that they are now advised that the contracts were *ultra vires*, and void, and they prayed a rescission and cancellation thereof: but if the court should decree that the contract only amounted to a lease of the road (which they conceded would not be *ultra vires*), then they prayed that it may be rescinded for non-compliance with its terms, and the inability of the Atlantic and Gulf Railroad Company to comply therewith. But if the court should think there was a valid contract of sale, then they repeated their prayer to be decreed to have a first lien on the proceeds of the road after the mort-

gages executed thereon by the South Georgia and Florida Railroad Company, and for a separate sale of that road subject to said mortgages.

The first contract referred to in the petition bore date June 19, 1868, and provided that the South Georgia and Florida Railroad Company should complete its road from Thomasville to Albany, and turn it over in sections, as completed, to the Atlantic and Gulf Railroad Company, and that when completed to Albany, the stock of the South Georgia and Florida Railroad Company should be incorporated with the stock of the Atlantic and Gulf Railroad Company, and that interest at the rate of seven per cent per annum on the actual cost of the road should be paid as well before such incorporation of stock, as on said stock after its incorporation; and that when the stock should be thus incorporated, all the rights, privileges, and franchises of the South Georgia and Florida Railroad Company, so far as related to the road from Thomasville to Albany, should vest in the Atlantic and Gulf Railroad Company, and said road should be a branch of the Atlantic and Gulf Road. This contract was modified by another contract made Jan. 15, 1869, which recited that the legislature of the State had passed an act authorizing the State to indorse the bonds of the South Georgia and Florida Railroad Company to the amount of $8,000 per mile; and that the Atlantic and Gulf Railroad Company consented to the issue of said bonds, and a first mortgage to secure them, and guaranteed their payment; and it was stipulated that the amount of said bonds should be deducted from the amount of preferred stock to be issued to the South Georgia and Florida Railroad Company for the construction of the road. Another agreement, made Sept. 1, 1869, authorized the further issue of bonds by the South Georgia and Florida Railroad Company to the amount of $200,000, to be secured by a second mortgage on the road, and guaranteed by the Atlantic and Gulf Railroad Company.

The road appears to have been completed to Albany prior to October, 1870. On the 10th of that month the following resolution was passed by the Board of Directors of the South Georgia and Florida Railroad Company: —

"Whereas the South Ga. & Fla. Railroad Company entered into an agreement with the Atlantic and Gulf Railroad Company, on the nineteenth day of June, 1868, by which a transfer of the said South Georgia and Florida Railroad was to be made (that is, all of said road between Thomasville and Albany) upon certain conditions therein stipulated, all of which will more fully appear by reference to said agreements; and whereas the South Georgia and Florida Railroad has been completed to East Albany and the same has been turned over to the Atlantic and Gulf Railroad Company, and which is now being operated by said Atlantic and Gulf Railroad Company; and whereas the president of the Atlantic and Gulf Railroad Company has signified his willingness to receive said road finished to East Albany; and whereas the South Georgia and Florida Railroad Company have made up the entire cost of said road and made affidavit certificate under oath as prescribed by said agreement: *It is therefore resolved*, that the president of this road proceed to Savannah, submit his estimates and certificates, and demand and receive the guaranteed stock agreed to be given to the South Georgia and Florida Railroad stockholders under said agreements in terms of the several agreements made by the South Georgia and Florida Railroad Company with said Atlantic and Gulf Railroad Company. *Resolved, further*, that the president be, and he is hereby, authorized to make, execute, and deliver all papers necessary to carry out and fulfil said agreements for a transfer of so much of said South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, specially reserving the other franchise or rights of building and equipping a railroad from Thomasville to the Florida line under the charter of the South Georgia and Florida Railroad Company."

This resolution was duly carried into effect shortly after its adoption, as appears by a final contract executed in due form between the companies, bearing date Jan. 8, 1876, which recited the several prior contracts, and the said resolutions, and the fact of their acceptance and of the performance and fulfilment of the same, and by which the South Georgia and Florida Railroad Company made a formal conveyance to the Atlantic and Gulf Railroad Company, its successors and assigns, forever, of so much of the South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, with all the appurtenances thereof, including the franchises of the South

Georgia and Florida Railroad Company, to construct and use the same.

The certificates of stock issued by the Atlantic and Gulf Railroad Company in pursuance of said contract were regular scrip certificates for preferred stock in that company, in the following form: "Atlantic & Gulf Railroad, Georgia: — Special guaranteed seven per cent. stock issued under a contract with the South Georgia & Florida Railroad Company, bearing date Jan. 2d, 1869, for the construction of the South Georgia & Florida Railroad: — This is to certify that Branch & Sons or bearer is entitled to sixty-six shares, on which the par value of 100 dollars has been paid, of the special stock of the Atlantic & Gulf Railroad Company, on which interest from date is perpetually guaranteed at the rate of 7 p. c. per ann., payable semi-annually, &c. Witness, &c. Sealed, &c., first day of November, 1872. (Signed) John Scriven, president: Attest, D. Macdonald, secretary."

No evidence was taken in the case, and the hearing was had on bill and answer. It was conceded, or, at least, not controverted, that the intervenors were holders of the stock certificates as claimed in their petition, and that said certificates originated in the manner and in fulfilment of the contracts therein set forth.

The court below denied the prayer of the intervenors and dismissed the petition; and went on to make a final decree in the cause, ordering a foreclosure and sale of the railroad of the Albany and Gulf Railroad Company, with all its branches, including the branch from Thomasville to Albany, subject, however, to all prior mortgage liens, including the first and second mortgages on the Thomasville branch. From this decree the intervenors have appealed.

The questions raised by the appellants, as stated in their brief, are as follows: —

1st, Was the sale of a part of the South Georgia and Florida Railroad and its franchises to the Atlantic and Gulf Railroad void as against public policy and *ultra vires?*

2d, If not, did the contract amount to anything more than a lease?

3d, If it was a sale, are not the South Georgia and Florida

Railroad Company and other intervenors vendors with the purchase-money unpaid, and hence entitled to assert their right of attachment upon the property sold, in preference to the claims of the mortgage creditors of the vendee, the Atlantic and Gulf Railroad Company?

4th, If the intervenors are not entitled to attach as vendors, are they not *creditors* of the Atlantic and Gulf Railroad Company, and entitled to be paid out of property of the debtor which is not covered by the mortgage; and in this case does the mortgage cover the South Georgia and Florida Railroad?

If only stockholders, can they not object to the sale of the South Georgia and Florida Railroad under the present proceedings?

The court below was of opinion that the sale and purchase of the road was not void, nor *ultra vires* of the two contracting companies, without examining the question of the right of the appellants to contest the validity of the transaction. We will proceed to give some examination to that question.

The appellants are stockholders of the Atlantic and Gulf Railroad Company. Their stock is a preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock. It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of a preferred dividend, and is sometimes so called. Though after it has accrued it may become a debt, so also does a dividend become a debt after it has been declared and has become payable. It has no priority over other debts, if, indeed, it has an equality with them. And this position, as stockholders of the Atlantic and Gulf Railroad Company, was voluntarily assumed by the appellants. This is true both of those who purchased their stock at second hand and of those who originally received the stock. They probably deemed it to their interest to accept payment for their work in this form. But again: not only are they stockholders in the Atlantic and Gulf Railroad Company, but the acceptance of the stock was an acknowledgment of the validity of the contract between the two companies. The issue of the stock was in part performance of that contract, and this ap-

pears upon the face of the certificates. After thus acquiescing in the purchase by the Atlantic and Gulf Railroad Company of the branch railroad in question, and of the amalgamation of stock incident to said purchase; and after the possession and use of said road and its franchises by the said company as a part of its road-system for a period of several years, the appellants are estopped from questioning the validity of said transaction, and cannot now repudiate their character of stockholders of the Atlantic and Gulf Railroad Company, and assume that of stockholders of the South Georgia and Florida Railroad Company. To sustain such a course on their part would have the effect of ripping up and unravelling a thousand transactions which have taken place on the basis of the purchase and amalgamation referred to. Whatever right the State may have to inquire into the validity of such purchase and amalgamation, certainly the appellants have no right in law or in equity to question it. In law, they are stockholders of the purchasing company, in which character they neither can, nor do, ask any relief; in equity, they are participators in the face of all the world in a transaction which is conceded to have been fair and supposed to be lawful at the time, and upon the faith of which numberless transactions in business, and in the stock and bonds of the purchasing company, have undoubtedly been entered into. To give to the appellants relief in any form in which it is asked, would be attended with injury and injustice to others who have innocently confided in the acts of the appellants and their associates.

We might safely stop here and affirm the decree below on this consideration alone. But as our view of the other questions which have been raised leads to the same result, it may be proper to state the reasons therefor.

The first relates to the power of the two companies to enter into the arrangement for the sale and purchase of the Thomasville branch. The power of the South Georgia and Florida Railroad Company to sell the road depends upon its charter, which took its origin in an act of the legislature approved Jan. 22, 1852, creating the Georgia and Florida Railroad Company, with power to construct a railroad from Oglethorpe, or some other point on the Southwestern Railroad, to Albany; also

with power to construct a railroad from Albany to Thomasville, and from thence to the Florida line in the direction of Tallahassee; also a plank or macadamized road in connection with the railroad; and for the purpose of constructing said road or roads, procuring right of way, and managing all its affairs, the said company was invested with the same powers and privileges granted to the Savannah and Albany Railroad Company, not inconsistent therewith; and it was enacted that the said Georgia and Florida Railroad Company might at any time incorporate their stock with the stock of any other company on such terms as might be mutually agreed upon. The company was further authorized, from time to time, to determine the amount of stock necessary to carry out its purposes and the construction of said road or roads. The powers given in this charter by adoption and reference to the charter of the Savannah and Albany Railroad Company consisted, as expressed in the charter of the latter company, of all the rights, privileges, and immunities which by the laws of Georgia were held or enjoyed by any incorporated railroad company or companies in the State; and by a reference to prior existing charters we find that, so far as relates to the question in hand, these powers were, "To have, purchase, possess, enjoy, and retain lands, rents, hereditaments, tenements, goods, chattels, and effects, of whatsoever kind, nature, or quality the same may be, and the same to sell, grant, demise, alien, or dispose of."

All the powers thus given to the Georgia and Florida Railroad Company in 1852 were conferred upon the South Georgia and Florida Railroad Company by an act passed Dec. 22, 1857. By this act the South Georgia and Florida Railroad Company was created, and the line of road which the Georgia and Florida Company was authorized to construct from Albany to Thomasville, and thence to the Florida line, was separated from the rest and granted to the South Georgia and Florida Railroad Company, which company was invested with the usual powers to purchase, hold, and convey property, real and personal, and with specific power to construct a railroad from Albany "to Thomasville," "and from Thomasville to any point on the Florida line," and to connect with any other road at such points as they should deem best; and it was enacted

"that the provisions of the act incorporating the Georgia and Florida Railroad Company, so far as applicable, shall be applied to said South Georgia and Florida Railroad Company." By reference and adoption, therefore, the latter company became invested with all the authority and power, in regard to the line between Albany and Thomasville, and between Thomasville and the Florida line, which had been conferred upon the Georgia and Florida Railroad Company. It seems to us clear that these powers were sufficient to enable the company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and exist-

ence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply. In view of the large power thus conferred upon the South Georgia and Florida Railroad Company, we cannot doubt that it had full power to enter into the arrangement made with the Atlantic and Gulf Railroad Company for the transfer of that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the same, and an incorporation of all its stock issued for the construction of said road with the stock of the latter company.

It is true that the South Georgia and Florida Railroad Company did not part with its entire franchise. Power was given to it by its charter to construct a road from Thomasville to the Florida line (being a distance of about fifteen miles due south), and to connect with any other road at such points as it might deem best. But this extension is mentioned as a distinct enterprise, has never been entered upon, and would have no value without a connection with some railroad in Florida, for which, so far as appears, no authority has thus far been accorded by that State. The authority to make it is nominal only, if it has not entirely expired by lapse of time; and could be of little use to the Atlantic and Gulf Railroad Company, which had a connection of its own with the Florida system of railroads at Live Oak. The retention of this nominal franchise by the South Georgia and Florida Railroad Company, which has never issued any capital stock under it, or with a view to its use, seems to be in reality a mere shadow without any substance. All the capital stock which the company ever provided for was that which went to the building of the road from Thomasville to Albany, and that, at its very inception, was incorporated with the stock of the Albany and Gulf Railroad Company; the stock of the latter company being issued and accepted in the place of it. So that, in truth, the terms of the charter have been literally carried out. At all events, we think that the arrangement made with the latter company was within the powers given to the South Georgia and Florida Railroad Company; and this arrangement was fully assented

to and acquiesced in by every subscriber to its stock, as before mentioned.

In this connection, it is proper to notice a fact which has been referred to by the counsel of the appellants in support of his views, but which seems to us corroborative of the view which we have taken of the powers of the South Georgia and Florida Railroad Company. The original route authorized to be taken by its parent company, the Georgia and Florida Railroad Company, extended, as we have seen, from Oglethorpe, or some other point on the Southwestern Railroad, to Albany, with authority also to construct a railroad from Albany to Thomasville, and from thence to the Florida line. Afterwards, as we have also seen, in December, 1857, the South Georgia and Florida Railroad Company was created, and that portion of the route extending from Albany southward to Thomasville and the Florida line was transferred to the latter company with all the general powers of the parent company, among which was the power to incorporate its stock with that of any other company. The northern part of the original route, extending from Albany northward to Americus, a point of connection with the Southwestern Railroad, still remained under the original charter; and this part (between thirty and forty miles in length) was afterwards transferred to the Southwestern Railroad Company with an incorporation of stock, similar to what was done by the South Georgia and Florida Railroad Company with the southern part of the line. But it seems that the Southwestern Railroad Company had not sufficient unissued stock to pay for the road thus acquired. Whereupon an act was passed by the legislature "to amend the charter of the Southwestern Railroad Company and to authorize an increase of the capital stock of said company," &c., by which, after reciting the power given to the Georgia and Florida Railroad Company to incorporate its stock with the stock of any other company, further recited that the latter company had agreed with the Southwestern Railroad Company to incorporate its stock with the stock of that company, and had delivered its railroad running from Americus to Albany to the Southwestern Railroad Company, and had received stock of the said company to the amount of near $500,000, and that

it thereby became necessary to increase the capital stock of said Southwestern Railroad Company; it was therefore enacted that the latter company be authorized to issue stock in addition to the amount mentioned in its charter for any sum not exceeding $500,000; and that the road from Americus to Albany should be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay to the State the same tax that the rest of the Southwestern Railroad Company was liable to pay. This arrangement, which the legislature thus enabled the Southwestern Railroad Company to carry out (and in doing so recognized its validity), was precisely similar to that which had been made between the South Georgia and Florida Railroad Company and the Atlantic and Gulf Railroad Company in regard to the road from Albany to Thomasville. The only difference between the two cases was, that the Southwestern Railroad Company had to get power to issue additional stock, — a power which the Atlantic and Gulf Railroad Company did not need, as it already had authority to issue the amount of stock required for carrying out its arrangement with the South Georgia and Florida Railroad Company; at least, it is so stated, and is not denied, nor is the contrary alleged in any of the pleadings.

The point taken, in relation to the issue of stock by the Atlantic and Gulf Railroad Company in payment of the road purchased by it, is, not that the company had no power to issue that amount of stock, but that it had no power to issue preferred stock. But it hardly lies in the mouth of those who received this stock, and who for several years accepted the interest guaranteed to be paid thereon, to make this objection, especially as no other parties, neither the State nor the holders of the common stock, have ever objected to the issue of this preferred stock. Without entering, therefore, into a discussion of the abstract question whether a railroad company may not issue a preferred stock, when done in good faith, instead of issuing bonds to the same amount, it is sufficient to say that the appellants are not in a position to raise the question.

But, supposing it to be shown that the South Georgia and Florida Railroad Company had the power to sell, had the Atlantic and Gulf Railroad Company the power to buy the road

in question? The latter company was formed by the amalgamation of two distinct companies, and became invested with all the powers contained in the charters of both. These companies were, first, the Savannah, Albany, and Gulf Railroad Company, chartered in 1847 under the name of the Savannah and Albany Railroad Company; and, secondly, the Atlantic and Gulf Railroad Company, chartered in 1856. The first of these companies was authorized to construct a railroad communication between Savannah and Albany, by such route as the company might select, with such branch road towards the north and towards the south from said road to such point or points as they might deem requisite; with power, also, at any time, to extend said road to any point or points on or across the Chattahoochee River. Besides the ordinary corporate powers given to this company, it was invested, as already mentioned, "with all the rights, privileges, and immunities which by the laws of Georgia are held and enjoyed by any incorporated railroad company or companies." The Georgia Railroad and Banking Company had been chartered in 1835. Other railroad companies in Georgia, then in existence, had power "to have, purchase, receive, possess, enjoy, and retain lands, rents, tenements, hereditaments, goods, chattels, and effects of whatsoever kind, nature, or quality, and the same to sell, grant, demise, alien, or dispose of." See Charters of Georgia Railroad and Central Railroad, Prince's Digest, pp. 311, 326. The second of the companies consolidated as aforesaid, to wit, the Atlantic and Gulf Railroad Company, had power to construct a railroad from a point in Wayne County, southwest of Savannah, to the western boundary of the State south of Fort Gaines, being in a general westerly direction across the southern part of the State; but it was provided that the Savannah, Albany, and Gulf Railroad Company, as well as the Brunswick and Florida Railroad Company, might join their tracks with that of the Atlantic and Gulf Railroad Company. The latter company was invested with all the privileges, immunities, and exemptions granted to the Central and to the Georgia Railroad Companies, or either of them.

The two companies — Savannah, Albany, and Gulf, and Atlantic and Gulf — were consolidated under the name of the latter

company by virtue of an act passed in April, 1863, by which it was provided that "the several immunities, franchises, and privileges granted to said companies by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue in force."

From these charters and laws it appears that the consolidated company had power to construct a railroad from Savannah to the southwestern border of the State; and, amongst other things, to construct a railroad communication between Savannah and Albany, and to make branch roads towards the north and towards the south: and, even before the consolidation, the Savannah and Albany Company was authorized to join its track to that of the Albany and Gulf Company; so that the line of roads, as finally located, constructed, and acquired, including the branch from Thomasville to Albany, cannot be said to have departed in any respect from the strict course pointed out and designated by the charters of the consolidated companies. The main line commences at Savannah, under the charter of the Savannah and Albany Company, and runs southwesterly to Wayne County, and thence, under both charters (for both companies were authorized to use the same track), westwardly to Thomasville and Bainbridge, in the southwestern part of the State, with a branch running from Dupont towards the south into Florida, and a branch from Thomasville towards the north to Albany, forming a railroad connection between Savannah and Albany. In making the railroad connection between Savannah and Albany, the original charter of the Savannah and Albany Railroad Company could not be construed to require that this connection should be made by a rigidly straight line. The directors were invested with reasonable discretion as to the route to be taken; and since the subsequent legislation expressly authorized the Savannah and Albany Company to join its track with that of the Albany and Gulf Railroad Company, it is clear that the line of the latter company was not regarded as an improper departure from that of the former. Indeed, by an act passed in 1857, the Albany and Gulf Railroad Company were required to get the release of the Savannah and Albany Company of its right of way over the line of its contemplated road, before it could have

the State subsidy proposed to be given to it; which plainly shows that the line of the Albany and Gulf road (which properly lay through Thomasville) was regarded as within the fair limits of the route granted to the Savannah and Albany Company. This being so, the branch road from Thomasville to Albany was fairly within the power and authority given to the Savannah and Albany Company by its original charter, to establish a railroad connection between Savannah and Albany.

Then, since the consolidated company had authority to construct a railroad from Thomasville to Albany, and to establish the railroad connection between Savannah and Albany in that way, and had the general power to purchase and receive property of every conceivable kind, nature, or quality (limited, of course, by the general objects of its charter), what was to hinder its purchasing from the South Georgia and Florida Railroad Company its line of road between Thomasville and Albany, and paying for it by the issue of its own stock, — an arrangement which, as we have seen, the South Georgia and Florida Railroad Company, on its part, had a perfect right to make? It seems to us that this question is not hard to answer; but that it is clear that the one company had the right to purchase this road as fully as the other company had the right to sell it; and that the right of both was fully given by the charters and laws which gave them their respective powers.

We do not mean, in the slightest degree, to disaffirm the general rule, that a corporation cannot dispose of its franchises to another corporation without legislative authority. But we think that the authority clearly existed in this case, being fairly derived from the legislation which affected the two companies, without any forced or strained construction of its terms.

The second question raised by the appellants, namely, whether the contract amounted to anything more than a lease, has been sufficiently answered by what has already been said. The transaction between the companies had in view a transfer of the entire interest of the South Georgia and Florida Railroad Company.

The third question raised is, whether the South Georgia and Florida Railroad Company and the other intervenors are not vendors whose purchase-money is unpaid, and who are thence

entitled to assert a right of attachment upon the property in preference to the claims of the mortgage creditors of the Atlantic and Gulf Railroad Company, the vendee? The original intervenors are certainly not entitled to assume any such position. As already shown, their *status* is fixed by their own choice, as stockholders of the Atlantic and Gulf Railroad Company. They are such, and nothing more, except as to the interest due on their stock, as to which they are nothing more than general creditors. As to the South Georgia and Florida Railroad Company, it has no claim at all. It received all that it stipulated for. The priority of its bonds and mortgages is fully conceded; and its stock, so far as the railroad in question is concerned, was incorporated with that of the Atlantic and Gulf Railroad Company, with which it became amalgamated and identified. Its separate existence *pro tanto* became merged in the latter company. How far it can ever be galvanized into new life for the purpose of the extension of the road from Thomasville to the Florida line, it is not necessary to inquire. That question has nothing to do with the one now in hand.

The only remaining question is, whether the deed of trust or mortgage given by the Atlantic and Gulf Railroad Company to the complainant and his co-trustee covers the railroad in question. In terms it covers and pledges the entire railroad of the Atlantic and Gulf Railroad Company in Georgia, constructed, or to be constructed, from Savannah to Bainbridge, or to and from any other points in the State of Georgia, with its appurtenances, with all rights of way acquired, or thereafter to be acquired or obtained, and all rolling-stock and machinery acquired, or to be thereafter acquired, and all franchises, rights, and privileges connected with or relating to said railroad, or the construction, maintenance, or use thereof. Under the settled rule in regard to the operation of railroad mortgages on after-acquired property, where the terms of the instrument extend to such property, there can be no question that the mortgage in this case did extend to and cover any portion of road belonging to the company and authorized by its charter, which was constructed after the mortgage was given. The only question here is, whether the railroad from Thomasville to Albany is fairly within this category. We have already seen that the

company had the power to construct this line; that it was within its chartered limits. There can be no doubt, therefore, that if the road had been constructed by the company without any reference to the South Georgia and Florida Railroad Company, it would have fallen directly within the operation of the rule in question. Instead of constructing it directly, the Atlantic and Gulf Railroad Company procured its construction through, and by arrangement with, and purchase from, the South Georgia and Florida Company. Can this make any difference? When constructed, the road became part of the system of roads of the Atlantic and Gulf Railroad Company, as much so as if it had constructed it independently. A road purchased as and for a part of its chartered line is no less a part of its proper road than one built for that purpose. Provision was made, it is true, in the contract between the companies, for a prior lien in favor of the mortgages separately placed upon the road thus acquired. That lien is conceded to be valid and binding. But subject thereto, the mortgage given to the complainant properly extends to and covers this road as part of the entire line of the company. It is embraced in the terms of the mortgage, and is in law subject to its operation. It is part of the lawfully acquired property of the Atlantic and Gulf Railroad Company, — acquired under its chartered rights and powers. It is the property of no other company. It is subject to the debts of no other company, except those which attached to it by virtue of the superior mortgage liens before mentioned. The appellants, as stockholders of the company, equally with the company itself, are bound by the mortgage. Their claims are inferior and subject to it. Their position as general creditors, in regard to any interest due them, is equally inferior. They have no equity that can prevail against it.

The appellants have suggested several subsidiary points which, regard being had to the views we have already expressed, cannot affect the result. One point is that the charter of the South Georgia and Florida Railroad Company expired in 1872, before the execution of the final deed to the Atlantic and Gulf Railroad Company. We do not understand that the charter expired at that time, but only that the time limited for the construction of the road expired. If the charter expired, how did the com-

pany become a party to this suit? But even if the charter did expire, the road was finished and in possession of the Atlantic and Gulf Railroad Company in 1870, and the entire transaction was then completed. The conveyance executed in 1876 was merely carrying out in form what was already completed and carried out in substance. But how can this objection avail the appellants in any view of the case? What right have they to object to the conveyance? Its only purpose was to carry out what they and all the parties concerned consented to and acquiesced in long before. And in their position, as stockholders of the Atlantic and Gulf Railroad Company, it does not lie in their mouths to object that the South Georgia and Florida Railroad Company unlawfully exercised corporate powers, when it completed the performance of its obligation to the Atlantic and Gulf Railroad Company.

But it is unnecessary to pursue the subject further. We see nothing in the points raised on the appeal to invalidate the decree of the Circuit Court.

Decree affirmed.

PARKERSBURG v. BROWN.

1. The act of the legislature of West Virginia, of Dec. 15, 1868, c. 118, authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing, is invalid, and the bonds issued under it are, as against the city, void.
2. As the consideration for bonds to the amount of $20,000, issued by the city to M., under that act, he, to secure the payment to the city of the semi-annual interest on $20,000, and of annual instalments on the principal, conveyed to J., as trustee, certain real estate and personal property, with a power of sale in case of default. The bonds were payable to M. or order. He indorsed them in blank and sold them to A. and B., who bought them for value, in good faith. M. paid one instalment of interest on them to the city. The latter made five payments of interest. It then took into its possession the property, and refused to make further payments. A suit in equity was instituted by the holders of the bonds against the city, but was not brought to a hearing for nearly three years. M., although a party thereto, made no defence. The bill prayed for a receiver of the property, but none was applied for; and the city having been allowed

to control and manage the property meantime, acted in good faith and with reasonable discretion, in taking care of it and disposing of some of it. *Held*, 1. The bonds are void because the necessary amount to pay them and the interest thereon was to be raised by taxation, which, not being for a public object, the Constitution of the State did not authorize, and the legislature had no power to pass the act. 2. Neither the payment of interest on the bonds by the city, nor the acts of its officers or agents in dealing with the property, operate, by way of estoppel, ratification, or otherwise to render the city liable on the bonds. 3. M. had a right to reclaim the property and to call on the city to account for it, in disaffirmance of the illegal contract, the transaction being merely *malum prohibitum*, and the city being the principal offender. Such right passed to the complainants as an incident to the bonds. 4. This court orders a decree to be entered declaring that the city exceeded its lawful powers in issuing the bonds, and that they cannot be enforced as its obligations, and providing for a sale of the remaining property, and for an account, wherein the city is to be credited with the sums it had in good faith paid for the acquisition, protection, preservation, and disposition of the property, and for insurance and taxes, and for interest on the bonds, and to be charged with what it had received, but not with any sum for loss of, or damage to, or depreciation of, the property, and ordering the distribution among the complainants of the net proceeds of the sale and the net amount of money, if any, remaining in the hands of the city, received from M. or from the sales by it of any of the property.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

The case is stated in the opinion of the court.

Mr. C. C. Cole and *Mr. William A. Cook* for the appellant.

Mr. B. M. Ambler, *Mr. William A. Fisher*, and *Mr. Charles Marshall*, *contra.*

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 15th of December, 1868, the legislature of West Virginia passed an act which provided as follows, c. 118 : —

"SECT. 1. That the mayor and council of the city of Parkersburg are hereby authorized and empowered to issue the bonds of said city to an amount not exceeding two hundred thousand dollars, for the purpose of lending the same to manufacturers carrying on business in or near the said city, in the said county of Wood. The aid bonds shall run twenty years, and bear interest at the rate of six

per centum per annum; and they shall be issued upon the recommendation of the following-named persons, who shall be considered the trustees of said loan, that is to say: . . . who shall have power to fill all vacancies that may occur in their number. They shall have power to make loans of said bonds to good, solvent companies, or individuals, on the following terms, that is to say: When persons engaged in manufacturing shall have invested in their business thirty-five (35) per cent. of the amount proposed to be employed in the business of manufacturing, clear of all liabilities, to be shown to said trustees by affidavits of the applicants, or by other satisfactory evidence, and when such proof is furnished, then said trustees, five members concurring, may lend to such applicants such amounts of said bonds as they may deem proper and judicious, not, however, to exceed sixty-five per cent. of the capital proposed to be used in manufacturing by the applicant: *Provided, however*, when such loans shall be made, the interest thereon shall be paid by the borrower semi-annually to the treasurer of said city; and five per cent. of the principal shall be paid annually to the said city by the borrower, to be placed to the account of the sinking fund of said city, until the several loans are paid in full. The said loans shall be secured by deed of trust or mortgage on real estate, or by other satisfactory security, sanctioned by said trustees: *And provided, also*, that no bonds shall be issued under this section until a majority of the qualified voters of said city concur in the same, by voting for or against the same, at an election to be held for that purpose."

On the 17th of April, 1869, an election was held in the city of Parkersburg, under authority of an ordinance passed by the mayor and city council of said city, "upon the proposition to authorize the said city council to issue bonds of the said city to the amount of two hundred thousand dollars, to be loaned to manufacturers under the provisions of said law and said ordinance." At said election 441 votes were cast in favor of said proposition, and 19 against it.

On the 6th of September, 1870, a communication having been received by the city council from M. J. O'Brien & Brother in regard to the erection of a manufacturing establishment and marine railway within the city limits, it was "resolved that the council agree, when the trustees of the improvement loan certify that the Messrs. O'Brien and Bro. have satisfactorily

secured the bonds loaned to them, and complied with the act of the legislature authorizing the loan of said bonds, that they will release said parties from city taxation on their property, to the amount of bonds invested in the same, not exceeding twenty thousand dollars: *Provided, however*, the release shall extend so long as the said property shall be used or operated as a manufacturing establishment and marine railway, but not in any event to exceed twenty years."

Nothing further was done on the subject until after section 8 of article 10 of the new Constitution of West Virginia went into operation on the 22d of August, 1872, which is as follows: —

"8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof within, and not exceeding, thirty-four years: *Provided*, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

On the 22d of April, 1873, the city council adopted the following resolution: —

"Be it resolved by the mayor and council of the city of Parkersburg, that, in the event of the firm of M. J. O'Brien & Brother taking from the city a loan of twenty thousand ($20,000) dollars of its bonds authorized under former resolution, dated September 6th, 1870, for manufacturing purposes, and paying punctually the interest thereon and five per cent. (5) of the principal for sixteen years, the said firm be released from any further payments and the balance of said bonds be paid by the city, and the said M. J. O'Brien & Brother are released from making a marine railway."

At a meeting of the city council on the 13th of May, 1873, the trustees of said loan made a report, showing that they had adopted the following resolution : —

" Whereas, M. J. O'Brien and W. S. O'Brien, composing the firm of M. J. O'Brien & Brother, are desirous of obtaining a loan of the bonds of the city, under and by authority of an act of the legislature of West Virginia, passed December 15, 1868, for manufacturing purposes, to the amount of $20,000, for the purpose of aiding them in the erection of a foundry and machine works in the city of Parkersburg; and whereas, for the purpose of erecting these works, they have bought of Mrs. Joanna Wait, widow of Walton Wait, deceased, and also from her as the guardian of Bettie C. Wait, infant heir of Walton Wait, deceased, lot No. 80 in said city of Parkersburg, on Kanawha Street, being 85 by 170 feet, and have received a conveyance from her of said lot, both as the widow of said Walton Wait and as the guardian of said Bettie C. Wait; and whereas it appears, by a schedule of personal property of said M. J. O'Brien & Brother, verified by affidavit, and now in the hands of the city attorney, that said M. J. O'Brien & Brother are the owners of $15,000 worth of personal property in their works at Volcano, free of incumbrance, we, therefore, recommend to the city council of the city of Parkersburg, upon the said M. J. and W. S. O'Brien and their wives executing a deed of trust to the said city on the said $15,000 worth of personal property, as well as upon the said lot No. 80, the city council to take from Mrs. Joanna Wait, or some one for her, bank stock, with power of attorney to dispose of the same, or solvent bonds, to the amount of $5,000, as security that said Joanna Wait, guardian, will obtain from the Circuit Court of Wood County, within two years, authority to convey to M. J. and W. S. O'Brien the said lot No. 80, for and on behalf of said ward, and when said authority is obtained, and said deed made, said stock or bonds to be given up, then the city council may deliver to said M. J. and W. S. O'Brien, upon the deposit of the aforesaid collaterals, $10,000 of said city bonds; and when said M. J. and W. S. O'Brien have put a building or buildings on said lot ready for the roof, costing not less than $8,000 when completed, shown by bills rendered and authenticated for same to the council, and when said Joanna Wait, guardian of said Bettie C. Wait, by the authority of the said Circuit Court of Wood County, has conveyed for and on behalf of her said ward the said lot No. 80, free of incumbrance, to said O'Brien & Brother, or made a further deposit of bank stock or

bonds to the amount of $8,000, under the conditions aforesaid, as security that she will obtain such authority within two years from the date hereof, and make said conveyance, which shall be held by said city as security for the payment of said bonds and interest until said deed is made by authority of said court, then said city council may deliver to said M. J. O'Brien & Brother the remaining $10,000 of said bonds; and said city council shall take, as a further security for the payment of said bonds and interest, from said M. J. O'Brien & Brother, to be deposited with the city treasurer, their insurance policies, amounting to $14,500, transferred to the said city, on their machinery, stock, &c., at Volcano; and when their buildings on said lot are completed, and the machinery thereon erected, then the said M. J. O'Brien & Brother shall have the whole insured to the amount of $15,000, and keep the same so insured for the benefit and security of said city on account of said loan."

At the same time the city attorney presented to the council a trust deed executed by "said O'Brien & Brother," which was accepted, and it was resolved "that, upon the execution of the trust by M. J. O'Brien & Bro., the clerk is authorized to issue immediately $10,000, part of city bonds, as agreed upon by the resolution of the 22d of April, 1873."

The trust deed, which was executed by the two O'Briens and their wives, and acknowledged by them on the 13th of May, 1873, and recorded on the 18th of June, 1873, is in these words: —

"This deed, made the thirteenth day of May, A. D. 1873, by M. J. O'Brien and P. F. O'Brien, his wife, and W. S. O'Brien and Jane C. C. O'Brien, his wife, parties of the first part, and Okey Johnson, trustee, party of the second part, witnesseth: That for and in consideration of one dollar in hand paid by the said trustee to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part hereby grant unto the party of the second part all, &c., of the following property, to wit: All that certain lot of ground situate on Kanawha Street, in the city of Parkersburg, known as lot No. 80 on the plat of said town, and being the same lot conveyed by Joanna M. Wait, guardian of Betty C. Wait, and Joanna M. Wait in her own right, to the said parties of the first part by deed dated the twelfth day of May, 1873, and all the personal property mentioned in Schedule A, and hereunto annexed

and made part and parcel of this deed, said property now situated at Volcano, in the county of Wood, and valued at fifteen thousand and forty $\frac{38}{100}$ dollars, which said last-named property is permitted to remain in the possession of the parties of the first part, and to be removed from Volcano aforesaid and placed in the building or buildings to be erected by said parties on the lot aforesaid, until the same shall be required by the party of the second part, upon being made as hereinafter specified, that is to say: Whereas an act passed December 15, 1868, by the legislature of West Virginia, authorizing the mayor and city council of the city of Parkersburg to lend its bonds for manufacturing purposes, to which act reference may be had for a more explicit understanding of the provisions; and whereas the parties of the first part have negotiated with the said city for a loan of its bonds to the amount of twenty thousand dollars, according to the provisions set forth in an ordinance passed by the said city council the twenty-second day of April, 1873, whereby it is, among other things, provided that if the parties of the first part shall punctually pay the interest on the aforesaid sum of twenty thousand dollars, and five per centum of the principal for sixteen years, the said parties of the first part shall be released from any further payment, which said ordinance was authorized under a former ordinance, dated September 6, 1870, to both of which ordinances reference may be had for a fuller understanding thereof, and are made part hereof, which negotiation for the aforesaid loan of $20,000 of the bonds of the said city is made on the part of said city pursuant to a recommendation in writing made by the trustees of said loan, as provided in said act of the legislature, to which recommendation in writing reference may be had for a fuller understanding thereof, and is made part hereof, in trust to secure the faithful performance by the parties of the first part, in their payment of the aforesaid interest on said twenty thousand dollars, and the payment of the five per centum of the principal, as specified in the aforesaid ordinance passed the twenty-second day of April, 1873. And if any default shall be made herein, then the party of the second part, as trustee aforesaid, shall proceed to sell the property hereby conveyed, pursuant to the provisions of chapter 72 of the Code of West Virginia, and the acts amendatory thereto."

Exhibit A, annexed to the trust deed, contained a list by items of the personal property, with a valuation opposite each item, the same being principally machinery and tools. Attached to it was an affidavit made by M. J. O'Brien, setting

forth that M. J. O'Brien & Brother owned all the property free of incumbrance, and that each item was worth the sum set down opposite to it, and that the whole was then worth $15,000.

On the 10th of June, 1873, an order was adopted by the council, reciting the statute, and the election, and the prior proceedings of the trustees of the loan and of the council, and the presentation of the deed of trust and the deposit of the $5,000 security, and of the insurance policies before provided for, and then ordered that the said security was satisfactory, and that $10,000 of the bonds of the city be delivered to M. J. O'Brien & Brother "forthwith, under the conditions of and in accordance with" the said act "and the orders made September 6, 1870, and April 22, 1873, made and intended to be made by authority of said act of legislature, and to be controlled by and construed according to its provisions," and further ordered that when Mrs. Wait should make the deed to lot No. 80, the $5,000 security should be given up.

Thereupon $10,000 of the bonds were delivered to the O'Briens. Each bond was a certificate of indebtedness for $500, payable to M. J. O'Brien & Brother, or order, dated June 1, 1873, sealed with the seal of the city and signed by the mayor and the clerk, payable June 1, 1893, at Parkersburg, with interest at the rate of six per cent per annum, payable semi-annually, June 1 and December 1, in the city of New York. Coupons payable to bearer for each payment of interest were attached. Each bond contained this statement: "This certificate is issued by authority of the act of the General Assembly of the State of West Virginia, passed December 15, 1868."

On the 9th of September, 1873, the city council passed the following order: —

"It appearing to the satisfaction of the council that M. J. O'Brien & Brother have their buildings, which, when completed, will cost more than eight thousand dollars, now up and ready to be roofed, and have therefore complied with the recommendation of the manufacturers' loan, and the former orders of the council in that respect, it is ordered that as soon as Mrs. Joanna Wait, or some one for her, shall deposit with the city treasurer bonds to the amount of

$8,000, or bank stock, with power of attorney to dispose of the same, as collateral security that she will obtain within two years from the 13th of May, 1873, the authority from the Circuit Court of Wood County to make for and on behalf of her ward, Bettie C. Wait, a deed to said M. J. O'Brien & Brother, for lot No. 80 in the city of Parkersburg, that the mayor of the city of Parkersburg is directed to deliver, properly signed by himself and attested by the clerk of the council, the remaining ($10,000) ten thousand dollars of the bonds of the city of Parkersburg, as provided for by former orders of this council."

The second lot of $10,000 of the bonds were thereupon issued to M. J. O'Brien & Brother, the bonds being in the same form as the others. No other proceedings of the city council appear as to the issuing of the bonds.

The bonds were all of them indorsed in blank by M. J. O'Brien & Brother, and were sold by them at eighty cents on the dollar, $10,000 in June, 1873, and $10,000 in September, 1873. The appellees are the owners of the entire $20,000 of bonds, and are *bona fide* holders of them. The O'Briens paid to the city the $600 of interest falling due Dec. 1, 1873, and the city paid the coupons due that day. The O'Briens paid no more. The city paid the coupons which fell due in June and in December, 1874, and in June and December, 1875. It paid no more.

The coupons which fell due June 1 and Dec. 1, 1876, not having been paid, the plaintiff, Isabella Brown, owning $5,000 of the bonds, filed this bill on behalf of herself and all other holders of the bonds who should unite in the suit, setting forth the said act of December, 1868, the election, the action of the trustees of the loan and of the city council, the giving of the security, the execution and recording of the deed of trust, and the issuing of the first $10,000 of bonds. Her $5,000 of bonds are part of those bonds. The bill sets forth the proceeding for the issuing of the rest of the bonds and their actual issue. It avers that the holders of all of the bonds are *bona fide* holders for value. The defendants in the suit are the city of Parkersburg, the two O'Briens and their wives, and the assignee in bankruptcy of the O'Briens.

In November, 1873, the O'Briens and their wives executed

to said Johnson a deed for said lot No. 80 and for another lot, in trust to secure one Leach for his indorsement of a promissory note of the O'Briens for $3,000, with power to sell the land in case the note should not be paid. On the 9th of November, 1874, Johnson sold lot No. 80 and its appurtenances at auction, under said last-named trust deed, to the city of Parkersburg, and, on the 8th of December, 1874, executed to the city a deed of it, which recited that the sale of the lot was "subject to a trust thereon in favor of the city of Parkersburg for $20,000," and that the sale was for $300, and conveyed the lot and its buildings and appurtenances to the city "subject to the lien of the said city aforesaid."

The bill sets forth said sale and conveyance, and avers that the city has, since said purchase, claimed said real estate as being its property, and has rented it, and is now claiming it and exercising to some extent rights of ownership over it; that after the deed from the O'Briens to Johnson was executed they were adjudged bankrupt, and their assignee in bankruptcy was permitted, without objection on the part of the city, to take possession of the movable tools and machinery covered by said deed; that said chattels were sold by said assignee to various purchasers, and became scattered and deteriorated in value; that some were sold subject to the claim of the city, and others without such reservation; that the city continued to pay the interest on the bonds until the maturity of the coupons which became due June 1, 1876, when it refused to pay them, and has paid no more and refuses to recognize the obligations of the bonds and coupons, on the ground that they were issued by the city without lawful authority; and that the city has neglected the real estate and the improvements and fixed machinery on it, and the buildings are unoccupied and unprotected, lying open to the weather and to depredations, and no care is used in protecting the buildings and machinery, and many valuable parts of the machinery have thus been lost. The bill alleges that the deed of trust to the city was executed for the purpose of securing the holders of the bonds and coupons, and they are the parties beneficially interested in the same, and the city is a trustee of all the property mentioned in the deed, for the holders of the bonds; that the city was

bound to care for the property and protect the title to it for the benefit of the *cestuis que trust*, and especially as it had induced them to purchase the bonds, as well in reliance on the deed as on the credit of the city; that the city was, as trustee, bound to interpose to prevent the sale of the chattels by the assignee in bankruptcy, and to place the property in the charge of a responsible custodian, and protect it from depredation, and that, in failing to exercise such care and in permitting such sale, the city has violated the duties assumed by it from its acceptance of the deed, and has become liable to account to the holders of the bonds for all the loss and injury which have occurred to said real estate and chattels by reason of such neglect; and that the owners of the bonds are entitled to the interposition of a court of equity for the care and protection of the property, and to a decree for the sale of such of it as remains upon the premises mentioned in the deed to the city, and for the sale of the real estate, and to a decree against the city requiring it to account for and pay over to the holders of the bonds all such moneys as have been lost to them from such neglect, and to pay to them any balance which may remain due to them after applying all sums which may result from such sales and accounting. The prayer of the bill, as originally filed, is for the appointment of a receiver to take charge of the property, and the appointment of a trustee to make sale of it, and the distribution of the proceeds of sale among the owners of the bonds and coupons, and that the city account for and pay over to them the value of the chattels so lost or sold, and for such loss as has resulted by reason of such neglect of duty on the part of the city in the care of the property, and the rents and profits received by the city from the property, and that the city and the O'Briens pay to the owners of the bonds any deficiency in the principal and interest thereof which may remain after the payment of the sums resulting from the sales and accounting aforesaid.

The city answered the bill, setting up various defences. One is that a majority of the qualified voters of the city did not vote at said election in favor of authorizing the issuing of bonds under the act of 1868. Another is that the voters voted on the question of authorizing the issue of bonds generally

under the act, and not on the question of issuing the particular bonds. Another is that the issuing of said bonds had not been authorized prior to the 22d of August, 1872, when said section 8 of article 10 of the new Constitution of West Virginia became operative; that said section governed in the issuing of said bonds; and that they were issued in violation thereof, in that the payment thereof was not provided for at the time of the issuing thereof, as required by said section, and all questions connected with the same were not first submitted to a vote of the people, as therein required, and said bonds are void. Another is that the act of 1868 was in violation of the Constitution of the State. Another is that at the time of the passage of said act the city had, and now has, no property out of which it could pay any such bonds, except such funds as it is or may be authorized by law to raise by taxation. Another is that the bonds were issued in aid of a private enterprise, for individual profit, and not for a public purpose; that it is in excess of the constitutional power of the legislature of the State to authorize taxation for the purpose of paying said bonds, unless that power was clearly conferred on it by the Constitution of the State; that no such power was conferred on it by the Constitution of the State in force at the time of the passage of said act or the one now in force; that the said act is void for want of power in the legislature to pass it; and that the bonds issued under it are void. Another is that the bonds are void because they were issued in violation of section 9 of article 10 of the Constitution of the State in force at the time they were issued, which provides that the legislature may, by law, authorize the corporate authorities of cities to assess and collect taxes for corporate purposes; that said provision amounts to a prohibition against assessing and collecting taxes for any other than a corporate purpose; and that said bonds, being issued for a private and not for a corporate purpose, are void. The answer alleges that if any property covered by the deed of trust was sold by the assignee in bankruptcy, it was sold by him subject to said deed of trust. It denies the allegations of the bill as to the neglect of the city to protect and care for the buildings and machinery. It avers that it is not chargeable with the care of the property, but that it has taken as good care of the same as

was possible under the circumstances, and has used all due diligence to rent it. It denies that the deed of trust was executed to secure the holders of the bonds and coupons, and denies that the city was or is a trustee for them of the property covered by the deed, and denies that it induced any person to take the bonds. It avers that it is not competent for the city to act as trustee in such a matter, wholly foreign to the purpose of its creation; that it has paid out, as interest on the bonds and expenses attending the issuing of them, and taxes on the property, more than it has received from all sources on account of the property; and that the complainant has a plain and adequate remedy in a court of law. It denies the right of the complainant to any decree against it for any sum in any event, whether the court shall deem the complainant entitled to a sale of the property mentioned in the deed of trust or otherwise. Finally, the answer says that if the court shall be of opinion that it has any jurisdiction in the premises, or that the complainant is entitled to resort to the property for the payment of the bonds or the interest thereon, the city is willing to submit to any order to be made by the court in relation to the disposition of the property, upon the court pronouncing the bonds void and the city not liable on account thereof, but it prays that in any order to be made the city may be decreed to receive out of the proceeds of any sale of the property the sum it has so expended above its receipts.

The bill was taken as confessed as to all the defendants except the city. The holders of all the bonds were made parties complainant. Proofs were taken on both sides. The bill was then amended so as to aver also that the city is estopped, by her conduct, to deny the validity of her indebtedness according to the tenor and effect of the bonds and coupons, and so as to add to the prayer for relief the following: "Or that the said city of Parkersburg may be decreed to pay the said bonds and coupons according to the tenor thereof, and especially that a decree may be passed for the payment of the overdue coupons upon the said bonds." The bill was further amended so as to allege that even if the city was not chargeable as trustee from the time of the execution of the deed of trust, it is chargeable with all the duties and liabilities of a trustee, in regard to all

of the property, from the respective times at which it actually took possession of the same; and the grantee in the deed of trust was made a defendant and appeared. The case was brought to a hearing, and a decree was made, which states that the court is of opinion that the city is indebted for the bonds and coupons and is responsible for their payment according to their tenor and effect, that the $20,000 of bonds are held by the several complainants in amounts severally specified, and that there are due to them severally certain specified sums for interest coupons due and unpaid upon the bonds (being interest from and including June 1, 1876, to and including June 1, 1879), with interest from the date of the decree; and then decrees that the complainants are entitled to have the bonds held by them respectively paid by the city at the maturity of the same, with interest payable at the times and in the manner stated in the interest coupons attached to the bonds, and that the complainants respectively recover against the city for the several sums so set out as due for interest on the bonds, and interest on the same from the date of the decree, and costs, and have execution therefor. From this decree the city has appealed to this court.

The bill, as filed, asked for equitable relief, and sought to charge the city as a trustee and to reach the property covered by the deed of trust. The relief granted by the decree was a simple money judgment against the city, for the interest due on the bonds at the date of the decree, based on the legal liability of the city to pay the bonds and coupons. For this there was a plain, adequate, and complete remedy at law, in each bondholder, if the city was thus liable. So that the decree made could not be sustained in any event.

But we are of opinion that, within the principles decided by this court in the case of *Loan Association* v. *Topeka*, 20 Wall. 655, the bonds in question here are void. The act of 1868 authorizes the bonds to be issued as the bonds of the city. The principal and interest are to be paid by the city. The bonds are to be lent to persons engaged in manufacturing. Those persons are to pay the interest on the "loans" semi-annually to the treasurer of the city, and are also to pay annually to the city five per cent of the principal, to go into the sinking

fund of the city, till the "loans" are paid in full. No fund is provided or designated out of which the city is to pay the principal or interest of the bonds. What the "borrower," as the act calls him, is to so pay to the city is not such a fund. The city is to pay the principal and interest of the bonds, according to their tenor, whether the "borrower" pays the city or not. No other source of payment being provided for the city, the implication is that the city is to raise the necessary amount by taxation. It has, by sect. 15 of the act of March 17, 1860, authority to levy and collect an annual tax on the real estate and personal property and tithables in the city, and upon all other subjects of taxation under the revenue laws of the State, which taxes are to be for the use of the city. A legitimate use of the moneys so raised by taxation is to pay the debts of the city. Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person. There is, in the act of 1860, a provision that the tax shall not exceed a given percentage of the assessed value of the property or so much on every tithable, but it does not appear that a tax for these bonds would exceed the limit. Therefore, the inference that it was intended, by the act of 1868, that such taxation as should be necessary to pay the bonds should be resorted to, must remain in full effect. There was no provision in the Constitution of West Virginia of 1862 authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the legislature had no power to enact the act of 1868.

There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some instalments of interest on the bonds (*Loan Association* v. *Topeka*, *ubi supra*), or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No such acts can give validity to the statute or to the bonds, however they may affect the *status* of the property dealt with or the relation of the city to such property.

But it is contended by the appellees that, independently of the original validity of the bonds, the city is liable to pay them, because it misled and prejudiced their holders, and prevented them from resorting to the security, or because it received the full value of the bonds in consideration of paying them. It is urged that if the bonds were void the city had no right to meddle with the security. There has, however, never been any impediment to a resort by the holders of the bonds to proceedings to have the property covered by the deed of trust administered for and appropriated to their benefit, as representing the O'Briens in respect to such property, and as subrogated to the rights of the O'Briens to have the property devoted to the payment of the principal and interest of the bonds, in view of their being void. The only misleading or prejudice was that the holders of the bonds, mistaking the law, supposed them to be valid obligations of the city. As to the receipt of property by the city, it received certain property, but it did not thereby enter into any obligation, even if it could have done so, to pay these bonds. The evidence shows that the city has endeavored, in a proper way and with a due regard to the interests of the O'Briens and of those interested under the O'Briens, to preserve and protect the property and realize from it as much as could be realized. The bill in this case was filed in December, 1876. The case was heard in September, 1879. The bill prayed for a receiver of the property, yet none was appointed or applied for, so far as appears. The sales by the city of movable property, which are complained of, took place after this suit was brought. The plaintiffs have chosen to leave all the property in the hands of the city up to this time. The city has acted in good faith, and with reasonable discretion, in regard to the property, throughout. No valuation placed upon the property, real or personal, or any part of it, by way of estimate or opinion, at the time the city took possession of it, or at any time since, can be taken, on the evidence in this case, as the measure of any liability of the city on the bonds or in respect of the property. Neither the O'Briens nor the plaintiffs interposed to control the property, but left the city to control and manage it. There are not about the acts of the city, in regard to the property, any elements which can consti-

tute the city a trustee of the property, with the duties imposed on a trustee. No trust arose in favor of the plaintiffs out of the deed of trust to Johnson. The trust thereby created was one to secure the payment by the O'Briens to the city of the interest on $20,000 and of the principal of that sum. The plaintiffs could not enforce that trust in the place of the city. It was a void trust, because the consideration of it was the issuing of the void bonds. Nor did the purchase by the city of the property which it bought subject to the trust validate the original trust or create a new one.

But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Morville* v. *American Tract Society*, 123 Mass. 129; *Davis* v. *Old Colony Railroad*, 131 id. 258, 275; and cases there cited. The O'Briens having indorsed and sold the bonds, the holders of the bonds succeeded to such right of the O'Briens, as an incident to the ownership of the bonds. The O'Briens suffered the city to take possession of and administer the property. They were made parties to this suit originally, and have made no defence to it. The right which the plaintiffs so have to call on the city to render an account of the property is one which can be properly adjudicated in this suit in equity. It involves the taking of an account, the sale under the direction of the court of what remains of the property, and the ascertainment of the proper charges to be allowed to the

city against the moneys it has received and against the proceeds of sale. There can be no doubt that the city is entitled to be credited the sums it has paid in good faith to acquire, protect, preserve, and dispose of the property, and for insurance and taxes, and the amount it has paid in paying the coupons it has paid, and that it is to be charged with what it has received. But it is not to be charged with any sum for loss of or damage to or depreciation of the property. The remaining property must be sold under the direction of the court below, and an account be stated on the foregoing principles, and the net proceeds of the sale and the net amount of money, if any, in the hands of the city, must be distributed among the plaintiffs. The decree of the Circuit Court must be reversed, with costs, and the case be remanded to that court, with instructions to enter a decree declaring that the city, in issuing the bonds, exceeded its lawful powers, and that they cannot be enforced as obligations of the city, and providing for a sale of the remaining property, real and personal, under the direction of the court, and the taking of an account between the city and the property, on the basis stated in this opinion, and the application, in conformity with this opinion, of the net proceeds of the sale, and of the net amount of money, if any, remaining in the hands of the city, received from the O'Briens, or from the sales by it of any of the property received by it, and for such further proceedings in the case as may be in conformity with this opinion.

We have not deemed it necessary to consider the question whether the bonds were void as having been issued in violation of section 8 of article 10 of the Constitution of West Virginia of 1872, or the question whether the act of 1868 required a vote by the voters of the city on each loan of bonds to be made, or the question whether the act of 1868 was observed in other respects, in issuing the bonds.

Decree reversed.

CLARKSON *v.* STEVENS.

1. Where, by a contract for the construction of a ship, the builder is to furnish the requisite labor and materials, and to receive therefor a sum payable in instalments as the work progresses, this court will not enforce any arbitrary rule of construction in determining the question whether the title remains in the builder until the ship is delivered or ready for delivery, or whether the property in so much of her as on the payment of any instalment is completed passes to the other party; but it will carry into effect the intent of the parties, to be gathered from the terms of the contract and the circumstances attending the transaction.
2. Being thereunto authorized, the Secretary of the Navy entered into a contract with S., whereby the latter covenanted to construct a shot-and-shell-proof war-steamer for harbor defence. The Secretary was to appoint an agent to receive and, on account of the Navy Department, receipt for all materials delivered at S.'s establishment for the construction of the steamer, — the materials, when receipted for, to become the property of the United States, and to be marked "U. S." The agent's certificate to S.'s accounts for materials and labor was the evidence on which payments were to be made to the latter. S. executed a mortgage to the United States to secure his faithful performance of the contract, conferring upon the mortgagee, in case of his failure to fulfil it, power to enter upon his establishment and sell the steamer. When the steamer should be fully completed by S. and accepted by the United States, the balance of the purchase price was then to be paid and the mortgage surrendered. The period within which the vessel was to be completed was from time to time extended. S. died, and the vessel was never finished. *Held*, 1. That the title to the unfinished vessel remained in S., and that no property therein vested in the United States. 2. That by the resolution of Congress, releasing and conveying to his heirs-at-law "all the right, title, and interest of the United States in and to" the vessel, nothing passed to them.

ERROR to the Court of Chancery of the State of New Jersey.

The facts are stated in the opinion of the court.

Mr. Walter L. Clarkson and *Mr. Frederick W. Stevens* for the plaintiffs in error.

Mr. Leon Abbett and *Mr. John P. Stockton*, Attorney-General of New Jersey, *contra*.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The controversy in this case arises between the plaintiffs in error, who are, with others, heirs-at-law of Robert L. Stevens,

deceased, and the State of New Jersey, and involves the title to an uncompleted ship-of-war, known as the "Stevens Battery."

The claim of the plaintiffs in error is founded on a resolution of Congress approved July 17, 1862, 12 Stat. 628, as follows: —

"*A resolution releasing to the heirs-at-law of Robert L. Stevens, deceased, all the right, title, and interest of the United States in and to 'Stevens' Battery.'*

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That all the right, title, and interest of the United States in and to 'Stevens' Battery' be, and the same hereby are, released and conveyed to the heirs-at-law of the said Robert L. Stevens, or their legal representatives."

Robert L. Stevens died in 1856, having his domicile in New Jersey, and by his will constituted his brother, Edwin A. Stevens, who was one of his heirs-at-law, and whom he appointed one of his executors, his sole residuary devisee and legatee.

Conceiving himself to be the owner of the unfinished vessel, of which he had been in possession since the death of his brother, and claiming as his residuary legatee, Edwin A. Stevens, who died Aug. 7, 1868, directed, by his will, his executors to complete it on his general plan, at a cost not exceeding $1,000,000, and then to offer it to the State of New Jersey as a present. The executors, after having expended $919,915.49 upon the vessel, found that they could not finish it for the amount of money to which they were limited, and discontinued the work. In the mean time the State of New Jersey had accepted the bequest, and the consent of Congress thereto was given in the following resolution, approved July 1, 1870: —

"*A resolution giving the consent of Congress to the reception of a certain bequest by the State of New Jersey under the will of the late Edwin A. Stevens.*

"Whereas Edwin A. Stevens, who was in his lifetime the owner of the ship known as the 'Stevens Battery,' originally commenced under contract for the United States government, and upon the building of which large sums of money were spent by his brother and himself, did, by his last will and testament (the United States having previously relinquished all claims to said ship), leave the

same to be finished by his executors, at an expense not exceeding the sum of one million of dollars, and when finished to be offered to the State of New Jersey as a present, to be by her received and disposed of as the said State shall deem proper; and

"Whereas doubts have been suggested as to the right of the said State to accept the said bequest without the consent of Congress, under the prohibition of the tenth section of the first article of the Constitution of the United States: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the consent of Congress is hereby given that the State of New Jersey shall receive and dispose of the said ship according to the terms and conditions of said bequest."

A bill in equity was filed in the Chancery Court of New Jersey, by the executors of Edwin A. Stevens, asking for a construction of the will, in certain particulars, including the questions arising upon this bequest to the State. The attorney-general appeared on behalf of the State, and filed an information, by way of cross-bill, to which the heirs-at-law of Robert L. Stevens were made parties, as claiming an adverse title. A final decree was made, establishing the title of the State, which was affirmed on appeal by the Court of Errors and Appeals. To reverse that decree the present writ of error was brought, the question presented being one which, as it arises under a law of the United States, and the decision thereon of the State court being in denial of the title claimed under the authority thereof, falls within the jurisdiction of this court.

To determine the proper construction and legal effect of the resolution of Congress of July 17, 1862, it becomes necessary to trace from its origin the history of the "Stevens Battery."

By the act of Congress of April 14, 1842, c. 22, "authorizing the construction of a war-steamer for harbor defence," it is enacted "that the Secretary of the Navy be and he is hereby authorized to enter into contract with Robert L. Stevens for the construction of a war-steamer, shot and shell proof, to be built principally of iron, upon the plan of the said Stevens: *Provided*, the whole cost, including the hull, armament, engines, boiler, and equipment, in all respects complete for service, shall not exceed the average cost of the steamers 'Missouri' and 'Mis-

sissippi,' " and $250,000 was thereby appropriated towards carrying the law into effect.

In pursuance of this law, the Secretary of the Navy entered, Feb. 10, 1843, into a contract with Robert L. Stevens for the construction of a war-steamer for harbor defence, which recited his proposal, describing the vessel, and containing certain specifications as to its construction, with a covenant on his part that he would faithfully build and construct the steamer conformably to the plan submitted, and complete the same within two years, provided Congress should make the further appropriations necessary for the purpose within a reasonable period.

According to the plan proposed the war-steamer was to be shot and shell proof against the artillery then in use on board vessels-of-war, viz. from 18-pounders to 64-pounders; to be propelled by submerged machinery, called Stevens's circular shells; to have greater speed than any of our steam vessels-of-war then built; the whole engine to be out of the way of shot from any vessel of an enemy; and with other specifications as to the character of the material and the dimensions and relations of the parts, which are important to be noticed only so far as to show that the proposed vessel was to be constructed upon a plan original and novel, and with the expectation of results not previously obtained in any naval construction.

The Secretary of the Navy and Stevens entered, Nov. 14, 1844, into an explanatory contract, which recited that the stipulations of the former had been found to be too loose and indefinite as to the details of its execution, and that the parties, considering themselves bound by so much thereof as related to the dimensions, power, ability to resist shot and shell, and other qualities and arrangements of the vessel, and the amount to be paid therefor, entered into further stipulations modifying and explaining the same. The time for the completion and delivery of the vessel was extended two years from the date of the new contract. Many additional specifications as to the details of construction were inserted. It was agreed that, if the cost of making any models or patterns used in the construction should be included in bills paid by the United States in the course of the work or at its completion, they should become the property of the United States.

It was also agreed that the Secretary of the Navy should appoint some person, whom Stevens should admit within his establishment for building said vessel, whose duty it should be to receive and receipt for, on account of the Navy Department, all materials delivered therein for constructing said steamer; which materials, when so received and receipted for, should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States; and it should be his further duty to certify all accounts, presented and certified by Stevens, for materials and labor, which should form the evidence on which payments should be made; but the authority of such inspecting officer, it was understood, should not extend to a right to judge of the quality or fitness of the materials or workmanship, but merely as to the cost thereof; "it being understood," the contract proceeds, "that the quality and fitness thereof, with other matters concerning the performance of the contract, are to be inspected and determined in the manner hereinafter provided for."

It was thereupon further stipulated, that before the final payment for the said war-steamer should be made a certificate should be rendered to the Navy Department, that, in her construction, armament, and equipment, all the provisions of the contract had been fully performed by Stevens, which certificate should be given and signed by persons appointed to examine the vessel, one by Stevens, one by the Secretary of the Navy, and, in case of disagreement, a third by the other two, the decision of the majority to be conclusive. It was also agreed that Stevens, in lieu of other security for the faithful performance of the contract on his part, should make to the United States a mortgage, which should be a first lien on all the land, docks, wharves, slips, and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war-steamer was to be constructed, with ample power to enter upon and sell the same in case of failure on his part to fulfil the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The Secretary of the Navy agreed to pay, as the price of the said war-steamer, when fully completed and delivered at the navy-yard at Brooklyn, in conformity with the contract,

the sum of $586,717.84, the supposed mean cost of the steamers "Missouri" and "Mississippi," or any additional sum that might afterwards be ascertained as properly included in that cost, to be indorsed on the contract "as the price which is to be paid for the said war-steamer when fully completed, delivered, and accepted."

Payments were to be made, from time to time, upon bills certified by Stevens and the agent of the United States, for not less than $5,000 each, and approved by the Navy Department, until the sum of $500,000 should have been paid; at which time, it was stipulated, that an examination should be had of the war-steamer, by persons to be appointed, as before agreed, for final examination, and if a majority of them should certify their opinion that the vessel could be fully completed according to contract for the remaining balance which might then be due, then payments of further bills in full should continue, not exceeding the full amount of the whole agreed price; but otherwise the examiners were required to certify the amount which, in their opinion, would be required to complete the steamer, when the Secretary of the Navy was authorized to withhold from future payments such deductions as might be necessary to meet the probable excess of cost. It was further provided, that when Stevens should have fully completed the said war-steamer, and she should have been duly delivered to and received by the agent of the United States, according to the terms of the contract, the full amount of the price remaining unpaid and to become due when she should be fully completed and accepted was required to be paid and the mortgage security cancelled and returned.

In pursuance of his contract to that effect, Stevens executed and delivered a mortgage on the premises therein described, being the basin, dock, shops, &c., wherein the war-steamer was to be constructed, conditioned to be void, in case he fully performed his contract in relation thereto, with a power of entry and sale, on the part of the mortgagee, in case default should be made in the completion and delivery of the said war-steamer at the expiration of four years from that date, according to the conditions and stipulations of the contract, and out of the proceeds of such sale to retain any dues that might have accrued

by reason of the failure to perform the contract, or so much thereof as should be necessary to complete any deficiencies on the part of the said Stevens.

The time for the performance of the contract was by a subsequent agreement extended for four years from Sept. 9, 1848.

From Jan. 5, 1845, to Dec. 14, 1855, there was paid out by the Navy Department on account of the vessel $500,000.

Robert L. Stevens had, in addition, expended in its construction, of his own means, $113,579.

The act of Aug. 16, 1856, c. 123, contains an appropriation "for Stevens war-steamer, eighty-six thousand, seven hundred and seventeen dollars and eighty-five cents," being the remainder of the contract price; but no portion of this was ever paid.

In the mean time, Edwin A. Stevens took possession of the work upon the death of his brother, as executor and residuary legatee, and expended thereon, prior to Sept. 5, 1857, of his own money, the sum of $89,185.37.

Nothing further appears to have been done until the passage of the act of April 17, 1862, c. 57, making an additional appropriation for the naval service for the year ending June 30, 1862. The second section is as follows: —

"*And be it further enacted*, That the sum of $783,294, being the amount necessary to be provided, as estimated by a board appointed for that purpose, to pay for and finish the 'Stevens Battery' now partially constructed at Hoboken, New Jersey, be and the same is hereby appropriated out of any money not otherwise appropriated for the immediate construction of said battery: *Provided*, that in the contract for the completion of said vessel it shall be stipulated that no part of the money claimed by Edwin A. Stevens to have been heretofore expended by him upon said vessel shall be refunded until the amount of said claim shall be established to the satisfaction of the Secretary of the Navy, and the payment of the said sum shall be contingent upon the success of said vessel as an iron-clad, sea-going war-steamer, to be determined by the President, and such contract shall stipulate the time within which the vessel shall be completed: *Provided, nevertheless*, that said money shall not be expended unless the Secretary of the Navy is of opinion that the same will secure to the public service an efficient steam battery."

The board, whose estimate is adopted in this act, was one appointed by the Secretary of the Navy, under the authority of a joint resolution of Congress, approved July 24, 1861, whose report was communicated to the House of Representatives in a letter of the Secretary of the Navy to the Speaker, dated Jan. 2, 1862. Ex. Doc. No. 23, H. R., 37th Congress, 2d Sess. Upon the question of the expediency of completing the vessel, the board specify six important particulars, as among "the many novel characteristics which she would possess," in which she differed from ordinary war-vessels, and conclude by saying: "We cannot recommend the expenditure of important sums of money upon projects of more than doubtful success when put into practical execution; and therefore we do not deem it expedient to complete this vessel upon the plan proposed." The report had previously stated "that the original projector of the vessel was the late Robert L. Stevens, Esq., deceased, and that his brother, Edwin A. Stevens, Esq., who now proposes to complete it, has materially changed the plans from what appears to have been originally intended."

No part of the sum appropriated by the act of April 17, 1862, was applied to the purpose of completing the battery. The Secretary of the Navy declined to do so, in the exercise of the discretion confided to him in the last clause of the section, for reasons set forth in his letter to the Speaker of the House of Representatives, dated May 27, 1862, in which he states that he had taken the opinion of a commission of experts, who had reported that "the vessel, if completed on the plans of Mr. Stevens, will not make an efficient steam battery," and, therefore, that he did not feel authorized to make the expenditure unless Congress should so direct.

Congress thereupon passed the joint resolution, approved July 17, 1862, on which the plaintiffs in error found their claim.

Nothing appears to have been done towards resuming work on the vessel from the date of the last previous expenditure in 1857, until the death of Edwin A. Stevens, on Aug. 7, 1868, during which time it remained in his possesion and control. His will contained the following provision: "I empower my executors to apply not exceeding the sum of one million dollars

to finish, on my general plans, as near as may be, in the discretion of my said executors, the battery known as the 'Stevens Battery,' and for the accomplishment of the said object I give to them the use of the dock and yards and basin heretofore appropriated to the said battery, and all the material provided for said battery. When said battery shall be finished, I direct my executors to offer the same to the State of New Jersey as a present, to be disposed of as the said State shall deem proper; and if not accepted by the said State, I direct my executors to sell the same, and the proceeds thereof shall fall into the residue of my estate."

In execution of this authority the executors, prior to Feb. 27, 1873, expended $919,915.49, of which $27,309.79 was received from the sale of old material.

The legislature of New Jersey, on March 21, 1871, had authorized the appointment of commissioners with power to sell the battery, and, in pursuance of that authority, the vessel, never having been finished, was sold for the sum of $75,000.

The contention of the plaintiffs in error is that the title to the unfinished vessel passed, as the work progressed, to the United States, and became vested, together with the right to enforce the contract for its completion, and the security of the mortgage, as against the estate of Robert L. Stevens, in his heirs-at-law, by force of the joint resolution of July 17, 1862.

In support of the proposition that by the building contract the title to the unfinished ship vested, as the work progressed, in the United States, counsel rely upon the rule of construction announced by Lord Tenterden in *Woods* v. *Russell*, 5 Barn. & Ald. 942, and followed by the English cases of *Clarke* v. *Spence*, 4 Ad. & E. 448; *Carruthers* v. *Paine*, 5 Bing. 270; *Laidler* v. *Burlinson*, 2 Mee. & W. 602; *Wood* v. *Bell*, 5 El. & Bl. 772, affirmed in the Exchequer Chamber, 6 id. 355; *McBain* v. *Wallace*, 6 App. Cas. 588; and by the American cases of *Moody* v. *Brown*, 34 Me. 107; *Butterworth* v. *McKinly*, 11 Humph. (Tenn.) 206; *Sandford* v. *Wiggins Ferry Co.*, 27 Ind. 522; *Scudder* v. *Calais Steamboat Co.*, 1 Cliff. 370.

This conclusion was assented to in the present case by the Chancellor, who proceeded to a final decree, however, against the plaintiffs in error, on the ground that the title of the

United States passed by the resolution of July 17, 1862, not to the heirs-at-law of Robert L. Stevens for their own benefit, but to or for the benefit of Edwin A. Stevens, the residuary legatee. The Court of Errors and Appeals, while affirming his decree, took a different view, and decided that the title of the ship never vested in the United States as owner; following its own previous decision in *Elliott* v. *Edwards*, 35 N. J. L. 265; s. c. 36 id. 449; the New York case of *Andrews* v. *Durant*, 11 N. Y. 35, and supported by the decision in *Williams* v. *Jackman*, 16 Gray (Mass.), 514, in which the rule is stated by Bigelow, C. J., as follows: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This is a general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

The rule first introduced in *Woods* v. *Russell*, 5 Barn. & Ald. 942, as interpreted by the English courts, according to *Clarke* v. *Spence*, 4 Ad. & E. 448, is "founded on the notion that provision for the payment, regulated by particular stages of the work, is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser." This *dictum* from *Woods* v. *Russell*, according to Benjamin on Sales, 246, 2d ed., was deliberately adopted as a rule of construction by which, in similar ship-building contracts, the parties are held to have, by implication, evinced an intention that the property shall pass, notwithstanding the general rule to the contrary, and adds: "The law thus established has remained unshaken to the present time."

Nevertheless, in *Wood* v. *Bell*, 5 El. & Bl. 772, Lord Campbell, C. J., said: "When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and ready for delivery; on the other hand, where a bargain is made for the purchase of an existing

ascertained chattel, the general rule, in the same absence of opposing circumstances, is that the property passes immediately to the vendee; that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated; and equally, in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price or the performance of any other condition, such intention will be upheld in the courts of law." "This principle," he added, "we believe to be well settled;" and referring to the cases of *Woods* v. *Russell*, *Clarke* v. *Spence*, *Laidler* v. *Burlinson*, and others, cited in argument, he remarked, that "previous decisions, therefore, are mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidence of intention;" and concluded by saying: "Still it must be remembered, after all, that what we have to determine is a question of fact; namely, what, upon a careful consideration of all the circumstances, we believe to have been the contract into which the parties have entered."

It is, perhaps, worthy of remark, that this passage from the judgment of Lord Campbell has, by the editors of Abbott on Merchant Ships and Seamen, been incorporated into the text of that treatise.

The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction. 1 Parsons, Shipping and Admiralty, 63. And such seems to us to be the true principle.

Accordingly, we are of opinion, that the fact that advances were made out of the purchase-money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evi-

dence of an intent that the property in the ship should vest in the United States prior to final delivery. Indeed, in reference to the latter circumstance, it is noticeable, as indicating a contrary intention, that the authority of the inspecting officer was expressly limited, so that it should not extend to a right to judge of the quality and fitness of the materials or workmanship, such matters and all others concerning the performance of the contract being reserved for determination after the completion of the work, as a condition of acceptance and final payment.

Much stress is laid, in argument, upon that provision of the contract which required all materials received at the yard for use in constructing the steamer to be distinctly marked with the letters "U. S.," and declared that they should become the property of and belong to the United States. But it does not follow, because the materials provided for that use were declared to be the property of the United States, it was intended that they should remain so after becoming part of the structure. Such a precaution might well have been suggested, as a security against a diversion of the materials to any unauthorized use, or to preserve them to the United States, in case, by reason of the failure of the work or from any other cause, they should not be used in the vessel. Indeed, as is remarked by the learned judge who delivered the opinion of the Court of Errors and Appeals in this case, the express declaration that defined the property in the unused materials seems to exclude the implication sought to be raised as to the property in the unfinished ship; for the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment.

There are two other provisions of the contract, which seem to us conclusive of the question, and, in a sense, adverse to the construction of the plaintiffs in error.

The first of these is, that which required Stevens, in lieu of other security for his faithful performance of the contract, to execute and deliver a mortgage on all the land, docks, wharves, slips, and all their appurtenances belonging to and embraced within the establishment at Hoboken, N. J., at which the war-steamer was to be constructed, with power to the

United States to enter upon and sell the same in case of his failure to fulfil his part of the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The taking of this security, as an indemnity to the United States, assumes the anticipated possibility that the failure might be total, so that the vessel, when offered for delivery, might be altogether rejected. And it does not detract from the force of this conclusion, that the alternative provides for completing deficiencies, if they should prove to be remedial; for, in that case, the United States, at its option, might accept the vessel, thus becoming invested with the title, and make good its deficiencies out of this security.

The other feature of the contract, which corroborates this view, is that which provides that final payment for the steamer shall be made only upon the certificate of examiners, to be appointed for that purpose, that in her construction, armament, and equipment all the provisions of the contract have been fully performed and completed, which requires that the steamer shall be fully completed and delivered at the navy-yard at Brooklyn, and fixes the gross amount which is to be paid for it when fully completed, delivered, and accepted. The fact that advances are to be made in the mean time is expressly stated to be in consideration of the security to be given by Stevens for the faithful performance of his contract, and that compensation for his time and services must be wholly deferred until the final completing and delivery of the vessel.

It is thus apparent, as we think, from these stipulations that the vessel was in all respects to be at the risk of the builder until, upon its completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract, and answering the description and warranty of an efficient steam battery for harbor defence, shot and shell proof.

And looking at the situation of the parties, and the objects they must have had in view, all doubt is removed as to their intention. Stevens was an ardent and sanguine inventor, who had convinced himself that his unique design of a naval structure was practicable and of great value, and that, if adopted, it would prove to be of immense public utility. He succeeded

also in persuading the government to make the experiment, and give him the opportunity of realizing his theories. But it was understood to be merely an experiment, and evidently, by the Navy Department, naturally conservative and inclined to adhere with some tenacity to its own traditions, regarded, at best, as of very doubtful success. The steamer, when built, was to constitute a part of the naval establishment of the United States. Can it be supposed that this was to take place except upon condition that, after completion and sufficient examination, it should be found fit for the service? This is the view, as it seems to us, which Congress, by its legislation, and the Navy Department, in all its dealings with the subject, constantly entertained and acted upon, and which both Robert L. Stevens and his brother, Edwin A. Stevens, did not hesitate to accept, the latter not shrinking from a further investment of $1,000,000 in an enterprise which he still cherished with confidence of ultimate success, after it had become to almost every one else a demonstrated failure, and after the government, for whom it was originally intended, had refused to it all further subsidies.

We find, therefore, that on July 17, 1862, the date of the joint resolution of Congress, under which the plaintiffs in error make their claim, the United States had no title to the "Stevens Battery;" but that the property in it had continued in Robert L. Stevens until his death, and passed, by his will, to Edwin A. Stevens, as residuary legatee. It follows that it did not pass to the heirs-at-law of Robert L. Stevens by virtue of the joint resolution.

It is urged, in argument, that, if the right to the vessel itself did not pass, then the joint resolution must be construed as a transfer to the heirs of Robert L. Stevens of the right of action of the United States to recover against his estate damages for his non-performance of his contract, together with the securities, by way of mortgage and lien, it held as indemnity. We see no ground for a construction that leads to so remarkable a result. The plain meaning of the resolution is limited to a relinquishment on the part of the United States of any interest it might be supposed to have in the vessel, in which the heirs of Robert L. Stevens are mentioned, probably, be-

cause it was with him that the building contract was made; and if it could operate at all as a release, would be to them, for the benefit of those who, by law, had become his successors in the title; and that release would necessarily convey with it, as an incident, an extinguishment of the obligation of the contract for construction, and all the securities taken for its performance. It was in effect, and was doubtless intended as, a declaration, on the part of the United States, for the benefit of whom it might concern, of its entire abandonment of all further connection with the battery and the contract for its construction. The subsequent assent on the part of Congress to its acceptance by the State of New Jersey, as a bequest from Edwin A. Stevens, while it could not operate to affect any rights vested in the interval, is, at least, a legislative interpretation of its previous release. This resolution expressly recites that Edwin A. Stevens was the owner of the battery in his lifetime, and is scarcely more explicit in the recognition of his title than was the conduct of all the parties, including the present plaintiffs in error.

We are of opinion, for the reasons stated, that there is no error in the decree complained of, and it is accordingly

Affirmed.

PATTERSON *v.* LYNDE.

The creditor of a corporation organized under the general laws of Oregon cannot, to recover his debt against it, enforce, by an action at law, the liability of a stockholder upon an unpaid subscription to its capital stock.

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

Patterson, a judgment creditor of a mining company, organized under the general laws of Oregon "in relation to the formation of private corporations," brought this action against Lynde to enforce his liability to the company upon an unpaid stock subscription, and thus sought to apply Lynde's indebtedness to the payment of the judgment.

Lynde demurred, and judgment was rendered in his favor. Patterson then brought this writ of error.

The constitutional and statutory provisions applicable to the case are set forth in the opinion of the court.

Mr. Charles M. Harris for the plaintiff in error.

Mr. Charles M. Osborn for the defendant in error.

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

The only question we deem it necessary to consider in this case is, whether a creditor of a corporation, formed and organized under the general laws of Oregon "in relation to the formation of private corporations," can maintain an action at law against a stockholder to recover, out of an unpaid balance of subscription to the capital stock, the debt due to him from the corporation.

Section 3 of article 11 of the Constitution of Oregon provides that "the stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

Section 14 of the statute "in relation to the formation of private corporations" is as follows: "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock. But if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

Since this case was decided below, the Supreme Court of Oregon has passed on the same question, and, in *Ladd* v. *Cartwright*, 7 Oreg. 329, determined that the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid, and that the remedy of the creditor to enforce this liability is in equity, where the rights of the corporation, the stockholder, and all the creditors can be adjusted in one suit. Of the correctness of this decision we have no doubt. The liability of the stock-

holder is upon his subscription, that is to say, upon his obligation to contribute to the capital stock, which is a trust fu: for the benefit of those to whom the corporation, as a corporation, becomes liable. *Sawyer* v. *Hoag*, 17 Wall. 610. The Constitution of Oregon created no new right in this particular; it simply provided for the preservation of an old one. The liability under this provision is not *to* the creditors, but *for* the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them, and the creditor has not been given, either by the Constitution or the statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.

Judgment affirmed.

EX PARTE CARLL.

The reviewing power of this court in a criminal case is, on a writ of *habeas corpus*, confined to the determination of the question whether the court which sentenced the prisoner had jurisdiction to try him for the offence whereof he was indicted and to sentence him to imprisonment.

PETITION for a writ of *habeas corpus* and a *certiorari*.

Mr. Abram J. Dittenhoeffer in support of the petition.

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

We have had occasion to say at the present term, in *Ex parte Curtis*, that "we have no general power to review the

judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted." This rule is well settled. *Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604.

The grounds of the present application as stated in the petition are, that the Circuit Court had no jurisdiction to try the prisoner for the offence of which he has been convicted and to commit him to prison therefor, because —

1. The instruments described in the indictment and charged to have been forged show on their face that they are not bonds or obligations of the United States, and, even if genuine, possessed no validity; and

2. It was conceded on the trial that the instruments set forth in the indictment were genuine registered bonds, and that the forgery complained of consisted in erasing the name of the original payee and substituting that of the prisoner.

All the bonds described in the indictment, except that in the third count, purport to be issued under the act of July 14, 1870, c. 256, as amended by the act of Jan. 20, 1871, c. 23. This act provides for an issue of bonds by the Secretary of the Treasury "in such form as he may prescribe." The bonds now in question appear to be signed by the Register of the Treasury and not by the Secretary. They also have the "imprint and impression of the seal of the Department of the Treasury of the United States." In the indictment it is averred that the counterfeits were of bonds of the United States. This is enough for the purposes of the jurisdiction of the Circuit Court. Whether the bonds counterfeited are in the form of those actually issued by the Secretary of the Treasury under the authority of the act referred to, is a question of fact to be established on the trial. Errors committed on the trial of this issue do not deprive the court of its power to imprison upon conviction, and, as has been seen, such errors are not subject to correction here, either in the present form of proceeding or any other.

What has just been said applies equally to the instrument described in the third count, which purports to be signed by

the acting Register of the Treasury. By the act of Feb. 20, 1863, c. 45, the President was authorized to designate some officer in a department to perform the duties of another in case of death, resignation, absence, or sickness.

The second ground of application presents no jurisdictional question. The indictment charged the prisoner with a crime against the laws of the United States, *United States* v. *Marigold*, 9 How. 560. We have nothing to do with questions arising on the evidence presented to sustain the charge.

Petition denied.

YOUNGSTOWN BANK *v.* HUGHES.

The value of the matter in dispute, when the jurisdiction of this court depends thereon, must be such as can be ascertained in money, and, if not disclosed by the record, may be shown by affidavits.

ON motion to dismiss an appeal from the Circuit Court of the United States for the Northern District of Ohio.

The case in stated in the opinion of the court.

Mr. W. C. McFarland in support of the motion.

Mr. Sidney Strong, *contra*.

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

Section 2782 of the Revised Statutes of Ohio (1880) provides, that if a county auditor has reason to believe or is informed that any person has given to a tax-assessor a false statement of his personal property, moneys, &c., or that the assessor has made an erroneous return of any property, moneys, &c., which are by law subject to taxation, he may proceed to correct the return and to charge such persons on the tax duplicate with the proper amount of taxes; "to enable him to do which he is . . . authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys, or credits, investments in bonds,

stocks, joint-stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return."

Section 2783 provides for process of subpœna in case any person shall neglect to appear and testify when called on by the auditor, and for punishment for contempt.

Under the authority of this statute the auditor of Mahoning County, in the exercise of his power to charge persons on the tax duplicate with the proper amount of taxes, called on the cashier of the First National Bank of Youngstown to appear and testify, and, because he could not testify without, to bring with him, the books of the bank showing its deposits. Thereupon the bank filed a bill in equity to enjoin the auditor, alleging for cause that such a proceeding on his part would unlawfully expose its business affairs, lessen public confidence in it as a depository of moneys, diminish its deposits, and greatly impair the value of its franchises. The Circuit Court dismissed the bill, and the bank appealed. A motion is now made to dismiss the appeal for want of jurisdiction, because the value of the matter in dispute does not exceed $5,000.

In *Barry* v. *Mercein*, 5 How. 103, it was decided that to give this court jurisdiction in cases dependent upon the amount in controversy, "the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained." To the same effect are *Pratt* v. *Fitzhugh*, 1 Black, 271; *De Krafft* v. *Barney*, 2 id. 704; *Potts* v. *Chumasero*, 92 U. S. 358, 361.

The present suit is not for money, nor for anything the value of which can be measured by money. The bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the auditor and the bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the bank, would be, in the highest degree, remote and speculative. Certainly no suit for even nominal damages could be sustained against the auditor on account of what he had done. All the cashier is required to do, is to give testimony in a proceeding instituted under the authority of law by the auditor to perfect the tax lists of the county. It is

supposed the books of the bank contain evidence pertinent to this inquiry, and appropriate measures are taken to have them produced for examination. The case is in no respect different in principle from what it would be if the evidence was called for in an ordinary suit in a court of justice between individuals.

Affidavits can only be used to furnish evidence of value not appearing on the face of the record when the nature of the matter in dispute is such as to admit of an estimate of its value in money.

Appeal dismissed.

UNITED STATES *v.* STONE.

STONE *v.* UNITED STATES.

1. Where *nil debet* is pleaded, it is not error to strike out a notice of special matter to be given in evidence, where evidence of such matter is admissible under the plea.
2. In a suit by the United States upon the official bond of a collector of internal revenue, transcripts from the books of the Treasury Department of his accounts, containing the usual items and showing the balances between the debits and credits, were put in evidence by the plaintiff. *Held*, that the papers, being in proper form and duly certified, are admissible; and an objection disclosed only by comparing them with other transcripts offered by him lies not to the competency of the evidence, but to its effect.
3. Where he served for two successive terms, his sureties under his second appointment are liable for taxes which he, during his service thereunder, collected upon assessment rolls received during the first term, and for moneys or stamps remaining on hand at the expiration of that term.
4. Although the transcripts are evidence of the amount, date, and manner of the officer's indebtedness, his sureties may, by other treasury transcripts, show that his default, in whole or in part, occurred during his first term; that credits were applied on a prior account, although they belonged to subsequent accounts; and that to the latter debits were improperly transferred.
5. It is not a valid objection to the introduction of the transcripts offered by the sureties that they do not on their face establish errors in the adjustment upon which the plaintiff relies, but require further evidence. The failure to produce such evidence furnishes ground only for their ultimate exclusion, or for an instruction to the jury as to their effect.

ERROR to the District Court of the United States for the Northern District of Mississippi.

The facts are stated in the opinion of the court.

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

Mr. George E. Harris, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought by the United States against Benjamin B. Emory and his sureties, upon his official bond, as collector of internal revenue for the Third District of Mississippi. The bond, dated March 29, 1870, is in the penal sum of $50,000, and reciting that he had been appointed and had received a commission as such collector, dated Dec. 29, 1869, is conditioned that "he shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession," &c. The breach alleged is, that he failed to account for and pay over the sum of $57,497.84 of public moneys which had come into his possession as such collector.

The defendants pleaded *nil debet*, and gave notice of special matter to be given in evidence under that plea, among others, that "the alleged liability for which this suit is brought arose, if at all, under a bond given by said Emory, as such collector, in October, 1869, and not under the bond on which this suit was brought," &c. They also pleaded payment before suit brought, and an argumentative plea of *non est factum*, to which a demurrer was sustained. Subsequently they filed an additional plea traversing the alleged breach of the condition of the bond.

Before the trial, the district attorney moved to strike out the defendants' plea of *nil debet*, with the notice of special matter attached, and an order sustaining that motion appears from the record to have been made; although, from a bill of exceptions taken at the time, it is stated that the motion was sustained only so far as the notice was concerned, and overruled as to the plea.

There was a verdict in favor of the United States for $10,003.52, and a judgment was rendered thereon.

Writs of error were sued out by both parties, and are now prosecuted to reverse that judgment, for errors alleged to have been committed by the court in its rulings on the trial, duly excepted to by the parties respectively, and brought upon the record by bills of exception.

They will be considered in their order, beginning with those assigned by the defendants below.

1. There was no error, as alleged, in striking out the notice of the special matter, to be given in evidence, under the plea of *nil debet.* It was proper to strike it out, because it was matter which denied the plaintiff's whole cause of action, which, consequently, it was bound to meet with its own evidence in the first instance, and which, therefore, the defendants traversed by the plea of *nil debet*, and the plea denying the alleged breach of the condition of the bond. Any evidence which would have been competent under the notice would have been equally so without it; and, in point of fact, all the evidence offered on the part of the defendants, which was competent under the notice, was admitted under the pleas.

2. The first bill of exceptions taken by the defendants states that "the said plaintiff offered to read to the jury certain transcripts from the books of the Treasury Department at Washington City, and certified transcripts of papers on file in said department, touching the official conduct of Benjamin B. Emory as late internal revenue collector for the Third District of Mississippi, which said transcripts are dated respectively ——, as shown by the certificates of the Secretary of the Treasury. And to these transcripts the defendants had filed written exceptions, and objected to their introduction as evidence, for the reasons assigned in said exceptions." The court overruled the objection and permitted the transcripts to be read in evidence, to which reading the defendants excepted; and it is now assigned for error.

In another part of the record there is this statement: "The following are transcripts from the books of the Treasury Department at Washington and of papers on file, which are referred to in the bills of exceptions taken and filed in this cause."

Then follows forty-seven printed pages of matter, consisting of certified statements of account from the books of the Treasury Department, and copies of numerous papers on file, apparently relating to the accounts of this collector. But it is impossible to know, with accuracy, from the record, which of these were offered in evidence by the plaintiff and to which the objection was intended to apply; for it appears from another bill of exceptions, — and there were six in all, — which was taken by the plaintiff, that some of these transcripts from the books of the Treasury Department were offered by the defendants themselves, and admitted in evidence, against the objection of the district attorney, — a ruling we are called upon to consider hereafter, as it is alleged as error on the part of the United States, under the writ of error which it prosecutes. It is only by subtracting these from the entire mass that we can infer to what the defendants objected.

The exceptions filed to these transcripts, referred to in the bill of exceptions and found elsewhere in the record, are as follows: —

"1st, The certificates are not such as the law requires.

"2d, The transcripts are incomplete, and do not set out the entries on the books of the department, and are not transcripts from the books, but summaries of what the officers suppose the books contain.

"3d, The reports and receipts of Emory, as collector for assessments, and other papers connected with the settlement of his accounts by the department, are not set out in said transcripts.

"4th, Emory's monthly and quarterly reports are not set out in said transcripts.

"5th, Emory's receipts for assessments are not set out in said transcripts.

"6th, Facts are set out in said transcript which did not come before the department, which were not in the course of its business, and of which its transcript is no evidence.

"7th, Said transcripts are partial, imperfect, and do not present the whole record statement in regard to said Emory's accounts as late collector as aforesaid."

The particulars in which the transcripts in question are sup-

posed to be open to these exceptions are not pointed out to us, either by anything in the record or in argument by counsel, and there is nothing upon their face which suggests them to us. The papers in question seem to be in the usual form of such statements, and purport to be copies from the books of the Treasury Department of the accounts between the collector and the United States, containing the usual items, and showing the appropriate balance between the debits and credits. If there is anything in them illegal, insufficient, or incomplete, we have not been able to discover it. *United States* v. *Gaussen*, 19 Wall. 198.

It is, however, said by counsel for defendants, that in the treasury transcript, showing an adjustment of the collector's accounts, covering all his official time prior to the date of giving the bond sued upon, he is charged with five items, aggregating $50,063.20, and that this account is balanced by credits, three items of which purport to be transfers to himself, as his own successor, amounting to $30,534.42, which it is alleged was an existing indebtedness to the government. In the next adjustment he is charged with the same items, showing an arrearage at that time of $60,613.85, and a balance is found against him as occurring since the date of the bond in suit, the effect of which, it is argued, is to shift a default from the first to the second bond; and it is claimed that for this reason the transcript offered by the district attorney was not competent evidence, and should have been excluded from the jury.

But this objection did not arise upon the face of the accounts offered in evidence by the United States, but only after a comparison between them and that offered by the defendants, and, therefore, would lie, not to the competency of the evidence, but to its effect.

It is true that the sureties sued are liable only for money received during the term for which the collector was appointed, covered by the bond to which they are parties, and not for the misapplication of money received and misapplied before or after that term. *United States* v. *Eckford's Executors*, 1 How. 250. It is nevertheless equally true that they are liable for taxes which he collected during that term, upon assessment rolls received during a prior term, or for moneys or stamps on hand

at the expiration of a former term, and remaining in his possession at the beginning of a new one; for the collector is responsible as well for moneys and stamps retained by him as his own successor, as for those received by him from any other predecessor. And the separate adjustment of his accounts for both periods, made at the Treasury Department upon its books, is *prima facie* evidence, not only of the fact and of the amount of the indebtedness, but also of the time when and the manner in which it arose. It is, of course, always open to the defendants sought to be charged to show by opposing proof that the default charged occurred before the commencement of their liability. We repeat what was said in that case. "The amount charged to the collector at the commencement of the term is only *prima facie* evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged, in whole or in part, had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied." p. 263.

3. It is next assigned for error, that the court omitted to charge the jury, "that facts not properly appearing on the books of the Treasury Department could not be embraced in the transcript, facts of which the department had no knowledge, and if so embraced they did not constitute proof in this case." This alleged omission on the part of the court is stated in the bill of exceptions to have occurred in connection with the following instruction, which was given: "That while it was true that the plaintiff could only recover in this case for money actually collected by Emory, and not accounted for to the government, yet, if they believe from the evidence that Emory had received the assessment rolls of the taxes imposed, that was *prima facie* evidence that he had received the money on them in the absence of any other or further proof on that subject."

Although the giving of this charge was excepted to, the error assigned upon it was not pressed in argument; nor could it be maintained, as the instruction was undoubtedly correct. Nor does it appear from the bill of exceptions that the court was asked to give the instruction, the omission of which is now complained of; although it states that for that cause the de-

fendants then and there excepted. But, waiving the form of the exception, it must be overruled, because, however correct the rule may be, which it states the court omitted to give to the jury, it is not shown, by anything in the present record, how it could apply to the case. It was not shown that there were any facts embraced in the transcripts which could not properly appear on the books of the Treasury Department, nor any of which the department had not knowledge; and no attempt has been made to point them out in argument.

This disposes of the errors assigned by the defendants, in none of which do we find any ground for disturbing the judgment.

4. A bill of exceptions was taken during the trial on the part of the United States. From that it appears that the defendants offered in evidence a certified copy of the official bond of Emory, as collector of internal revenue for the Third District of Mississippi, under an appointment dated Oct. 2, 1869, the bond being dated Oct. 11, 1869, with sureties other than the present defendants, and a certified transcript from the books of the Treasury Department of an adjustment of his accounts as such collector, under that appointment, from Nov. 4, 1869, to March 28, 1870, showing a balance due from him to the United States, "transferred to himself as his own successor," of $4,027.52, and with which he is charged in the next adjustment under the bond sued on, dated March 29, 1870; and in which, also, he is credited with $13,050.17, as "amount of taxes on lists transferred to himself as collector under second bond," and with $13,456.13, as "amount of stamps transferred to himself as collector under second bond, viz. tobacco $8,098.88, spirits $5,327.25." To the introduction of these documents in evidence the district attorney objected. The objection was overruled, the evidence was admitted, and an exception was taken, on which error is now assigned on the part of the United States.

The objection, however, cannot be sustained. We have already stated that it was competent for the defendants to show, in their own exoneration, that the balance charged against the collector, upon the adjustment of his accounts, during the period when they were liable for his defaults, in fact,

had arisen by virtue of some default occurring during a prior term. For that purpose, and as tending to prove such a claim, it was competent and proper to show that credits had been given to him, on a prior account, that belonged to subsequent ones, and that he had been debited in the latter with items improperly transferred from previous ones. And to do that, the accounts, in which these charges and credits appeared, were manifestly pertinent and material. It required, of course, further evidence to show the impropriety of the adjustment, unless the facts appeared on the face of the papers, as they did not in this case; and the failure to follow them up, with such further evidence, might have been a sufficient ground, when the defendants had rested, for granting a motion to rule out the testimony, or for an instruction to the jury as to its effect; but the objection would not prevail, in the first instance, to its introduction.

We find no error in the record.

Judgment affirmed.

SHELTON *v.* VAN KLEECK.

1. The only questions open for examination on a bill of review for errors of law appearing on the face of the record are such as arise on the pleadings, proceedings, and decree, without reference to the evidence in the cause.
2. The truth of matters of fact alleged in such a bill is not admitted by a demurrer thereto, if they are inconsistent with the decree.
3. Where the decree in a foreclosure suit adjudged the sale of the mortgaged lands, the alleged new matter discovered, if it relates to the proceeding in selling them, can have no effect on the decree.

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

Van Kleeck filed his bill, Nov. 18, 1877, against Shelton and others, praying for the foreclosure of a deed of trust in the nature of a mortgage upon certain lands in Illinois, executed by Shelton and wife, Sept. 21, 1872, to secure the payment to Van Kleeck of the sum of $9,000. Shelton and wife answered. Elizabeth Blue filed a separate answer, setting up, among other

defences, usury, partial payment of the mortgage debt, and insisting that other land should be subjected to the payment of a part of the amount claimed in the bill. All the other defendants failed to answer, and the cause was referred to a master, who submitted his report April 28, 1879. Exceptions were taken thereto, and overruled. Upon final hearing, a decree was rendered, declaring that $12,667.25 was due to Van Kleeck, and ordering a sale of the lands by a master. He sold them Sept. 30, 1879, and on the 10th of the following month he reported the sale. No exceptions were filed, and it was confirmed by an order entered the 15th of December, 1880. On the 31st of that month Shelton entered a motion to set aside the sale. The motion was overruled, to which an exception was taken and an appeal allowed. The master executed a deed to Van Kleeck, who was thereupon put in possession of the premises by the marshal.

Shelton and wife then filed this bill of review, in which they set out the pleadings in the original suit, and the decree there rendered, and specify the following errors as appearing upon the face of the record : —

1. At the time of rendering the decree the indebtedness of the petitioners to Van Kleeck did not exceed the sum of $4,000, and the amount decreed is unjust, oppressive, and inequitable. 2. The amount of the decree is unjust, exorbitant, and a great oppression on your petitioners. 3. The decree is not consistent with the evidence in the case, and is contrary thereto. 4. The decree is usurious, — large usurious interest, to wit, about $5,000, being duly incorporated in and forming part of the amount for which it was rendered. 5. The decree nnjustly and oppressively discriminates against the petitioners, by arbitrarily providing that their homestead be first sold, thereby exposing it to sacrifice, and that the farm and homestead of Elizabeth Blue shall not be sold for more than $4,000, thereby arbitrarily compelling a sale of the petitioners' homestead for $8,667.25 and the costs of sale. 6. The decree does not determine the rights or interests of any of the defendants except your petitioners and said Elizabeth Blue. 7. The decree was only entered against a part of the defendants, leaving the suit still pending as to the others. 8. The decree is contradictory, and shows that the

same defendants made default, and answered the bill and defended at the same time. 9. The decree is against the law, and contains divers other errors and imperfections.

The bill then alleges that since the rendition of the decree certain new matter has been discovered. It is sufficiently stated in the opinion of the court.

A demurrer to the bill was sustained. The complainants thereupon appealed here.

Mr. Charles J. Beattie for the appellants.

Mr. John I. Bennett for the appellees.

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

The only questions open for examination on a bill of review for error of law appearing on the face of the record are such as arise on the pleadings, proceedings, and decree, without reference to the evidence in the cause. This has been many times decided in this court. *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95 U. S. 99; *Thompson* v. *Maxwell*, id. 391.

A demurrer admits only such facts as are properly pleaded. As questions of fact are not open for re-examination on a bill of review for errors in law, the truth of any fact averred in that kind of a bill of review inconsistent with the decree is not admitted by a demurrer, because no error can be assigned on such a fact, and it is, therefore, not properly pleaded. This disposes of the first, second, third, fourth, and fifth specifications of error presented in this bill of review. They are all errors of fact, and can only be determined by a reference to the evidence. It nowhere appears from "the bill, answer, and other pleadings, together with the decree," constituting what Mr. Justice Story said, in *Whiting* v. *Bank of the United States*, *supra*, "is properly considered as the record," that there was any usury in the case, or that the appellants had not waived their homestead rights as alleged in the bill.

All the allegations of error on the face of the record are equally bad. It is stated in the decree that all the material averments of fact in the bill were proved, and on these facts the priority of the lien of the complainant was established.

All the issues were thus disposed of, and the decree was in favor of the complainant and against all the defendants. The omission of the name of McGregor from among those against whom it was stated in the decree the bill was taken as confessed, is unimportant. If, as is stated in the brief of counsel for the appellant, he was served with subpœna, and did not plead, answer, or demur to the bill, the decree was in fact *pro confesso* as to him, and he is as much bound as if he had been particularly named.

All the new matter alleged to have been discovered relates to the proceedings in making the sale, and can have no effect on the original decree. So far as the decree confirming the sale is concerned, the matter is not new, for the addition to the transcript, filed by consent, shows that all the affidavits now relied on to establish the new facts were actually read in evidence on the hearing of a motion, made before the confirmation, to set aside the sale. These affidavits cannot be considered on a bill of review to reverse the decree of confirmation for errors appearing on the face of the record, because as evidence they form no part of the record which can be looked into on such a review. But, as part of the exhibits annexed to a bill of review for alleged discovery of new matter, they may be referred to for the purpose of determining whether, upon the showing of the complainant in review, the matter alleged to be new first came to his knowledge after the time when it could have been made use of at the original hearing.

This disposes of the case; and the decree dismissing the bill of review is

Affirmed.

UNITED STATES v. DENVIR.

An officer charged with the disbursement of public moneys is not liable for interest thereon, if he has not converted them to his own use, nor neglected to disburse them pursuant to law, nor, when thereunto required, failed to account for or transfer them.

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

The Solicitor-General for the United States.

There was no opposing counsel.

MR. JUSTICE MILLER delivered the opinion of the court.

The United States recovered a judgment in the court below against Denvir, on a bond which he, as surety, had given for the faithful performance by David F. Power of all his duties as acting assistant paymaster in the navy of the United States. There was no service on Power, nor was an appearance entered for him. No defence by Denvir having been made, judgment was rendered for the sum of money found to be in the hands of the paymaster, with interest from the service of the writ in this suit, in March, 1875. The United States asserted a right to interest from the date of the last receipt of money by the paymaster, namely, August, 1865, and excepted because the court overruled this proposition.

No evidence was given of any demand on the paymaster, or any refusal to pay or transfer the fund in his hands, or to comply with any lawful order on the subject.

Though the condition of the bond is not exactly the same as in the case of *United States* v. *Curtis*, 100 U. S. 119, the principle of that case must control this.

That principle is that where an officer of the government has money committed to his charge, with the duty of disbursing or paying it out as occasion may arise, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order.

The mere proof that the money was received by him raises no obligation to pay interest in the absence of some evidence of conversion or some refusal to respond to a lawful requirement.

The obvious reason for this is that the government places the money in the hands of this class of officers, and all others who are disbursing officers, that it may remain there until needed for use in the line of that officer's duty; and until that duty requires such payment, or a return of the money to the proper department of the government, he is in no default, and cannot be required to pay interest.

Judgment affirmed.

NOTE. — *United States* v. *Knowles*, error to the same court as the preceding case, was submitted at the same time for the United States by *The Solicitor-General.*

MR. JUSTICE MILLER, who delivered the opinion of the court, remarked, that this case differed from that only in the circumstance that it was a suit on the bond of a military storekeeper in the army, and the amount found due had reference to property as well as money.

The same question as to interest was raised, and the court, on the ground that no demand had been made until the service of the writ, only allowed interest from that date.

Though, in the case of personal property and, indeed, of money so held, proof of a conversion might justify interest from the date of such conversion, there was no evidence in this case of such conversion or of an earlier demand than that made by the service of the writ.

Judgment affirmed.

DETROIT *v.* DEAN.

A stockholder of a corporation, in order to protect its rights and property against the threatened action of a third party, filed his bill against the latter and the corporation, alleging, *inter alia*, that the directors, although thereunto requested, had neglected and refused to institute proceedings. *Held*, that he must show a clear case of such absolute and unjustifiable neglect and refusal of the directors to act as would lead to his irreparable injury, should he not be permitted to bring the suit. *Hawes* v. *Oakland*, 104 U. S. 450, cited upon this point and approved.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. Henry M. Duffield for the appellant.

Mr. George Ticknor Curtis, *Mr. Edward N. Dickerson*, and *Mr. E. W. Meddaugh* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

In December, 1871, the Mutual Gas-Light Company of Detroit was created a corporation under a general law of Michigan, for the purpose of manufacturing, selling, and furnishing gas for consumption in Detroit. The proposed corporators had previously made application to the common council to authorize the corporation, when formed, to lay gas-pipes, mains, conductors, and service-pipes in the avenues, streets, lanes, highways, alleys, public parks, and squares throughout the city; and obtained the passage of an ordinance granting permission to the company to lay the pipes, subject, however, to certain conditions. Power was conferred by law upon the city authorities to grant the permission "upon such reasonable regulations as they might prescribe;" and they provided that the permission should cease if the company should, at any time, combine with any other company concerning rates to be charged for gas either to the city or to private consumers; and that the company should not sell its property, franchises, or privileges to any other gas-light company, under the penalty of a forfeiture of its works to the city. The company accepted the terms of the ordinance; erected its manufacturing works in the township of Hamtranck, just beyond the boundary of the city; laid mains and service-pipes in the streets, and in November, 1872, commenced distributing and supplying gas to private consumers and to the city, and continued to do so up to the time this suit was commenced.

During this period, and previously, another corporation, known as The Detroit Gas-Light Company, was in existence, and was also supplying gas to private consumers and the city. In June, 1877, the two companies entered into an agreement to divide the city between them, one to take the part lying easterly of the middle of Woodward Avenue, and the other the part lying westerly of it, each to transfer to the other its property situated in the portion of the other, and each stipulating not to lay mains or to supply gas in the portion of the other,

reserving, however, the right to fulfil all obligations resting upon it with respect to any portion of the city. The difference in the value of the property exchanged was $140,000 in favor of the old company, and this sum the new company agreed to pay.

The common council, deeming this division of the city, and other things done or omitted by the company, to constitute a breach of the conditions upon which permission to lay its pipes in the streets had been granted, passed, on the 14th of December, 1877, an ordinance repealing the previous one, reciting as reasons for it that the company had not built its gas-works in the city of Detroit, but in the township of Hamtranck; that it had entered into an agreement with the Detroit Gas-Light Company to divide the territory of Detroit between them for the supply of gas; and that it had refused to lay mains in streets on petition of owners or occupants of buildings for a supply of gas.

The repealing ordinance declared that the company had thus forfeited its gas-pipes, mains, conductors, and service-pipes lying within the avenues, streets, lanes, highways, alleys, public parks, and squares of the city, and all other property situated within its limits; and that the title to the whole had vested in the city of Detroit. It therefore directed the comptroller to assume possession and control of the same and to serve a copy of the ordinance upon the company. To restrain the enforcement of this ordinance and protect the rights and property of the company the present suit was commenced by the complainant, a citizen of New York. The company had expended large sums of money in the construction of its works, and created for that purpose a debt, represented by bonds secured by mortgage upon its property, which, with interest, amounted to $650,000. There was, therefore, an urgent necessity for legal proceedings to stop the seizure of the property. There were only three directors of the company, two of them residents of Detroit and one of New York; and as the company could not maintain a suit in the Federal court against the city, they devised such a case of refusal on their part to take the necessary legal proceedings to protect the property and rights of the company as to

give jurisdiction to the Federal court of a suit brought for that purpose by the non-resident director and stockholder. The three directors discussed the matter among themselves. The president represents himself to have been very belligerent in his disposition. According to his statement, he professed not to want any legal proceedings taken. He proposed to settle the matter by force, and if any man attempted to take the property, to shoot him on the spot. His feelings on the subject must have been very intense, for more than two months afterwards he testified under oath that he would "most assuredly" have shot any man who meddled with him "as quick as wink;" as quick as he would have shot a burglar in his house at midnight. Dean, the complainant, another director, favored more pacific methods; he desired legal proceedings to be instituted. The third director, Meddaugh, was similarly disposed. He was a member of the bar of Michigan, and acting as one of the attorneys of the company. He favored legal proceedings, but expressed a want of confidence in the local tribunals of the State by reason of the then excited condition of the public mind; he desired to get into the Federal court, and so he resolved to object to a suit in the State courts. A meeting of the directors was thereupon improvised in his office to carry out the course resolved upon. Dean then asked that the officers of the company be instructed to protect its property and rights from the execution of the threat contained in the repealing ordinance of the city, and for that purpose to bring suit in the proper court. The matter being discussed, it was resolved, "That the company, convinced of the improbability of obtaining redress or justice in the local courts, which would be its only recourse, in the present excited condition of the public mind — the press of the city having, for some time past, continually aggravated public feeling by exaggeration and falsehood — cannot prudently enter into a litigation with the city, and that no such attempt on its part would now be made." Dean voted against the resolution, the other two directors in favor of it. The resolution having passed, Dean, on the following day, commenced the present suit, alleging the refusal of the directors to institute proceedings in the name of the company. The bill was read in the presence of the three

directors, and one of them, Meddaugh, acted as a solicitor in the case.

It is impossible to read the testimony of the president contained in the record, with his hesitating and evasive answers to the interrogatories of counsel, and not be convinced that the refusal, which constituted the basis of the present suit, was made for the express purpose of enabling a suit to be brought in the Federal court, and that no such refusal would have been given if that result had not been desired. It was an attempt to get into the Federal court upon a pretence, that justice was impossible in the State courts, owing to the excited condition of the public mind. The only party who could seek redress in a Federal court, by reason of his citizenship, was willing to trust the local courts; and if a determination had not existed to force the controversy away from them, we have no doubt that the other directors would readily have agreed with him. The refusal to take legal proceedings in the local courts was a mere contrivance, a pretence, the result of a collusive arrangement to create for one of the directors a fictitious ground for Federal jurisdiction. The case comes, therefore, within the purview, if not the letter, of the provisions of sect. 5 of the act of March 3, 1875, c. 137, defining the jurisdiction of the Circuit Courts of the United States. That section declares: "That if, in any suit commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party, not a stockholder, possesses; but when he resorts to such pro-

ceedings, to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it. The opinion in the case of *Hawes* v. *Oakland* is full of instruction on this head, and to it we refer for a statement of the law; we can add nothing to its cogent reasoning. 104 U. S. 450.

The decree of the court below must be reversed, and the case remanded with directions to dismiss the bill, without prejudice to a suit in the State courts; and it is

So ordered.

MILLER *v.* LANCASTER BANK.

Where a party sues out a writ of error to a State court, this court has no jurisdiction to re-examine the judgment or the decree, although it be adverse to the Federal right, if he set up and claimed the right, not for himself, but for a party in whose title he had no interest.

MOTION to dismiss a writ of error to the Court of Appeals of the State of Kentucky.

The facts are stated in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Martin F. Morris* in support of the motion.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* in opposition thereto.

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

From this record it appears that one S. W. Miller, being insolvent, made an assignment of his property to M. J. Durham, trustee, for the benefit of his creditors. The trustee afterwards

instituted a suit in the Boyle Circuit Court of Kentucky to enforce his trust. To this suit S. D. Miller and E. B. Miller, two of the present appellants, were parties; and in due course of proceeding a decree was entered for the sale of the assigned property. In this decree it appears that S. D. Miller and E. B. Miller, who were then in possession of part of the premises under a lease, were permitted to hold until the 31st of December, 1880, but it was added: "Said S. D. Miller and Ed. B. Miller agree to give said trustee the full, entire, and peaceable possession of the house and lands they use and occupy, on or before the thirty-first day of December next, and on their failure so to do, the trustee, Durham, may have a writ of *habere facias possessionem* against each of them, and the clerk of this court is hereby directed to issue the same."

Under this decree the property now in question was sold and duly conveyed to the First National Bank of Danville. The Danville Bank afterwards sold and conveyed the property to the National Bank of Lancaster, a bank organized under the national banking law. Tit. LXII., Revised Statutes. After these conveyances were made a writ was applied for, under the decree, in behalf of the Lancaster Bank, and issued to John Meyer, sheriff of the county, commanding him to take the possession of the property from S. D. Miller and E. B. Miller, and deliver it to Durham, the trustee. Thereupon S. D. Miller, E. B. Miller, and John W. Miller, the last of whom had in some way got into the possession of the property after the decree, filed a petition in the Boyle Circuit Court against the Lancaster Bank and the sheriff, to enjoin the execution of the writ, on the ground that it was issued without authority and was void. In this petition it was alleged that the Lancaster Bank had no power under its charter to take and hold the property, and that consequently the deed to it was inoperative and void. There were also allegations of irregularity in the form of the writ, and that since the decree Durham, the trustee, had sold and conveyed the property to the Danville Bank. To this petition the Lancaster Bank filed an answer and counter-claim. In the counter-claim the bank set up its title through the sale under the decree. The prayer was that the petition of the plaintiffs be dismissed and a judgment rendered for the recovery

of possession. Upon the hearing the writ which had been issued was set aside for irregularity, but a new writ was awarded the bank. From a judgment to that effect an appeal was taken to the Court of Appeals of Kentucky, where the judgment was affirmed. To reverse this judgment of affirmance the present writ of error was brought.

Our jurisdiction depends on the question whether the plaintiffs in error have been denied by the judgment below any "title, right, privilege, or immunity specially set up or claimed" under the banking act. As early as 1809 it was held by this court in *Owings* v. *Norwood's Lessee*, 5 Cranch, 344, that in order to give us jurisdiction in this class of cases the right, title, or immunity which is denied must grow out of the Constitution, or a treaty or statute of the United States relied on. Under this rule jurisdiction was not taken in that case, although it was an action of ejectment by Norwood's lessee, and the record showed that an effort was made to defeat the recovery because of an outstanding title in a third person adverse to Norwood and protected by a treaty. Mr. Chief Justice Marshall, in speaking for the court, said: "Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the States; and whoever may have this right is to be protected. But if the person's title is not affected by the treaty, or if he claims nothing under a treaty, his title cannot be protected by the treaty." The principle thus announced has been recognized in many cases since. *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Henderson* v. *Tennessee*, 10 How. 311; *Wynn* v. *Morris*, 20 id. 3; *Hale* v. *Gaines*, 22 id. 144; *Verden* v. *Coleman*, 1 Black, 472; *Long* v. *Converse*, 91 U. S. 105. *Henderson* v. *Tennessee*, like *Owings* v. *Norwood's Lessee*, was an action of ejectment, and the effort was to defeat the recovery by showing an outstanding title in a third person under a treaty with which the party in possession did not connect himself; but the jurisdiction was denied, Mr. Chief Justice Taney saying, in the opinion: "The right to make this defence is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger

in bar of the action. It is true the title set up in this case was claimed under a treaty. But to give jurisdiction to this court the party must claim the right for himself, and not for a third person in whose title he has no interest." And in *Hale* v. *Gaines* it was said: "The plaintiff in error must claim (for himself) some title, right, privilege, or exemption under an act of Congress, &c., and the decision must be against his claim to give this court jurisdiction. Setting up a title in the United States by way of defence is not claiming a personal interest affecting the subject in litigation."

In our opinion these cases are conclusive of the present motion. The plaintiffs in error set up no title against the bank. In effect, they seek to prevent the issue of an execution on a judgment against them, or those under whom they claim, because, as between the Danville Bank and the Lancaster Bank, a conveyance made by the Danville Bank of the property to be delivered under the execution is inoperative on account of the provisions of the banking law. What was done between the two banks had no effect on the title of the parties in possession, and it was a matter of no importance to them whether the execution issued on the application of the one or the other. Clearly, therefore, the plaintiffs in error occupy no other position than that of parties setting up title in the Danville Bank by way of defence, and that is not claiming for themselves any title, right, privilege, or immunity given by the law.

Motion granted.

MR. JUSTICE MILLER took no part in the decision of this case.

PIERCE *v.* INDSETH.

1. Judicial notice is taken of the seal of a notary public, and such seal, impressed upon either the paper or the wax thereunto attached, entitles his certificate of protest to full faith and credit. *So held*, where, in an action against the drawer of a foreign bill of exchange payable in Norway, such a certificate made in that country was, when put in evidence by the payee, accepted as proof of the presentment and non-payment of the bill.
2. The question as to whether the presentment was made in due time is determined by the law of the place where the bill is payable.
3. The deposition of a lawyer of Norway, to the effect that the holder of such a bill payable there at sight is allowed a year after its date within which to present it for payment, was, by the court below, properly admitted under the statute of Minnesota, which provides that the existence, tenor, and effect of all foreign laws may be proved by parol evidence, but that the court may, in its discretion, when the law in question is contained in a written statute, reject such evidence, unless it be accompanied by a copy thereof.

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

This is an action by the plaintiff in the court below, Ole A. Indseth, against the defendants, composing the firm of Pierce, Simmons, & Co., on a foreign bill of exchange, payable at sight to his order, drawn by them at Redwing, in Minnesota, on the Christiania Bank, in Norway, which is as follows: —

"*Exchange* 15,441 $\frac{50}{100}$ *kroner per stamp* 2*c.*

"PIERCE, SIMMONS, & Co., BANKERS,
"RED WING, MINNESOTA, February 1, 1877.

"At sight of this original of exchange (duplicate unpaid) pay to the order of O. A. Indseth fifteen thousand four hundred and forty-one $\frac{50}{100}$ kroner, value received, and charge same to account of Sk. P. I. & Co., Chicago, as per advice from them.

"PIERCE, SIMMONS, & Co.

"TO CHRISTIANIA BANK OF KREDIT KASSE, Christiania, Norway."

The value of these kroners in our money was $4,469.35.

Indseth resided at the time near Eidsvold, in Norway, and the bill was purchased by his agent in Minnesota, who forwarded it to him. He received it Feb. 27, 1877, and retained it in his possession until April 12 following, when he presented it to the bank for payment, which was refused. He then caused the bill to be protested by a notary of Norway for non-

payment. The drawers were notified of its non-payment by letter from the plaintiff, which they received at Red Wing as early as May 15, 1877, and also by the original certificate of protest of the notary, which, with a translation, was, at that time, shown to one of them by the agent of the plaintiff, to whom the document was sent for that purpose.

It appears from the findings of the court below that the drawers had no money to their credit with the Christiania Bank when the bill was drawn, but depended for its acceptance and payment upon advices to the bank by Skow, Peterson, Isberg, & Co., bankers, at Chicago. That firm failed, and made an assignment on the 21st of March, 1877. It had, however, from February 28 to that date, inclusive, to its credit with the bank, money sufficient to pay the bill; but no portion of it had been set apart for that purpose, and it has been since paid to the assignee of the firm. On the 15th of February, 1877, the drawers wrote to the payee a letter stating that, fearing their draft might not be paid, they had caused a cable despatch to be sent to Christiania directing payment; but there was no evidence that the bank received such a despatch, if sent, or gave them any credit on it.

Eidsvold, at or near which the plaintiff resided, is distant about fifty miles from Christiania, the place where the bank was situated, and between them there was daily communication by mail and by railway.

In proof of the presentment of the bill to the bank and the latter's refusal to pay the same, a copy of the notary's certificate of protest was given in evidence by the plaintiff, the defendants having stipulated for the admission of a copy with the like effect as the original, which was needed elsewhere. Subsequently the defendants themselves produced the original, for the purpose of showing its character, insisting, at the time, that it had no authenticity as the act of the notary, and was not, therefore, competent evidence of the presentation and non-payment of the bill.

To meet the objection of unnecessary delay in presenting the bill, the plaintiff gave in evidence, against the objection of the defendants, the deposition of a lawyer of Norway as to the law of that country respecting the presentation of bills of

exchange for payment. Exception was taken to the ruling of the court in its admission. It appeared, from the deposition, that by the law of Norway the holder of a foreign bill of exchange, payable at sight, is allowed a year after its date within which to present it to the drawee for payment; and that the drawer is not relieved from liability, if the presentation be not made within the year, unless he can prove that owing to the delay he has suffered a loss in his accounts with the drawee.

Evidence was offered by the defendants to show that the plaintiff, himself, had admitted his negligence in presenting the bill; but on objection of counsel it was excluded, to which ruling an exception was taken.

The court found in favor of the plaintiff for the full amount of the bill; and judgment having been entered on the finding, the case was brought to this court for review.

Mr. Charles E. Flandrau for the plaintiffs in error.
Mr. Edward C. Palmer for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court, and after stating the case as above, proceeded as follows: —

The certificate of the protest of the bill of exchange by the notary in Norway was properly received in evidence. It is in due form, and bears what purports to be the seal of the notary. The seal, it is true, is impressed directly on the paper by a die with which ink was used. This is evident from inspection of the original, which has been transmitted to us from the court below for our personal examination.

The use of wax, or some other adhesive substance upon which the seal of a public officer may be impressed, has long since ceased to be regarded as important. It is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself in such a manner as to be readily identified upon inspection.

The language used in *Pillow* v. *Roberts*, reported in 13 Howard, as to the sufficiency of a seal of a court impressed upon paper instead of wax or a wafer, is applicable here. Said the court, speaking by Mr. Justice Grier: "Formerly, wax was the most convenient and the only material used to receive and retain the impression of a seal. Hence it was said: *Sigillum*

est cera impressa; quia cera, sine impressione non est sigillum. But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held, that an impression made on wafers or other adhesive substances capable of receiving an impression, will come within the definition of '*cera impressa.*' If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper, is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed, and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it."

Here there is no difficulty in identifying the seal. The impression, which is circular in form, has within its rim the words "Notarial Seal, Christiania." Besides, the court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. We thus recognize the seal to the document in question as that of the notary in Norway, and as such authenticating the certificate of protest and entitling it to full faith and credit. Greenleaf's Evid., sect. 5; Story on Bills, sect. 277; *Townsley* v. *Sumrall*, 2 Pet. 170; *Chanoine* v. *Fowler*, 3 Wend. (N. Y.) 173; *Halliday* v. *McDougall*, 20 id. 81; *Carter* v. *Burley*, 9 N. H. 558.

The certificate being admitted, proved the presentation of the bill to the bank on the 12th of April, 1870, and its non-payment. That this presentation was made within the period allowed by the law of Norway appears from the deposition of a lawyer of that country, taken under a commission from the court. That law allowed a year after the issue of the bill for its presentation; and on the question of timely presentation the law of the place where a foreign bill of exchange is payable

governs, and not the law of the place where it is drawn. In giving a bill upon a person in a foreign country, the drawer is deemed to act with reference to the law of that country, and to accept such conditions as it provides with respect to the presentment of the bill for acceptance and payment. Thus, where days of grace on bills are different in the two countries, the rule of the place of payment must be followed. In England and the United States three days of grace are usually allowed; in France there are none, and in some places the number of days varies from three to thirty. Whatever is required by law to be done at the place upon which the bill is drawn, to constitute a sufficient presentment either in time or manner, must be done according to that law; and whatever time is permitted within which the presentment may be made by that law, the holder may take, without losing his rights upon the drawer, in case the bill is not paid. So, also, if the bill be dishonored, the protest by the notary must be made according to the laws of the place. It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the laws of the place where the bill is payable.

In this case the bill having been protested, the drawers were notified of its dishonor by letter from the payee, received by them on the 15th of May following, and also by personal delivery at about the same time of the original certificate of the protest, with a translation of it into English, to one of the drawers by an agent of the payee, to whom they were transmitted for that purpose. No question is made that this notice was not sufficient to charge the drawers.

The testimony of the lawyer of Norway as to the law of that country was admissible under the statute of Minnesota, which provides that "the existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof."

The general rule as to the proof of foreign laws is that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. *Ennis* v. *Smith*, 14 How. 400. But this rule may be varied by statute, and that of Minnesota leaves it to the discretion of the judge to require the production of a copy of the written law when the fact appears that the law in question is in writing. The discretion of the judge here was not improperly exercised, even if in such case his action would be the subject of review, as contended by counsel.

The admission of the payee that he had been negligent in presenting the bill was properly excluded. His negligence in that respect could not have affected his legal rights, if in point of fact the bill was presented within the time allowed by the laws of Norway.

We have thus far assumed that the drawers were entitled to notice of the presentation and non-payment of the bill. But it may be doubted whether such was the fact. They had no funds with the bank in Norway when the bill was drawn or at any other time, and they relied for its payment upon the advices of third parties. Although such third parties had funds at the bank after the bill had been received by the payee in Norway, there is no evidence that they ever advised the bank to pay the bill out of such funds. It is found by the court that the bank never set apart any portion of them to meet the bill. The cable despatch of the drawers, of which the letter of February 15 speaks, if it ever reached the bank, does not appear to have induced it to give them any credit. In the most favorable view, therefore, which could be taken of the position of the drawers, we see nothing which relieves them from liability.

Judgment affirmed.

TURNER v. FARMERS' LOAN AND TRUST COMPANY.

A suit for the foreclosure of a mortgage commenced in a State court was removed to the Circuit Court, where a motion to remand it was made and overruled. A final decree in favor of the complainant was passed, whereunder the mortgaged property was sold. From the order confirming the sale an appeal was taken. *Held*, that the final decree, not disclosing a want of jurisdiction of the court below, as to subject-matter or parties, will be examined here only to ascertain whether the sale conformed to its provisions.

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. George W. Kretzinger and *Mr. Nathaniel A. Cowdrey* for the appellants.

Mr. James D. Campbell for the appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was commenced on the 21st of November, 1874, in the Circuit Court for De Witt County, Illinois, by Malcolm C. Turner, James Turner, and others, constituting the firm of Turner Brothers, against the Indianapolis, Bloomington, and Western Railway Company, the Farmers' Loan and Trust Company, and others. The complainants, suing in behalf of themselves and all other bondholders and creditors of the railway company, asked a decree for the foreclosure of several mortgages, covering as well its property and franchises as the road and franchises of the constituent companies, by whose consolidation it was created.

The Farmers' Loan and Trust Company appeared and answered. It also filed a cross-bill, making all necessary parties defendant thereto; and, as trustee in some of the mortgages creating prior liens upon the main line of the consolidated road, it prayed for a decree of foreclosure, a sale of the mortgaged property, and a proper distribution of the proceeds arising therefrom among the several classes of creditors of the railway company. Subsequently, on the 26th of April, 1876, it filed a petition, accompanied by a sufficient bond, for the removal of the suit into the Circuit Court of the United States for the

Southern District of Illinois; and thereafter, it is asserted, the State court proceeded no further. A transcript of the proceedings having been filed in the Circuit Court of the United States, a motion was there made to remand the cause, while the Farmers' Loan and Trust Company moved that the court take jurisdiction. By an order entered on the 19th of July, 1876, the former motion was denied and the latter sustained.

On the 18th of July, 1877, a final decree was passed, ascertaining the amounts due and unpaid on the mortgages to the Farmers' Loan and Trust Company. By that decree it was ordered and adjudged that the railway company, within twenty days thereafter, pay to the trustee $6,234,625, the amount so ascertained, with interest from the date of the decree; that in default of such payment the equity of all the defendants to the cross-bill, in the mortgaged property, be forever barred and foreclosed, and the property — which included all the rights, effects, and franchises of the consolidated company, and of its constituent companies, as to the main line of road — be sold as an entirety, the same being, in the opinion and judgment of the court, incapable of sale separately, or in division, without material injury to its value.

It was further decreed that the mortgaged property be sold without appraisement, and without reference, and not subject, to any law of Illinois or Indiana conferring the right of redemption from mortgage sales.

On the 8th of May, 1878, the original decree was amended by way of further direction for its execution.

The sale occurred on the 30th of October, 1878, was reported to court on the succeeding day, and on the 1st of November, 1878, exceptions thereto were filed by James Turner and the railway company. On the 23d of December, 1878, the exceptions were overruled, and an order entered confirming and approving the sale in all respects.

On the 3d of February, 1879, Turner and the railway company filed their joint petition, praying an appeal from the final order confirming the sale. The appeal was allowed, and the bond tendered was approved, not to operate as a *supersedeas*. Subsequently, the purchaser received a deed and took possession of the property under the direction of the court.

It may be stated that a similar decree was entered in the Circuit Court of the United States for the District of Indiana, in a suit pending therein between, substantially, the same parties and relating to the same property. That suit was commenced on the 18th of November, 1874, in the Circuit Court for Montgomery County, Indiana, and thence, upon the petition of the Farmers' Loan and Trust Company, removed into the Federal court.

Notwithstanding the record is very voluminous, it is believed that this statement is sufficient to indicate the grounds upon which this court rests its determination of the case.

The appellants have assigned numerous errors, the first and most important of which relates to the jurisdiction of the Circuit Court of the United States. Their contention is, that under the act of March 3, 1875, c. 137, the State court could not have been deprived of jurisdiction to proceed, unless the petition for removal was filed "before or at the term at which such cause could be first tried and before the trial thereof;" that the petition of the Farmers' Loan and Trust Company was not so filed; consequently, it is insisted that the jurisdiction of the Federal court could not have attached. It is further argued that the pleadings disclose the fact that there was no such controversy in this suit, between citizens of different States, as would authorize its removal from the State court under the act just cited or that of March 2, 1867, c. 196, even if the latter is in force for any purpose.

Without admitting the soundness of these propositions, we are of opinion that the questions of jurisdiction now raised cannot be determined upon an appeal merely from the order confirming the report of sale. Whether the suit was one which the Farmers' Loan and Trust Company was entitled to have removed, that is, whether the Circuit Court of the United States could rightfully proceed after the petition for removal, accompanied by a sufficient bond, had been filed in the State court, was a question directly presented to that court for judicial determination upon the motion that the cause be remanded. The denial of that motion constituted an adjudication by the Federal court that the facts existed which were necessary to give jurisdiction. And had the question not been thus for-

mally presented, it was the duty of the Circuit Court to dismiss or remand the cause, as justice might have required, at any time during its progress, when it appeared that the suit did not really or substantially involve a dispute or controversy properly within its jurisdiction. *Williams* v. *Nottawa*, 104 U. S. 209. Further, the final decree necessarily involved, and was itself, a judicial determination, as between the parties, that the suit was one of which that court might take cognizance. That decree, unmodified and unchallenged by any direct appeal therefrom, should, upon this appeal only from the order confirming the sale, be deemed conclusive, between the parties and their privies, as to all matters in issue and by it adjudicated, including the questions of jurisdiction now pressed upon our attention. Such, we think, must be the rule, especially under existing statutes regulating the jurisdiction of the courts of the United States. Whether or not a cause, commenced in a State court, could have been tried at some term thereof prior to the filing of a petition for removal; whether the parties to a particular suit, without regard to their position as plaintiffs or defendants, can be so arranged on different sides of the controversy as to make a proper case for removal upon the ground of citizenship; whether there is in the suit a separable controversy between citizens of different States to which the judicial power of the United States extends, — are often questions difficult of solution. *Removal Cases*, 100 id. 457. We have held in numerous cases that upon the filing in the State court of a petition and bond for removal, the suit being removable under the statute, its jurisdiction ceases. And to the end that litigants may not, in such cases, be harassed by doubt as to which court has authority to proceed, the party against whom the removal is had is at liberty to move that the suit be remanded; and the act of 1875, for the first time in the legislation of Congress, declares that an order of the Circuit Court remanding a cause may, in advance of the final judgment or decree therein, be reviewed by this court on writ of error or appeal, as the case may require the one or the other mode to be pursued. Prior to that act the remedy, in that class of cases, was by *mandamus* to compel the Circuit Court to hear and determine the cause. *Babbitt* v. *Clark*, 103 id. 600;

Insurance Company v. *Comstock*, 16 Wall. 258; *Railroad Company* v. *Wiswall*, 23 id. 507. When the Circuit Court assumes jurisdiction of the cause, the party denying its authority to do so, may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose. *Railroad Company* v. *Koontz*, 104 U. S. 5. In the present case we have seen that the appeal is only from the order confirming the sale. Appellants elected not to appeal from the final decree, although it necessarily involved every question affecting the jurisdiction of the Circuit Court. That decree is, consequently, not before us for any purpose, except to ascertain, from an inspection thereof, whether the sale was conducted in conformity with its provisions. In such cases, upon an appeal, not from the final decree, but only from an order in execution thereof, the court will not examine the record, prior to such decree, to see whether the petition for removal was filed in due time, or whether it makes a case of Federal jurisdiction, by reason of the presence in the suit of a controversy between citizens of different States, but will assume that the final decree, being passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to subject-matter or parties, was within the power of the court to render. Whether the order confirming the sale would have been erroneous, had the decree itself disclosed, affirmatively, a want of jurisdiction, is a question which need not be decided.

What we have said disposes of numerous other assignments of error, such as that the court erred in decreeing that the property of the railroad company be sold without appraisement and without reference, and not subject to the laws of Illinois and Indiana conferring the right of redemption from sales of mortgaged real estate; in ordering the railroad and other property to be sold without first ascertaining what claims existed which were prior in lien to the mortgages foreclosed; in amending the decree of September, 1877, after the expiration of the term at which it was entered; in ordering the cross-bill of the Farmers' Loan and Trust Company to be taken by default as against the complainants in the original bill, after it appeared that they had become bankrupts, and their property and rights

had passed to an assignee in bankruptcy, who was not made a party to the cause; in decreeing the personal property of the railroad company to be sold, and in subsequently delivering it to the purchasers, in disregard of the alleged rights of appellants under the chattel mortgage executed to Thomas on the sixteenth day of November, 1874; in refusing to entertain appellant Turner's petition to intervene, filed on the day of sale; and in directing a foreclosure and sale of the property for the principal and interest of the debt secured by the mortgage, when, as is claimed, it did not appear that the principal had become due.

We do not stop to consider whether these objections find any support in the record, since it is sufficient to say that, if any such errors exist, they necessarily inhere, some in the final decree of foreclosure and sale, and others in the orders which preceded it. They cannot be examined upon an appeal merely from the order confirming the report of sale. Our authority extends, as we have shown, no farther than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken. And some of these exceptions plainly have reference, not to the sale itself, but to the final decree of foreclosure; such, for instance, as that the terms of sale were too onerous; that the property was sold subject to various claims, the amount of which was wholly uncertain; and that the court had no jurisdiction in the case. The only exceptions which properly relate to the sale are that the price at which the property was struck off and sold — $1,000,000 — was inadequate and insufficient; and that the property was not advertised for a sufficient length of time. It is enough to say that the record discloses no ground upon which these exceptions could have been sustained. One exception was to the effect that the purchasers at the sale constituted a committee, acting as agents of bondholders of the railway company, and that the report of sale did not disclose the names of the principals for whose use the property was purchased, or the amount to which each of said parties was beneficially interested. We are unable to perceive anything of substance in this exception. Since the sale was, in all material respects, in conformity with the final decree, from which no

appeal was prayed, and since the record discloses no ground upon which its fairness can be impeached, the court below properly overruled the exceptions and confirmed the sale. The order appealed from must, consequently, be

Affirmed.

MERCHANTS' BANK OF PITTSBURGH *v.* SLAGLE.

Where the trustees of a bankrupt who were appointed under sect. 5103 of the Revised Statutes distributed the proceeds of the sale of his property pursuant to an order entered by the proper District Court sitting in bankruptcy, and affirmed by the Circuit Court in the exercise of its supervisory jurisdiction, — *Held*, that the order is binding, and that the creditors are thereby concluded.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. John Dalzell and *Mr. J. F. Slagle* for the appellant.

Mr. George Shiras, Jr., for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

Christopher Zug and Charles H. Zug, composing the partnership of Zug & Co., were, on their own petition of May 11, 1876, declared bankrupts by the District Court for the Western District of Pennsylvania.

At the first meeting of the creditors, Slagle and Miller were appointed trustees, and Smith, Dunlap, and Clarke a committee of creditors, under sect. 5103 of the Revised Statutes. This action of the creditors was duly approved by an order of the District Court.

The trustees disposed of the property of the bankrupts, of which the Sable Iron Works, sold for $130,000, constituted the principal item. They then submitted their final accounts of the copartnership assets and the individual assets, and, on the committee approving them, made an order of distribution among the creditors.

Thereupon Coleman and others, creditors of Christopher Zug

individually, applied to the District Court and obtained a rule on the trustees whereby a report of their order for distribution was filed in that court. They then took exceptions to the report, in which the separate creditors of Charles H. Zug joined, on the ground that the Sable Iron Works had never been partnership property, but that the title was held by the two Zugs as tenants in common, in the proportion of four-fifths by Christopher and one-fifth by Charles. On final hearing these exceptions were sustained, and an order was made directing that the proceeds of the sale of the iron works be distributed on that basis to the private creditors of the individuals who composed the partnership.

An appeal to the Circuit Court from this order was dismissed, on the ground that no appeal lay from such an order. At the same time, in a proceeding under the supervisory power of the Circuit Court, a full hearing was had on the merits, and the action of the District Court affirmed.

From that order an appeal was taken to this court, which was dismissed on the ground that, being a proceeding under the supervisory power of the Circuit Court, it was not reviewable here. *Nimick* v. *Coleman*, 95 U. S. 266.

In that case it was urged that the District Court, in assuming to control the trustees in the distribution of the fund in their hands, acted without jurisdiction, and that its order was void; to which this court responded by saying: "If, as is claimed, the District Court acted without jurisdiction or in a manner not to bind the parties, its decree as made was void; and the aggrieved partnership creditors may very properly consider whether they cannot proceed in equity to call the trustees to a proper accounting and distribution. Upon that question, however, we express no opinion."

It is said that the suit now before us on appeal was commenced under this suggestion, in which the partnership creditors, calling into court the trustees and the individual creditors, seek to have the sum arising from the sale of the Sable Iron Works distributed among the former alone.

As this would require the order of the District Court on that subject to be set aside and reversed, or disregarded as a nullity, we are compelled to consider, before we proceed further, if this

can be done. All known modes of review of that order have been exhausted. The appeal from it to the Circuit Court was dismissed, whether rightfully or not cannot now be inquired into. On the petition of review, which was the legitimate mode of correcting the error, if one existed, the Circuit Court affirmed the order of the District Court; and from that decree, as we decided in the case above cited, there could be no further appeal.

It only remains to inquire if it was absolutely void for want of jurisdiction in the District Court to make it.

It is strenuously argued that when the estate of the bankrupt passes to the trustees appointed under the provisions of sect. 5103 of the Revised Statutes, the power of the District Court as a court of bankruptcy over them and their proceedings ceases, and that they become invested with a judicial function, in the exercise of which they are amenable to no other court. That as to collection and distribution of the bankrupt's assets, the case has been taken out of the category of bankrupt proceedings and wholly withdrawn from the control of the District Court.

It is difficult to perceive any plausible reason for this idea.

The meeting of the creditors, which may appoint the trustees and the committee, must be one held after the court has made an adjudication of bankruptcy and ordered such a meeting. The resolution of the meeting for settling the estate under this section by trustees and a committee, and the appointment of the trustees and committee, must be presented to the court and approved by it, or they are of no force.

The trustees are declared to have and to hold the property in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had if no proceeding in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed, showing thus that their powers were compounded of that of the owner and of the ordinary assignee in bankruptcy.

The court by order is to direct all acts and things needful to be done to carry into effect the resolution of the creditors, and the winding up and settlement of any estate under the provision of this section shall be deemed to be proceedings in bank-

ruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy.

It further provides that the court may compel the production of witnesses, books, and papers before the trustees, in the same manner as in other cases of bankruptcy, and that the bankrupt shall in like manner be entitled to his discharge.

Under sect. 4972 of the Revised Statutes, "the jurisdiction conferred upon the District Courts as courts of bankruptcy extends . . . to the collection of all the assets of the bankrupt; . . . to the adjustment of the various priorities and conflicting interests of all parties; . . . to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; . . . to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy."

Is there anything in sect. 5103 in conflict with this comprehensive declaration of the powers of the District Court over a case in bankruptcy "until the final distribution and settlement of the estate"?

On the contrary, it is one of the express provisions of the latter section that "the winding up and settlement of any estate under provisions of this section shall be deemed to be proceedings in bankruptcy," and the section is full of directions to the court to aid in this settlement, and the trustees are twice assimilated in their functions to those of an assignee in bankruptcy.

We are unable to see any judicial functions conferred on these trustees. Their powers, though somewhat enlarged, are in the main the same as those of the assignee, and are properly ministerial. It is true, they may do many things without an order of the court which an assignee could not do, such as selling property, allowing claims, and compromising disputes about rights of property. We might even hold that their order of final distribution would be valid if uncontested. *Moors* v. *Albro*, 129 Mass. 9.

But in all this we are of opinion that their action is subject to the revision and final control of the District Court whenever

that is invoked in aid of the substantial rights of any one interested in what they do. It is inconceivable that Congress intended to create in them an *imperium in imperio*, whose actions, however wrong, could be reached by no tribunal whatever. And if any supervision of their acts is to be had at all, it is very clear that the District Court is the one to whom that duty is confided.

A case bearing a strong analogy to this is that of *Wilmot* v. *Mudge*, 103 U. S. 217, in which it was decided that a composition order, under the act of June 22, 1874, c. 390, was a bankruptcy proceeding, and that, notwithstanding the act declared that such a composition should be binding on all the creditors, it did not discharge the bankrupt from debts created by fraud; because that act was *in pari materia* with the general bankrupt law, and was not inconsistent with sect. 5117 of the Revised Statutes, in regard to debts created by fraud.

That was a stronger case than this in favor of the argument that a composition was a proceeding which took the case out of the other provisions of the bankrupt law, for the statute which authorized it was passed long after the general law and after the revision.

In the present case the trustee section is a part of the original statute of bankruptcy, and contains in itself the declaration that what is done under it is a part of the bankruptcy proceeding.

As we are satisfied that the District Court, in correcting the order of distribution made by the trustees, acted within its powers, and as that order has passed beyond judicial review, except as it has already been had on petition to the Circuit Court, that order must govern the decision of this case, and the decree of the Circuit Court dismissing the bill is

Affirmed.

SAVANNAH *v.* JESUP.

1. Where a foreclosure suit was brought, and the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon — *Held*, that the order of the Circuit Court rejecting the claim is binding upon the corporation, and the latter is entitled to an appeal where the amount of taxes is sufficient to give this court jurisdiction.
2. Certain taxes assessed for the years 1877 and 1878, by the city of Savannah, upon land situate within its limits, which belongs to the Atlantic and Gulf Railroad Company, *held* to be unauthorized by law.

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

The facts are stated in the opinion of the court.

Mr. Alexander R. Lawton for the appellant.

Mr. Walter S. Chisholm for the appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

In *Georgia* v. *Jesup*, *ante*, p. 458, will be found a brief statement of the history of a suit which Jesup, as surviving trustee, commenced on the 15th of February, 1877, in the Circuit Court of the United States for the Southern District of Georgia, against the Atlantic and Gulf Railroad Company, a Georgia corporation, for the foreclosure of certain mortgages, covering the main line and branches of that company, with their respective appurtenances, rolling-stock, equipment, &c. In addition to the facts there stated, it may be added, that on the 10th of April, 1879, — the mortgaged property being then, as it had been since Feb. 20, 1879, in the actual possession of receivers, — the city of Savannah, a municipal corporation of Georgia, by leave of court, filed, in the cause, its petition *pro interesse suo*. It was therein alleged that the city was a creditor of the railroad company, in this, that the latter was indebted to the city for taxes "upon real estate owned and used for its legitimate corporate purposes," within the corporate limits of Savannah, in the sum of $2,853.75 for the year 1877, and $3,720 for the year 1878; and that for those sums execution had duly issued on the 20th of January, 1877, and the 1st of March, 1879, respectively, and were then in the hands of the city mar-

shal to be levied on the goods, chattels, lands, and tenements of the company. The prayer of the city was that it be heard in its own interest; that the court would authorize it to proceed in the collection of the taxes by levy and sale, under its ordinances and the laws of the State; else order the receivers to pay the taxes out of the funds and property in their possession, or give such other and immediate relief in the premises as to the court seemed proper.

This intervening petition, having been submitted and considered upon the merits, was, by order of the court, dismissed. Subsequently, the main cause was heard upon bills and answers, and the various interventions filed, and a final decree rendered, in which, among other things, it was recited that various persons had intervened for their interest, claiming to have liens against the property of the company, as laborers, mechanics, or material-men, or claiming to have an equity to be paid out of moneys in the hands of the receivers before payment of the bonds secured by the mortgages. By the decree it was, among other things, ordered and adjudged that certain claims of laborers and mechanics were superior liens on the mortgaged property and its proceeds, but that the claims of those who have furnished material only, but not as laborers or mechanics, although entitled to liens therefor, be postponed to the mortgages therein mentioned, "and no allowance is made, or to be paid, from the proceeds of said property, or from the money in the receivers' hands, to any other persons than to those who have such liens as aforesaid."

The city of Savannah prayed, and was allowed, an appeal — the one now before the court — from the decree denying its claim for taxes for the years 1877 and 1878.

Upon the oral argument in this court, some question arose as to whether the present appeal brings before us for review the merits of these claims for taxes. We are of opinion that this question must receive an affirmative answer. If the city had a valid claim for taxes, paramount to the lien created by the mortgages, two courses were open to it, — to postpone action under its executions until the proceedings in the Circuit Court of the United States were concluded, and its possession of the property, by receivers, had ended; or, with leave of court, to

file a petition *pro interesse suo*, submitting its claims for judicial determination. It adopted the latter course, and, in so doing, put itself in a condition to appeal from any order adverse to its interests, if such order involved an amount sufficient to give this court jurisdiction. This practice received the sanction of this court in *Wiswall* v. *Sampson*, 14 How. 52. The order dismissing the city's petition was followed by a final decree, which, in terms, limited the distribution of the proceeds of sale to certain claimants (the city not among the number), excluding all others. The orders in the court below, therefore, constituted, in every essential sense, a judicial determination adverse to the city's claims for taxes. Until those orders are reversed or modified, the city is concluded against any further assertion of its rights in the premises. Consequently, the appeal from the decree dismissing the petition and denying the claims for taxes, brings before us the question whether those claims were valid and enforceable against the property of the railroad company, or the proceeds arising from any sale thereof. That question we proceed to examine.

In conformity with an act of the legislature of Georgia, passed April 18, 1863, the Atlantic and Gulf Railroad Company was formed by the consolidation of two other companies, — one, the Savannah, Albany, and Gulf Railroad Company, incorporated Dec. 25, 1847; and the other, the Atlantic and Gulf Railroad Company, incorporated Feb. 27, 1856. The two constituent companies acquired, by their respective charters, an immunity from all taxation in excess of one-half of one per cent upon its annual net income or the annual net proceeds of its investments, — whether the one or the other is not material in the present case. This immunity passed to the consolidated company, subject, however, to the right of the State, reserved in the Code of Georgia (which was in force on and after Jan. 1, 1863), to withdraw it altogether. In *Railroad Company* v. *Georgia*, 98 U. S. 359, we held that this immunity or limited exemption was, in law, withdrawn by the State in the act of Feb. 28, 1874, entitled "An Act to amend the tax laws of the State so far as the same relate to railroad companies and to define the liabilities of said companies to taxation, and to repeal so much of the charters of such companies respectively as

may conflict with the provisions of this act." As the present case turns mainly upon the construction and effect of that act, it is necessary to examine its provisions with some care.

By the first section it is enacted that from and after the passage of the act "the presidents of all the railroad companies in this State shall be required to return on oath, annually, to the comptroller-general the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the comptroller-general."

The second section provides that the presidents of railroad companies shall "pay to the comptroller-general the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the comptroller-general shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against incorporated companies hereinbefore mentioned."

The third section provides, that if any railroad company affected by the first and second sections of the act "desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the first section in this act, and after paying the tax levied on such corporation by the tax act for 1873, and continuing to pay the same while the question of its liability under this act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the comptroller-general aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality on the part of the comptroller-general and of said corporation, in

which cases the comptroller-general shall be represented by the attorney-general of the State or such other attorney as the governor may select, and if the grounds of such illegality be not sustained, the comptroller-general shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the act, and if at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the comptroller-general."

The remaining section does nothing more than repeal all conflicting laws.

In *Railroad Company* v. *Georgia*, *supra*, the constitutional validity of that act was sustained.

The effect, then, of the act of 1874 was, that whereas, prior to its passage, the railroad company enjoyed immunity from all taxation, except at a limited rate upon its annual net income, or annual net proceeds of its investments, by that statute, each class or species of its property, without exception, was thenceforward liable, without deducting the indebtedness of the company, "to be taxed as other property of the people of the State." Now, the argument of learned counsel is that by its charter the city had "full power and authority to make such assessments and lay such taxes on the inhabitants of said city, and those who have taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience, and advantage of said city;" and that "besides real and personal property, the said mayor and aldermen may tax capital invested in said city, stocks in money, corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade, or calling, dividends, bank, insurance, express or other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law or competent authority of the United States." Code of Georgia, sect. 4847. Consequently, it is

argued, when the act of 1874 withdrew the immunity theretofore enjoyed by the company, and declared that its property should "be taxed as other property of the people of the State," such of the property of the company, within the city, as was taxable under its charter, could be thereafter reached for all purposes of municipal taxation.

This argument at first blush would seem to have some force, but we are of opinion that the opposing view is more consistent with the language of the statute of 1874, and the policy which seems to have dictated its enactment. Upon its face that act appears to establish a system of taxation by the State, for its benefit exclusively, of the property of railroad companies. The returns by the companies are required to be made to the comptroller-general, under the same regulations prescribed for returns to him by other incorporated companies. The taxes assessed are to be paid to that officer, and upon him, as representing the State, and upon no other officer, is imposed the duty of enforcing their collection. In the event of litigation he is to be represented by the attorney-general of the State, or by such other attorney as the governor may select. The statute, thus imposing, in behalf of the State, taxes to be collected by its officer, and to be paid, when collected, into its treasury, provides no machinery by means of which the property of railroad companies may be taxed by municipal corporations for local purposes. No provision is made for taxation by the municipal authorities of counties, cities, and towns, through which the road passes, of such portion of the company's property as was within their respective limits. Nor is any provision made for the transmission by the comptroller-general to such local authorities of the returns made to him by railroad companies of their property for taxation. Had the statute done nothing more, in the cases of railroad companies whose charters were subject to legislative repeal or modification, than to withdraw the immunity from taxation theretofore enjoyed by them, there would be more force in the position taken by the city of Savannah. But such is not the case; for, in the same act requiring taxation, for the benefit of the State, of all the property of railroad companies, and which, therefore, operated as a withdrawal of the then existing right of limited exemption

from taxation, the legislature makes the returns to the comptroller-general by the railroad companies of their property the only basis of the taxation to which, by its provisions, they are to be thereafter subjected. The mode prescribed by the statute for the payment of taxes by railroad companies has reference exclusively to taxes to be paid to the State, and not to municipal corporations. It seems to the court that the legislature did not intend, when imposing, as was done by the statute of 1874, taxation for the State upon all the property of railroad companies, to put upon the same property the additional burden of municipal taxation, which, had not that act been passed, would have been forbidden by the charters of those companies. The city relies upon that statute as opening the door for municipal taxation upon all the property of the railroad company which was taxable under any law of the State. But as the State simply substituted, for taxation to a limited amount, taxation for the benefit of the State upon all the property of the company according to its value, we do not think that the railroad company could be subjected to additional taxation upon the part of the city of Savannah without further legislation to that end.

Counsel have called our attention to *Bailey* v. *Magwire*, 22 Wall. 215, and insist that the principles there announced, if applied in this case, will lead to a conclusion different from that indicated. We do not so understand that case, and do not assent to any such interpretation of the decision there rendered. In that case it appeared that the Pacific Railroad Company, a Missouri corporation, was granted an exemption from taxation for a limited period. When, as well as before, that immunity was granted, the property of the company was liable for county, school, and municipal taxes, under *the public laws of the State* providing a *general scheme for the taxation of all property*. It was decided that there was nothing in the language of the statute, giving the exemption for a fixed term of years, which justified the conclusion that the State intended to relieve the property of the railroad company, after the exemption ceased, from the same liability for municipal taxes to which it was subject, by the general tax laws of the State, at the time that exemption was granted. The essential difference

between that case and this is, that the Atlantic and Gulf Railroad Company was, from its organization, exempted from *all* taxation, in excess of a limited amount, and, simultaneously with the withdrawal of that immunity, the State provided for the taxation of all of its property for the benefit of the State. Here it is not claimed that the property of the company was taxable by the city of Savannah during the period of limited exemption, withdrawn by the act of 1874, and for which exemption was substituted taxation, for the benefit of the State, of all of its property.

But it is contended that the taxes for the year 1878 stand upon a different footing from those in 1877, that is, that the city is entitled to collect the former, even if the law be otherwise as to the latter. This position rests upon that part of the Constitution of Georgia (which went into effect Dec. 21, 1877) declaring that "all laws exempting property from taxation, other than the property herein enumerated [which does not embrace the property of railroad corporations], shall be void." We are unable to perceive how, in the view expressed as to the scope and effect of the act of 1874, that constitutional provision can have any bearing upon the present case. The act of 1874, as was ruled in *Railroad Company* v. *Georgia*, took away the immunity of limited taxation previously enjoyed by the Atlantic and Gulf Railroad Company under its charter, and substituted another mode of taxation, for the benefit of the State, covering all the property of that company. The act of 1874 contained no exemption, and it was, therefore, unaffected by a constitutional provision declaring laws to be void which exempted property, other than that specially enumerated, from taxation.

For the reasons given we are of opinion that the decree below is right, and it is

Affirmed.

MR. JUSTICE MILLER dissenting.

I do not agree to the construction which the court places upon the act of the State of Georgia subjecting the railroad company to taxation.

When that statute says that the property of the railroad

company is "to be taxed as other property of the people of the State," I understand it to mean, that it is to be subjected to all the lawful taxes imposed by State laws under the same circumstances that the property of the citizen is.

In *Bailey* v. *Magwire*, 22 Wall. 215, a statute of Missouri, passed under similar circumstances and in language almost identical, was held to have this meaning.

That the statute of Georgia only provides *in that act* for the means of collecting the taxes due the State, affords no argument against taxation by counties and cities for local purposes, because the laws already in existence were sufficient for that purpose.

JENKINS *v.* INTERNATIONAL BANK.

1. Where a judgment in a State court is rendered against one shortly thereafter declared to be a bankrupt, a writ of error to that judgment brought by his assignee is a suit, within the meaning of section 5057 of the Revised Statutes.
2. The limitation of time in that section applies to a suit by the assignee to recover a debt or other moneyed obligation, as well as to a controversy concerning property or rights of property to which there are adverse claims.

ERROR to the Supreme Court of the State of Illinois.

The facts are stated in the opinion of the court.

Mr. W. T. Burgess for the plaintiff in error.

Mr. Julius Rosenthal and *Mr. A. M. Pence*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

In the course of a complicated litigation in the Circuit Court of Cook County, Illinois, between Samuel J. Walker and his creditors, it became a question whether the International Bank of Chicago, which was a party to the litigation, had a just and paramount right to certain promissory notes, secured by mortgage on real estate which it held as collateral security for debts due by him to it.

In the progress of the case the bank filed its cross-bill, alleging that it held the notes and mortgage not only as security

for the specific loan made on them at the time they were received, but for a large balance due from him, and praying for a decree for this balance.

Walker denied this, and asserted that by reason of usury the bank had been overpaid and was indebted to him. A decree was rendered in favor of the bank, finding the amounts due as follows: On the collateral notes, $23,116.66; on Walker's three principal notes to the bank, $17,092.86; on the entire indebtedness of Walker to the bank, $172,474; and adjudging that the sum to be realized from the collaterals should be first applied on the three notes amounting to $17,092.76, and the remainder on the general balance due the bank.

This decree was rendered on the 28th of February, 1878. Shortly afterwards Walker was adjudged a bankrupt. Jenkins became his assignee, and on the 5th of March, 1881, sued out a writ of error from the Court of Appeals for the First District of Illinois. The decree was there reversed. The bank having removed the case to the Supreme Court of the State, the decree of the Court of Appeals was reversed, on the ground that Jenkins had not brought his writ within the two years allowed by the bankrupt law. He thereupon brought the case here, and the only question that we can consider is the correctness of the ruling on that point.

Without searching the record for the precise date at which Jenkins became the assignee of Walker, and as such had authority to assert his rights, it is conceded that it was more than two years prior to any movement of his to bring the decree of the Circuit Court before the appellate court.

The question was raised in the argument of the case in the Supreme Court of Illinois, whether the writ of error sued out by Jenkins from the Court of Appeals was the beginning of a suit, or was so far a mere continuance of the former suit that the language of the act of Congress did not apply. In accordance with its own previous decisions, that court held that a writ of error was the beginning of a new suit. This question concerning the nature and effect of a writ of error in the courts of Illinois would seem not to be reviewable here, or, if it were, we should follow the decisions of that court on the subject.

We are, however, satisfied that, within the meaning of the

limitation clause of the bankrupt law, this first appearance of the assignee, more than two years after the decree of the court and the termination of the litigation between Walker and the bank, is a suit brought by him after that time.

There remains, however, the question, mainly argued before us, whether the suit thus commenced between the assignee and the bank involved an adverse interest touching any property or rights of property transferable to or vested in him. We can see but little reason to doubt that, so far as the controversy related to the right to the collateral securities resting on the mortgage, it was a suit touching adverse interests to property consisting of the notes and the equitable interests in the real estate mortgaged to secure them, and the adverse claims being that coming to Jenkins as assignee of Walker, and the claim of the bank.

But in that decree there was an adjudication against Walker of a debt to the bank of more than $150,000 after these collaterals had been applied in payment of the debt thus established, and this decree would be evidence, whether conclusive or not, of the right of the bank to share in the dividends of the bankrupt's estate.

So that apart from the collaterals, here was a decree for money which the assignee was interested in reversing if he came in time. We must, therefore, inquire whether, as to this personal judgment, the assignee is barred by the limitation of the bankrupt law.

This question is one which has received the consideration of many of the courts of bankruptcy in this country, but with no unanimity in the result, and its solution depends upon the construction of sect. 5057 of the Revised Statutes. It reads thus: "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." It is asserted by the plaintiff in error that this limitation can have no application to a case

where the assignee is suing to recover on a simple debt or other money obligation, and as the sentence stands in this section there is plausibility in the argument.

It is, however, true in one sense, that debts are property, and this sense of the word is coming more into use in legislation every day. If it be permissible to hold that it was so used in this act, then the interest of the assignee in the debts due to the bankrupt is an interest adverse to the parties who have to be sued on them before they will pay, and the debts claimed to be due by the bankrupt are matters in which the interest and the duty of the assignee, when they come into contest, are adverse to the creditor. If a debt secured by a mortgage raises, as it unquestionably does when a suit is brought to foreclose it, an interest adverse to the mortgagor, or to some purchaser from him of the equity of redemption, it would be a strange construction, which requires the assignee to bring his foreclosure suit to enforce a debt well secured, within the two years, while as to a simple note, unsecured, he can sue at any time, unless barred by the statute of the State. No reason can be seen for such a discrimination.

Assuming that there is some ambiguity in sect. 5057, as we find it in the Revised Statutes, we may be permitted to examine the connection in which it stood in the original Bankrupt Act of March 2, 1867, c. 176. On reference to that it will be found that it was a part of the second section of that act, the one which conferred upon and defined the jurisdiction of the Circuit Courts in bankruptcy cases. The part pertinent to the matter in hand is this: "Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits, at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of

action shall have accrued for or against such assignee: *Provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

We are not aware that it has ever been held that this section did not confer upon the assignee the right to bring a suit, whether it was at law or in equity, to recover a debt or other moneyed obligation in the Circuit Court of the district. If any such doubt was ever entertained, it was put at rest by the third section of the act of June 22, 1874, c. 390, which was an act amending the act of 1867 in many particulars.

This section declares that after the words "adverse interest" in line twelve of the section we have quoted, should be inserted "or owing any debt to such bankrupt," thereby making it clear that the jurisdiction did extend to the collection of debts owing to the bankrupt.

The limitation clause of the section, however, needed no amendment, for it applied to all suits, brought in any court, Federal or State, by or against the assignee, and using the word "or" distributively, it applied to all suits touching an interest in property transferable to the assignee, no difference who was the suitor. The reason of this is that there might be suits brought concerning property or rights of property vested in the assignee, in which he was not a necessary party, as ejectment against his tenant, or foreclosure of liens paramount to his, to which the plaintiff did not choose to make him a party. It was intended to say that in any such case, in any court, where the suit touched property or rights to property of the bankrupt passing to the assignee, it would be a good defence that it was not brought within two years after the right of action accrued.

This construction is consistent with the language of the original statute, and with the policy of it as declared by this court in *Bailey* v. *Glover*, 21 Wall. 342, and repeated in numerous cases since.

"It is obviously one of the purposes of the bankrupt law," says the court, "that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in

the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days." To prevent the estate being wasted in litigation and delay, "Congress has said to the assignee, You shall begin no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed."

The language of the revision in sect. 5057, though slightly varied from that of the original act, was not intended to give a different meaning. As it is susceptible of the interpretation that no suit shall be brought by or against the assignee, or by or against any person, touching an adverse interest in property transferred to him by the assignment, which is clearly the meaning of the original act, this latter construction must be given to the section under consideration.

Judgment affirmed.

ADAMS v. CRITTENDEN.

1. Distinct decrees in favor of or against distinct parties cannot be joined to render the aggregate sum sufficient to give this court jurisdiction.
2. Except in special cases, this court has no jurisdiction to re-examine the judgment or the decree of the Circuit or the District Court, unless the matter in dispute, exclusive of costs, although it arises upon the Constitution or a statute of the United States, exceed the sum or value of $5,000.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama.

The case is sufficiently stated in the opinion of the court.

Mr. William K. McAllister and *Mr. James L. Pugh* for the appellants.

Mr. David P. Lewis for the appellees.

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

This case was submitted under Rule 20, but on looking into

the record we find that we have no jurisdiction. The suit was begun in equity by an assignee in bankruptcy and a purchaser of certain lands sold under an order of the bankrupt court, to restrain the defendant Crittenden from enforcing a decree in his favor against the property for $1,828.93, and the defendant Weaver from enforcing another decree in her favor for $2,348.10. The decrees to be enjoined were entirely separate and distinct from each other, one having been rendered in a suit instituted by Crittenden, and the other in a suit by Weaver. The two suits presented substantially the same questions for adjudication, but they were in all other respects distinct. The two decrees were rendered on the same day, and draw interest from March 6, 1879. The Circuit Court, in the present suit, dismissed the bill on the 24th of October, 1881; and from a decree to that effect this appeal was taken.

The case comes clearly within the rule stated at the present term in *Ex parte Baltimore & Ohio Railroad Company*, *ante*, p. 5, to the effect that distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction; but if they could, these appellants would be in no better condition, because the aggregate of the two decrees, with interest added to the date of the dismissal of the bill, does not exceed $5,000.

Except in certain cases, of which this is not one, the mere fact that the matter in dispute arises under the Constitution or laws of the United States, or treaties made, does not give us jurisdiction for the review of the judgments or decrees of the Circuit or District Courts. If the value of the matter in dispute, exclusive of costs, does not, in such a case as this, exceed $5,000, we cannot consider it any more than others in which the amount in value is less than our jurisdictional limit.

Appeal dismissed.

ELGIN v. MARSHALL.

1. Judgment was rendered by the Circuit Court for $1,660.75 against a town, on interest coupons detached from bonds which it had issued under a statute, the unconstitutionality of which it set up as a defence. The bonds were for a larger sum than $5,000. *Held*, that this court has no jurisdiction to re-examine the judgment.
2. Sections 691 and 692, Rev. Stat., as amended by sect. 3 of the act of Feb. 16, 1875, c. 77, in limiting the appellate jurisdiction of this court in cases of the character therein mentioned, refer to the sum or value of the matter actually in dispute in the suit wherein the judgment or decree sought to be reviewed was rendered, and exclude, in determining such sum or value, any estimate of the effect of the judgment or decree in a subsequent suit between the same or other parties.

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

The facts are stated in the opinion of the court.

Mr. George E. Cole for the plaintiff in error.

Mr. S. U. Pinney for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought by Marshall and another, being citizens of Wisconsin, against the town of Elgin, Minn., to recover the amount due upon certain coupons or interest warrants, detached from municipal bonds, alleged to have been issued by it, in aid of a railroad company. The defence set up was that the bonds and coupons were void, the statute, under the assumed authority of which they had been issued, being, as was alleged, unconstitutional. The cause was tried by the court without the intervention of a jury, and it is part of the finding that, at the time of rendering the judgment, the plaintiffs were the owners of the bonds and coupons mentioned in the complaint. Judgment was given for the amount, $1,660.75, due thereon, being for the interest on fifteen bonds of $500 each. The town brought this writ of error.

The case has been fully presented in argument upon its merits, as they appear from the finding; but as we consider ourselves obliged to dismiss the writ of error, for want of jurisdiction, we have considered no other question.

This question is anticipated by the counsel for the plaintiff in error, who, while admitting that the amount sued for, and for which judgment was recovered, is less than $5,000, yet maintains that the value of the matter in dispute is in excess of that sum, because the defendants in error being the holders and owners of the bonds, to the amount of $7,500, have obtained, by the present judgment, an adjudication, conclusive upon the plaintiff in error, as an estoppel, of its liability to pay the entire amount of the principal sum.

It is true that the point actually litigated and determined in this action was the validity of the bonds, and as between these parties, in any subsequent action upon other coupons, or upon the bonds themselves, this judgment, according to the principles stated in *Cromwell* v. *County of Sac*, 94 U. S. 351, might, and as to all questions actually adjudged would, be conclusive as an estoppel.

And accordingly the plaintiff in error, in support of the jurisdiction of this court, relies on what was said in *Troy* v. *Evans*, 97 id. 1, that, "*prima facie*, the judgment against a defendant in an action for money is the measure of our jurisdiction in his behalf. This *prima facie* case continues until the contrary is shown; and if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount." The point was not involved in the decision of that case, as the writ of error was in fact dismissed; and what was said, in the opinion, seems to have been rather intended as a concession for the sake of argument, than as a statement of a conclusion of law. The inference now sought to be drawn from it we are not able to adopt. In our opinion, sects. 691 and 692, Rev. Stat., which, as amended by sect. 3 of the act of Feb. 16, 1875, c. 77, limit the jurisdiction of this court, on writs of error and appeal, to review final judgments in civil actions, and final decrees in cases of equity and of admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000, have reference to the matter which is directly in dispute, in the particular cause in which the judg-

ment or decrees ought to be reviewed, has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. *Lee* v. *Lee*, 8 Pet. 44; *Barry* v. *Mercein*, 5 How. 103; *Pratt* v. *Fitzhugh*, 1 Black, 271; *Sparrow* v. *Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions.

Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. *Williamson* v. *Kincaid*, 4 Dall. 20; *Course* v. *Stead*, id. 22; *United States* v. *Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record, as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case, unless its right and duty to do so are apparent upon the face of this record.

The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by

reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties; and yet, before the principal sum, in the present case, or any future instalments of interest shall have become due, the bonds may have been transferred to a stranger, for or against whom the present judgment would not be evidence. And in every such case it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to the suit, but also, whether and in what circumstances, and to what extent, the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies, that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

Accordingly this court has uniformly been strict to adhere to and enforce it.

In *Grant* v. *McKee*, 1 Pet. 248, it refused to take jurisdiction, because the value of the premises, the title to which was involved in that action, was less than the jurisdictional limit, although they were part of a larger tract, held under one title, on which the recovery in ejectment had been obtained against several tenants, whose rights all depended on the same questions.

Stinson v. *Dousman*, 20 How. 461, was an action at law for the recovery of rent, where the claim and judgment against the defendant below were less than the amount required to give

this court jurisdiction on a writ of error; but in giving judgment for the plaintiff below, for any sum at all, the court necessarily passed upon a defence of the defendant, set up by way of answer in the nature of a counter-claim, insisting upon an equitable right to a conveyance of the land, out of which it was alleged the rent issued, and the value of which was in excess of the limit required for the jurisdiction of the court. The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was, not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld.

Gray v. *Blanchard*, 97 U. S. 564, and *Tintsman* v. *National Bank*, 100 id. 6, are instances of the strict application of the rule limiting the jurisdiction to the amount actually in dispute in the suit; of which a similar example is found in *Parker* v. *Morrill*, *ante*, p. 1, decided at the present term.

Indeed, so strictly has it been applied, that, in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. We have had occasion to repeat and apply this principle in several cases at the present term. *Ex parte Baltimore & Ohio Railroad Co.*, *Schwed* v. *Smith*, *Farmers' Loan & Trust Co.* v. *Waterman*, *Adams* v. *Crittenden*, *ante*, pp. 5, 188, 265, 576. In some of these cases, the value of the matter in dispute, actually determined against the party invoking our appellate jurisdiction, actually was largely in excess of its limit, and yet its exercise was forbidden, because it was divided into distinct claims, no one of which was sufficient of itself to entitle either party to an appeal, although the decision in one was necessarily the same in all, because rendered upon precisely the same state of facts. *Russell* v. *Stansell*, 105 U. S. 303.

To entertain jurisdiction in the present case would be, in our opinion, to unsettle the principle of construction by which, in

all the cases referred to, this court has been guided. The writ of error is accordingly

Dismissed for want of jurisdiction.

NOTE. — *Plainview* v. *Marshall*, error to the same court, was submitted at the same time and by the counsel who argued the preceding case. MR. JUSTICE MATTHEWS, who delivered the opinion of the court, remarked, that the two cases did not differ in any material respect, the value of the matter in dispute in each being less than $5,000. For the same reasons the writ of error in this case was

Dismissed.

PACE v. ALABAMA.

Section 4189 of the Code of Alabama, prohibiting a white person and a negro from living with each other in adultery or fornication, is not in conflict with the Constitution of the United States, although it prescribes penalties more severe than those to which the parties would be subject, were they of the same race and color.

ERROR to the Supreme Court of the State of Alabama.

Section 4184 of the Code of Alabama provides that "if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offence, be fined not less than one hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offence, with the same person, the offender must be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary, or sentenced to hard labor for the county for two years."

Section 4189 of the same code declares that "if any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years."

In November, 1881, Tony Pace, a negro man, and Mary J. Cox, a white woman, were indicted, under sect. 4189, in a Circuit Court of Alabama, for living together in a state of adultery or fornication, and were tried, convicted, and sentenced, each to two years' imprisonment in the State penitentiary. On appeal to the Supreme Court of the State the judgment was affirmed, and he brought the case here on writ of error, insisting that the act under which he was indicted and convicted is in conflict with the concluding clause of the first section of the Fourteenth Amendment of the Constitution, which declares that no State shall "deny to any person the equal protection of the laws."

Mr. John R. Tompkins for the plaintiff in error.

Mr. Henry C. Tompkins, Attorney-General of Alabama, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court, and after stating the case as above, proceeded as follows: —

The counsel of the plaintiff in error compares sects. 4184 and 4189 of the Code of Alabama, and assuming that the latter relates to the same offence as the former, and prescribes a greater punishment for it, because one of the parties is a negro, or of negro descent, claims that a discrimination is made against the colored person in the punishment designated, which conflicts with the clause of the Fourteenth Amendment prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating State legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offence, to any greater or different punishment. Such was the view of Congress in the enactment of the Civil Rights Act of May 31, 1870, c. 114, after the adoption of the amendment. That act, after providing 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 person and property as is enjoyed by white citizens, declares, in sect. 16, that they "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offence for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offence committed between persons of different sexes; the other prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Sect. 4184 equally includes the offence when the persons of the two sexes are both white and when they are both black. Sect. 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Judgment affirmed.

HAYDEN *v.* MANNING.

Under the act of March 3, 1875, c. 137, the Circuit Court should dismiss a suit where the name of the complainant who has no real interest in the subject-matter thereof, has been improperly and collusively used for the purpose of creating a case cognizable there.

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

The case is stated in the opinion of the court.

Mr. John H. Mitchell and *Mr. Augustus H. Garland* for the appellant.

Mr. George A. King and *Mr. W. Lair Hill* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a case which the Circuit Court should have dismissed, under the fifth section of the act of March 3, 1875, c. 137, concerning the jurisdiction of the Circuit Courts of the United States, instead of granting the relief for which the complainant prayed.

It is charged in the bill that Hayden, the appellant, while acting as the attorney of Rachel Dove and Bethuel Dove, her husband, purchased under execution a valuable tract of land belonging to her, and that he had defended the suit for the foreclosure of a mortgage, in which a decree was rendered under which the property was sold. It is set out with sufficient fulness that at this sale he bought the land at less than its value, under circumstances which should subject the title which he acquired to the character of a trust for the benefit of Mrs. Dove.

It is not necessary now to inquire into the truth of that allegation, on which the Circuit Court rendered a decree in favor of Manning, the complainant in the suit, because we are of opinion that he had no such interest in the matter as to enable him to sustain a suit in the Circuit Court of the United States in regard to it.

The sale to Hayden was made March 5, 1864, and he received the sheriff's deed April 26 thereafter. On the 7th of April, 1875, Rachel and Bethuel Dove conveyed the land to Manning, who brought the present suit May 12, 1876.

It appears in evidence that not long after the sheriff's deed was made to him, Hayden took possession of the land, and has retained it ever since, though it is said he obtained the possession unfairly.

In April, 1874, Rachel Dove began a suit in the State court of Polk County, where the land was situated, against Hayden to recover these premises, and the court decided against her on demurrer. From this decision she took an appeal to the Supreme Court. She subsequently dismissed it, and also her suit in the court of original jurisdiction. While the latter was pending, and in April, 1875, the conveyance of the land in question was made to Manning.

Manning was the husband of her daughter, and, as he resided in California, he had the citizenship necessary to enable him to renew the litigation in the Circuit Court of the United States.

The deed purports to be one of bargain and sale for the consideration of $5,000; but no money was ever paid on it. No note or other obligation was given, nor any mortgage, as security for the debt. It does not appear that Manning ever promised to pay anything for it.

Mrs. Dove's account of the transaction is this: "My daughter Elizabeth is the wife of Charles Manning, the plaintiff. Manning never has paid me any money on this land, but he was going to. He never gave me his note. I can't say when I saw Manning last. I think eight years ago. Manning wrote first about having the land conveyed to him; said he would take the matter off our hands. I have not the letter with me."

Dove says that neither from his own knowledge nor that of his wife is he able to state whether any part of the $5,000 has been paid. Manning's deposition was not taken, nor is any word, verbal or in writing, produced as coming from him in regard to this suit. The bill, which is filed in his name, is neither signed nor sworn to by him. Dove swears that he is the agent and attorney in fact of Manning, and as such he verifies the bill.

The defendant, who is called upon to make full and perfect answer, does so under oath, and denies that Manning was in good faith the lawful owner of the land. No bond for costs

was given by Manning, or any one for him. Dove, in swearing to the bill of costs of about $300, does not say that plaintiff had paid any part of them, but that they were incurred in the suit.

There is no evidence that the deed from Dove and wife to Manning was ever delivered to him, or was ever in his possession; and there is no reason to suppose it ever left Oregon, or that he had been in Oregon for years before or after its execution.

Undoubtedly, Mrs. Dove and her husband could have given their interest in the property to their daughter, and a conveyance in consideration of natural love and affection might have been good.

But this deed was not made to her, nor on any such consideration, but recites a consideration of $5,000 in money, while it clearly appears that no money was paid, or secured by note or mortgage, or promised or intended to be paid.

"Manning wrote to me," says Mrs. Dove, "about having the land conveyed to him; said he would take the matter off our hands." What matter? Manifestly the litigation at that time going on. "I will sue for you in my name. I can go into a court of the United States where you can't go," is what he meant.

There is not a syllable in this record inconsistent with the idea that the deed was made to Manning without his knowledge, recorded in Oregon, and delivered to the lawyers who brought this suit (the same who brought the suit in the State court), without his authority, and without any communication from him whatever. If the bringing of this suit was a tort, there is no evidence in the record by which Manning could be connected with it, or with any assertion of claim under the deed.

It seems to us that Manning's name is used because he is a citizen of a different State from the defendant, for the sole benefit of Mrs. Dove; that he has no real interest in the controversy, and, if cognizant of what is going on, of which there is much doubt, that he is passively permitting the use of his name for her benefit, in order to make a simulated case of jurisdiction in the Federal court.

This is precisely the case provided for in the act of 1875.

The "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court," because the real controversy is wholly between citizens of the same State. "The name of Manning, the plaintiff in the suit, has been improperly and collusively used (in the language of this statute) for the purpose of creating a case cognizable under it." *Williams* v. *Nottawa*, 104 U. S. 209; *Hawes* v. *Oakland*, id. 450; *Detroit* v. *Dean*, *ante*, p. 537.

Decree reversed, and cause remanded with directions to dismiss the bill for want of jurisdiction, and without prejudice to any other action in a proper court.

THOMPSON *v.* PERRINE.

1. *Thompson* v. *Perrine*, 103 U. S. 806, cited and reaffirmed.
2. Overdue coupons detached from a municipal bond which has not matured are negotiable by the law merchant.
3. Where coupons are payable to bearer, the right of the holder thereof to sue thereon in a court of the United States does not depend upon the citizenship of any previous holder. He is not an assignee, within the meaning of the act of March 3, 1875, c. 137.

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. Timothy F. Bush and *Mr. F. N. Bangs* for the plaintiff in error.

Mr. William M. Evarts for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

In *Thompson* v. *Perrine*, 103 U. S. 806, we affirmed a judgment of the Circuit Court of the United States for the Southern District of New York, against the town of Thompson, in that State, for the amount of certain coupons of bonds, executed in behalf of that town, by virtue of the provisions of an act passed May 4, 1868, and amended April 1, 1869. Those

acts, as will be seen from the statement of the former case, authorized the town of Thompson, in aid of the construction of a railroad from Monticello, N. Y., to Port Jervis, in the same State, — a majority of its taxpayers, appearing upon the last assessment roll, and representing a majority of the taxable property, not including lands of non-residents, having first consented to the debt being contracted, — to issue bonds, and to invest *the proceeds*, when disposed of, in the capital stock of the railroad company organized to construct the proposed road. Bonds were issued, and instead of selling them and investing the proceeds in the company's stock, the local authorities exchanged them directly with the railroad company for stock. This, according to certain decisions of the highest court of New York, was in violation of the act giving authority to issue the bonds. But, by an act passed April 28, 1871, — previous to which time the bonds had been issued and delivered, — that exchange for stock was, in express terms, ratified and confirmed. And the controlling question in the former case was as to the constitutional validity of the latter statute. In *Horton* v. *Town of Thompson*, 71 N. Y. 513, decided January, 1878, the Court of Appeals of New York held, that as the taxpayers had only consented to an issue of bonds, the proceeds of the sale of which should be invested in stock, it was beyond the power of the legislature to validate bonds, which, in violation of the act under which they were issued, were not sold, but were directly exchanged for stock, of which fact all purchasers had notice from the recitals of the bonds themselves. The adjudication, it was contended by counsel, was binding upon us. But to that proposition we declined to give our assent, and stated, with some fulness, the reasons why we could not give to the decision in the case just cited the effect claimed for it by the town.

We held, for reasons which need not be repeated, that it was within the constitutional power of the legislature of New York to pass the curative statute of April 28, 1871, and that from the moment it was enacted (if not before) the bonds, by whomsoever held, whether by the railroad company or others, became binding obligations upon the town, as much so as if they had originally been sold and the proceeds invested in

stock of the railroad company, as required by the acts under which they were issued.

That decision controls the present case; for the latter, in its essential features, differs from the former only in the circumstance of the time when Perrine acquired title to the coupons in suit. Those heretofore sued on were purchased by him in 1875, while those now in suit were purchased by him in 1878, when they were overdue, and after the decision in 71 N. Y. was announced. Counsel for the town now insist that this court should follow the ruling in *Horton* v. *Town of Thompson*, at least as to holders of coupons or bonds who purchased after it was decided; and they suppose that this court placed its former decision upon the ground mainly that Perrine had purchased the bonds there in suit before the Court of Appeals declared the act to be unconstitutional. But in this view we do not concur. The reference, in the former case, to the date when Perrine purchased, was to illustrate the injustice which would be done were we, in opposition to our own view of the law, to follow the ruling of the State court made after he purchased, — a decision which, with entire respect for the State court, was held not to be in harmony with its former decisions. What we decided was that the curative statute was within the limits of the legislative power, and that, at least from its passage, the bonds, by whomsoever held, whether by the railroad company or others, became enforceable obligations of the town. *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 416; *Mitchell* v. *Burlington*, 4 Wall. 270; *Taylor* v. *Ypsilanti*, 105 U. S. 60.

There is, however, one point made in this case, not made in the former one, and which it is our duty to notice. It is, that this action is excluded by statute from the jurisdiction of a Circuit Court of the United States.

The eleventh section of the act of Sept. 24, 1789, c. 20, declares that no District or Circuit Court shall "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The provision in the act of

March 3, 1875, c. 137, is: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

It is not claimed that the words "assignee" and "assignment," as found in the act of 1875, have any meaning different from that attached to the same words in the act of 1789, or in sect. 629 of the Revised Statutes. But the contention of counsel is that the coupons in suit, being detached from the bonds and overdue when Perrine purchased them, were dishonored, and, therefore, not negotiable by the law merchant; consequently, it is claimed, they are not within the exception of promissory notes negotiable by the law merchant, but are embraced by the general inhibition upon suits founded on contract where the assignor himself could not have sued in the Circuit Court.

This position cannot be sustained. It is an immaterial circumstance that the coupons, when purchased by Perrine, were detached from the bonds. And the bonds not having then matured, the coupons, though overdue, had not lost the quality of negotiability by the law merchant. This result must follow from the principles announced in *Cromwell* v. *County of Sac*, 96 U. S. 51. Further, and apart from any consideration of the question as to the negotiability, according to the law merchant, of these coupons, Perrine is not an assignee within the meaning of the act of 1875, or of the previous statutes relating to the same subject. Giving the words assignee and assignment their broadest signification, and conceding that, in some cases, the holder of a promissory note may become such in virtue alone of an assignment, yet, according to the established construction of the act of 1789, the right of the holder of a promissory note or bond, payable to a particular person or bearer, to sue in his own name, did not depend upon the citizenship of the named payee or of the first or any previous holder; this, because, in all such cases, the title passed by delivery and not in virtue of any assignment. In *Bullard* v. *Bell*, 1 Mason, 243, Mr. Justice Story said, that to bring a case

within the exception contained in the eleventh section of the act of 1789, "the action must not only be founded on a chose in action, but it must be assignable; and the plaintiff must sue in virtue of an assignment." "A note," said he, "payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is, therefore, payable to any person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer." In *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 326, this court said that it had "uniformly held that a note payable to bearer is payable to anybody, and is not affected by the disabilities [to sue] of the nominal payee." *Thomson* v. *Lee County*, 3 Wall. 327; *Bushnell* v. *Kennedy*, 9 id. 387; *City of Lexington* v. *Butler*, 14 id. 282; *Cooper* v. *Town of Thompson*, 13 Blatchf. 434; *Coe* v. *Cayuga Lake Railroad Co.*, 19 id. 522.

The coupons in suit are payable to the holder thereof, and, upon the authority of the adjudged cases, Perrine is not an assignee within the meaning of the act of 1875. He is entitled to sue without reference to the citizenship of any previous holder.

We perceive no error in the record.

Judgment affirmed.

PRAY *v.* UNITED STATES.

A. was appointed occasional weigher and measurer, at a fixed compensation per annum *when employed*. He rendered accounts for his services each month, Sundays being deducted; was paid on that basis, and gave his receipts therefor. He subsequently brought suit to recover pay for the Sundays excepted from those accounts. *Held*, that he is not entitled to recover.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Thomas H. Talbot for the appellant.

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

MR. JUSTICE MILLER delivered the opinion of the court.

According to the finding of facts in this case, the claimant received, on the first day of March, 1867, a written instrument appointing him *occasional* weigher and measurer, with a compensation fixed at $2,000 per annum *when employed*. He held the place and performed the duties of occasional weigher and measurer at Portland, Maine, under that appointment until Nov. 30, 1877.

A further finding is this: —

For each month during the period of said service the claimant was paid his compensation upon bills made out in the following form: —

"THE UNITED STATES *Dr. to* F. E. PRAY, *Occasional Weigher of the Customs for the Port of Portland.*

"For my services as occasional weigher of the customs from to , inclusive, Sundays excepted, one month, at two thousand dollars per annum."

Each bill so made out was for the sum due for the month named in it, after deducting the Sundays, and to each was subjoined a receipt, signed by the claimant, in the following form: —

"Received payment for the above services, $, of , collector of customs for the Port of Portland."

The present suit is brought to recover compensation for the Sundays excepted out of these monthly payments during the entire period of service.

This demand is founded on the law which gives to the weighers and measurers, holding office as such by the usual appointment, a salary of $2,000 per annum, in which, of course, Sundays are disregarded.

Counsel for the government contends that his letter of appointment, naming him as "occasional weigher and measurer," to be paid at the rate of $2,000 per annum "when employed," justified payment at that rate only for the days when he was in actual service.

Whatever might have been said in opposition to this view, if claimant had asserted it during the early time of his service, it is clear that, by the form of the bill for services for each month, he expressed his own understanding of the contract to be the same as that with the collector who employed and paid him. He makes out in his own name, "for (his) my services as occasional weigher," "for one month, Sundays excepted," his bill, with the sum fixed on that basis, and accepts and signs a receipt for it, and this he does every month for ten years.

He cannot be permitted now to say, after he is out of that employment, that his contract was for $2,000 a year as an absolute salary.

If this was the case of a person employed by a bank, a railroad company, or in any large business requiring many persons for its service, the case would admit of no argument.

We think it equally plain in the present case. *United States* v. *Adams*, 7 Wall. 463; *United States* v. *Child*, 12 id. 232; *United States* v. *Justice*, 14 id. 535; *Mason* v. *United States*, 17 id. 67.

Judgment affirmed.

RED ROCK *v.* HENRY.

1. A statute is not repealed by a later affirmative statute, which contains no repealing clause, unless the conflict between them cannot be reconciled, or the later covers the same ground as the former, and is clearly intended as a substitute therefor.
2. The statute of Minnesota of March 6, 1868, pursuant to which certain bonds were issued by the town of Red Rock, to aid in the construction of a railroad, was not repealed by the statute of March 5, 1870, *post*, p. 599.
3. The act of March 2, 1871, *post*, p. 600, has no effect upon the rights of the holder of the bonds, as there had been a previous compliance with every condition upon which the town had agreed to issue them.

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

The legislature of the State of Minnesota, on March 6, 1868, passed an act entitled "An Act to authorize the towns in Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson Counties to issue bonds to aid in the construction of any railroad running into or through said counties." The first three sections of the act, the only ones material to this case, are as follows: —

"SECT. 1. Each town in the counties of Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson is authorized to issue bonds as hereinafter provided to aid in the construction of any railroad running into, or proposed to be built through, either or all of the counties aforesaid.

"SECT. 2. Said bonds shall be issued in sums of not less than one hundred dollars each, may bear interest at a rate not exceeding ten per cent. per annum, payable annually, and shall run for a period not exceeding ten years from their respective dates. They shall be signed by the chairman of the board of supervisors, and countersigned by the town clerk of such towns; and the principal and interest as they become due shall be payable to the person or corporation to whom they shall be issued, or bearer, on presentation to the town treasurer.

"SECT. 3. Any town in either of the aforesaid counties may, at any usual or regularly called special meeting, by vote of a majority of the legal voters of such town present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest and the date of payment of all and any thereof, and the person or cor-

poration to whom the same shall be issued and made payable, and the time at which and the terms and conditions upon which the same will be issued; and such town may, at such meeting, by vote, delegate all or any of the foregoing powers to the board of supervisors or any committee appointed by the town."

This act was amended Feb. 27, 1869, by substituting "thirty" for "ten" years, as the limit of time at or within which the bonds were to be made payable.

While the act, thus amended, was in force, to wit, May 9, 1869, the Southern Minnesota Railroad Company, by Clark W. Thompson, its general manager, made the following proposition to certain towns in the counties of Mower and Fillmore, among which was the town of Red Rock, the plaintiff in error: —

"I propose, in the name of the Southern Minnesota Railroad Company, to build and put in operation the Southern Minnesota Railroad, from its present terminus in Fillmore County to some point on the Minnesota Central Railroad, on or before the thirty-first day of December, one thousand eight hundred and seventy-two, on the following conditions, to wit: —

"That the following towns in Fillmore and Mower Counties shall vote and certify to the Southern Minnesota Railroad Company the following amount of bonds of their respective towns, payable in twenty years, with seven per cent. annual interest Fillmore, fifteen thousand dollars; Spring Valley, twenty-five thousand dollars; Frankfort, fifteen thousand dollars; Grand Meadow, fifteen thousand dollars; Red Rock, twenty-five thousand dollars, and Walthan, fifteen thousand dollars; the bonds not to be delivered, and the interest not to commence, until said completed road shall reach the town, or some point as far west as the eastern line of the town, voting the aid, if said road shall be done by the time specified."

A special meeting of the legal voters of the town of Red Rock was held May 15, 1869, at which a majority of them then present and voting adopted the following resolutions: —

"*Resolved*, That under the provisions of an act of the legislature of the State of Minnesota, entitled 'An Act to authorize the counties of Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson

to issue bonds to aid in the construction of any railroad running into or through said counties,' the supervisors of the town of Red Rock, Mower County, Minnesota, and their successors in office be, and are hereby, authorized and required to issue and deliver to the Southern Minnesota Railroad Company the bonds of said town, with interest coupons attached, to the amount of twenty-five thousand dollars, such bonds to bear interest at the rate of seven per cent. per annum, payable annually; such bonds to be issued in denominations of not less than one thousand dollars each, and to be payable in twenty years from their date, and to be signed by the chairman of said board of supervisors and attested by the clerk of said town, whenever said railroad company shall have completed its said road, from its present termination, Fillmore County, to some point within one hundred rods of the southeast corner of the northeast quarter of section nine in township one hundred and three north of range seventeen west, and shall have established a regular freight and passenger depot and are doing business therefrom.

"*Resolved*, That the bonds shall not be issued or delivered to said company, and no obligation incurred by said town by voting of this resolution, unless said company shall have completed said road to said point by the thirty-first day of December, one thousand eight hundred and seventy-two."

Prior to the issue of the bonds mentioned in these resolutions the company never formally agreed in writing to the terms and conditions on which the bonds were voted, but in the fall of 1869 it located its road between the points and upon the line mentioned in the above resolution; and in December of that year it let the contract for constructing that portion of its line so located. Work was at once begun, and was carried on during the winter, spring, and summer of the year 1870.

Before the close of the summer, and more than two years before the time fixed in the resolution, the company had complied with all the terms and conditions of that resolution, and had completed its road between the points and upon the line prescribed in the resolution, and had built the depot, and was "doing business thereupon."

Whereupon, in pursuance of the proposition made to the company in said resolution of May 15, 1869, the town of Red Rock, on March 9, 1871, issued to the company twenty-five bonds of $1,000 each, falling due in twenty years. The bonds

referred on their face to the law of the State and the vote of the legal voters of the town of Red Rock by which it was supposed the issue of the bonds was authorized, and they recited that the company had fully performed the conditions upon which the town had promised to issue the bonds.

After the issue of the bonds, and before the maturity of the first coupons thereunto attached, the company sold, transferred, and delivered the bonds, with all the coupons appertaining and attached thereto, to Jacob A. Henry, for the consideration of $900 for each of said bonds, such price then being their full market value, and he forthwith paid the money to the company. At the time of such purchase and payment, he had no knowledge of any of the special acts of legislature hereinafter mentioned, and no knowledge of the proceedings of the electors or other authorities of the town, except what he derived from the recitals contained in the bonds.

He brought this suit upon the coupons which matured since he became the holder of the bonds.

The defence set up was this: That before the company had fully complied with the conditions upon which the town had proposed to issue its bonds, to wit, on March 5, 1870, the legislature of Minnesota passed an act, the sections of which pertinent to this case are as follows: —

"SECT. 1. Each township and village, town and incorporated city in the counties of Mower, Dodge, Goodhue, and Dakota, by a vote of a majority of the supervisors of any township, or of the majority of the city council of any such village, town, or city, as hereinafter provided, may create and issue its bonds, with interest coupons attached, to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid.

"SECT. 2. The majority of the supervisors of any township, or the majority of the village, town, or city council of any such village, town, or city in the aforesaid counties, may fix the amount and size of the bonds to be issued by said township, village, town, or city, the rate of interest and the date of payment of all or any part thereof, and the person or corporation to whom the same shall be issued and made payable, and the time at which, and the terms and conditions upon which the same shall be issued to such corporation.

"SECT. 3. Before the bonds are issued in any township or incorporated village, town, or city, the question of issuing them shall be submitted to the legal voters thereof by the supervisors of said township or by the council of said village, town, or city. And the supervisors of townships and common councils of said villages, towns, and cities are hereby authorized to appoint and call special elections for such purposes, which elections shall be called and conducted in such form and manner as elections are usually conducted in such townships, villages, towns, or cities."

The act further provided, that if the majority of the voters at such election voted for the issue of the bonds, the said supervisors or the said common council should cause the bonds to be delivered to the railroad company whenever it should have complied with the terms and conditions upon which the bonds were to be issued.

Afterwards, to wit, on March 2, 1871, and before the bonds in controversy were issued, the legislature amended the first section of the act, so as to make it read as follows: —

"SECT. 1. Each township, village, town, and incorporated city in the counties of Mower, Dodge, and Goodhue, by a vote of a majority of the supervisors of any township or of the majority of the city council of any such village, town, or city, subject to the approval and ratification of the legal voters of said township, village, town, or city, as hereinafter provided, may create and issue its bonds, with interest coupons attached, to aid in the construction of any railroad running into or proposed to be built through either or all the counties aforesaid."

This was followed by a repealing section, as follows: —

"SECT 2. All acts and parts of acts inconsistent with this act are hereby repealed."

The contention of the town was that the act of 1868, under which it was claimed that the bonds had been issued, had been repealed by the above-mentioned acts of 1870 and 1871. Upon this question the judges of the Circuit Court were divided in opinion. In accordance with the opinion of the presiding judge, judgment was rendered in favor of Henry, and the question upon which the judges differed was certified to this court for its decision.

Mr. Gordon E. Cole for the plaintiff in error.

Mr. E. G. Rogers and *Mr. W. P. Clough* for the defendant in error.

MR. JUSTICE WOODS delivered the opinion of the court.

The statute of March 5, 1870, is an affirmative act, and contains no express repeal of the act of March 6, 1868. The question is, therefore, whether the former act repeals the latter by implication. The leaning of the courts is against repeals by implication, and if it be possible to reconcile two statutes, one will not be held to repeal the other. *McCool* v. *Smith*, 1 Black, 459; *United States* v. *Tynen*, 11 Wall. 88.

It was held in *Wood* v. *United States*, 16 Pet. 342, that a repeal by implication must be by "necessary implication; for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary."

In *United States* v. *Tynen*, *ubi supra*, it was declared by Mr. Justice Field, speaking for the court, that "it is when the later act plainly shows that it was intended as a substitute for the former act that it will operate as a repeal of that act."

So in *Henderson's Tobacco*, 11 Wall. 652, this court said, Mr. Justice Strong delivering its opinion, that "when the powers and directions under the several acts are such as may well subsist together, an implication of repeal cannot well be allowed."

In *King* v. *Cornell*, decided at the present term, the Chief Justice, expressing the opinion of the court, on this point said: "While repeals by implication are not favored, it is well settled that when two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier and embraces new provisions which plainly show that the last was intended as a substitute for the first, it will operate as a repeal." *Ante*, p. 395. See also *Murdock* v. *City of Memphis*, 20 Wall. 590.

The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole

ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.

Guided by this rule, we are to settle the question upon which the judges of the Circuit Court were divided in opinion.

It must be conceded that while the act of 1868 requires only the vote of a majority of the legal voters of the town before the bonds authorized thereby could be lawfully issued, the act of 1870 requires a vote of a majority of the supervisors, as well as a vote of the majority of the legal voters, to warrant the issue of bonds under its authority. It is, therefore, clear that the conditions upon which the towns of Mower County were authorized to issue their bonds were different under the two acts. Nevertheless, we are of opinion that the latter act was neither repugnant to, nor was it intended as a substitute for, the former. This, we think, will appear from the following considerations.

The act of 1868 authorized the issue of bonds by the towns of five counties; namely, Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson. The map of Minnesota discloses the fact that they form a part of the southern tier of the counties of the State, and, beginning at the Mississippi River, extend in a right line from east to west in the order named in the act. It appears from the record that prior to the passage of the act of 1868 the Southern Minnesota Railroad Company was chartered and empowered to construct and use a railroad from the Mississippi River westward across the State of Minnesota to its western boundary. This fact makes it reasonably clear that the object of the act of 1868 was to authorize the towns of the counties named to issue their bonds in aid of the construction of that line of railroad.

The act of 1870 authorizes the towns, &c., of the counties of Mower, Dodge, Goodhue, and Dakota to issue bonds to aid in the construction of any railroad running into or proposed to be built through either or all of said counties. The map shows that these counties, beginning with Mower, on the southern boundary of the State, extend in a line northwardly to the Mississippi River opposite St. Paul. It is, therefore, reasonably clear that the purpose of this law was to aid in the construction

of a line of railroad running north and south through these counties. It is true that each of the acts authorizes the towns to issue bonds in aid of any railroad running into either of the counties named therein, but this fact is consistent with the general purpose of the act as above indicated.

We have, therefore, two acts, one passed to authorize the towns in a certain group of counties to aid in the construction of one line of railroad, and the other to authorize the towns in another group of counties to aid in the construction of another line of road, and the county of Mower happens to be common to both groups.

When we consider the different objects which it is reasonably clear the legislature had in view in the passage of these two acts, it is a fair construction to hold that it was not the intention of the legislature, by the passage of the later act, to repeal the older act, either totally or partially.

It is not contended that the supposed repeal affected any of the counties named in the first act except the county of Mower. If the method of authorizing the issue of bonds in that act was an unsafe and vicious one, which the legislature intended to change, why did it not repeal the act as to other counties and apply to them also the restrictions contained in the later act?

It would not be an unwarranted construction of the two acts to hold that bonds, issued in aid of an east and west line of railroad, passing through the counties named in the act of March 6, 1868, should be issued in conformity with that act, and that bonds issued in aid of a north and south line of railroad, running through the counties named in the act of March 5, 1870, should be issued in conformity with the latter act.

We think that the circumstance that the county of Mower happens to be in both groups of counties, does not show a purpose on the part of the legislature to repeal the first act, so far as it affects that county.

The language of the act of 1868 might have been sufficient to authorize the towns in Mower county to issue bonds in aid of a north and south line of railroad, but it was necessary to pass an act to authorize the towns in the counties of Dodge, Goodhue, and Dakota, to issue bonds in aid of such a road. In

passing this act the county of Mower was included, doubtless, for the purpose of making clear and unquestionable the authority of towns in that county to issue bonds for the same purpose.

We, therefore, find no repugnance between the statutes, nor do we find the later act to be a revision of the entire subject covered by the older act, nor to be intended as a substitute for it. There is, therefore, no repeal.

There is another consideration which is entitled, in our opinion, to some weight, and that is, that before the act of 1870 was passed, the railroad company had made considerable progress in performing the conditions upon which the town of Red Rock had agreed to issue its bonds. It had located its line of road according to the proposition made by the town, and had for more than two months been engaged in constructing its road upon that line. It is true it was under no binding contract with the town to go on and complete the line, but it had unmistakably manifested its purpose to do so, and had expended and was expending large sums of money in an effort to comply with the conditions upon which the town had agreed to issue its bonds. If, under these circumstances, the legislature had withdrawn the authority of the town to issue its bonds or had imposed new conditions upon the issue, it would have been an act of bad faith. If possible, we should give such a construction to the act of the legislature as would relieve the State from such an imputation. *Broughton* v. *Pensacola*, 93 U. S. 266.

The amendatory act of March 2, 1871, with its repealing clause, can have no effect on this controversy. That act was passed more than six months after the company had fully complied with all the conditions upon which the town of Red Rock had agreed to issue its bonds. It was too late then for the legislature to interfere. The company was entitled to the bonds, and any attempt by the legislature to forbid their issue would have been unconstitutional and void.

The burden is on the town to make it appear that the act of March, 1868, which authorized the issue of the bonds, the coupons of which are in suit, was repealed by the subsequent act of 1870. In view of the considerations which we have stated,

we are of opinion that the repeal has not been satisfactorily shown. On the contrary, we think it reasonably clear that no repeal of the former act was intended by the passage of the act of 1870.

As these views coincide with those of the presiding judge of the Circuit Court, upon which the judgment was based, it follows that it must be affirmed; and it is

So ordered.

WEETH v. NEW ENGLAND MORTGAGE COMPANY.

Where the judges below are opposed in opinion, this court will not take jurisdiction of the case, if their certificate, instead of being confined to single points of law, presents either questions of fact or the whole case for adjudication.

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

The case is stated in the opinion of the court.

Mr. John M. Thurston for the appellants.

Mr. J. D. Campbell for the appellee.

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

This case comes here by appeal on a certificate of division after a decree in accordance with the opinion of the presiding judge, as required by sect. 650 of the Revised Statutes. The value of the matter in dispute is less than $5,000, and we have consequently no jurisdiction, unless the questions certified are such as we can consider.

The controversy is as to whether certain notes sued on are usurious. In the progress of the cause a reference was made to one of the masters of the court "to report on the law and the facts as shown by the pleadings and the proofs herein." The master reported, stating the facts he found and his conclusions of law thereon. To this report exceptions were filed by both parties, on the ground, among others, that the facts found

and stated were not sustained by the evidence. Upon the hearing of the cause by the court the judges were divided in opinion on the following questions: —

1. Whether the notes sued on were usurious.

2. Whether the master's report should in all things be affirmed.

These are the questions certified to us.

The rule is well settled that, to give us jurisdiction on a certificate of division of opinion, the questions certified must be of law and not of fact. *Wilson* v. *Barnum*, 8 How. 258; *Dennistoun* v. *Stewart*, 18 How. 565; *Silliman* v. *Hudson River Bridge Co.*, 1 Black, 582; *Daniels* v. *Railroad Company*, 3 Wall. 250; *Brobst* v. *Brobst*, 4 id. 2. We cannot in this way be called on to consider the weight or effect of evidence. It is equally well settled that we cannot take jurisdiction where the whole case is certified up for adjudication instead of single points. *United States* v. *Bailey*, 9 Pet. 267; *Nesmith* v. *Sheldon*, 6 How. 41.

The certificate in this case is manifestly subject to both these objections. The counsel for the appellants opens his argument with the candid statement that "the first question submitted depends on the solution and determination of the second, to wit: whether the master's report should in all things be sustained?" that is to say, whether the evidence supports the findings, and if it does, whether the master was right in his conclusions of law. This certainly presents the whole case for adjudication, and involves a finding of the facts by this court.

Appeal dismissed for want of jurisdiction.

PORTER v. UNITED STATES.

1. Bounty was not allowed by the act of Congress of June 30, 1864, c. 174, where vessels of the enemy were, during the rebellion, destroyed by the combined action of the sea and land forces of the United States.
2. Property seized upon any waters of the United States, other than bays or harbors on the sea-coast, was not maritime prize, nor was any bounty paid by the United States for the destruction thereof.

APPEAL from the Supreme Court of the District of Columbia.

This was a proceeding termed a libel of information filed in the Supreme Court of the District of Columbia, on behalf of David D. Porter and others, officers and men of the North Atlantic Squadron, to recover the bounty provided by the act of Congress of June 30, 1864, c. 174, regulating prize proceedings and the distribution of prize money.

The eleventh section of that act declares "that a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

The libel, in substance, alleges that between the 8th of October, 1864, and the 28th of April, 1865, the North Atlantic Squadron, consisting of eleven ships of war — which are men-

tioned — was under the command of David D. Porter, now admiral of the navy; that by orders of the President of the United States and of the Secretary of the Navy he ascended the James and York Rivers, in Virginia, with the vessels composing his squadron, for the purpose of expelling the naval and military forces of the Confederate States from those waters, and to assist in the capture of Richmond; that previously to April 1, 1865, the Confederates, in order to obstruct the passage of the vessels, had erected along those rivers batteries and other means of defence; had caused boats to be sunk in the streams and trees to be filled in and across them; and had placed in the James River, in support of the defences of Richmond, many armed steam batteries, steam rams, iron-clad ships of war, and armed steamers, of which eleven are mentioned by name; that the fleet removed the obstructions from the river, attacked the naval forces of the Confederates, destroyed some of the vessels, and caused the enemy to destroy others to prevent them from falling into the possession of the United States, and that nine vessels, which are named, were thus destroyed.

The libel further alleges that the vessels of the enemy, aided by the guns of the batteries and the obstructions in the river, constituted a superior force to that under the command of Admiral Porter; and claims that by the act of Congress, cited above, the officers and men of the squadron were entitled to a bounty of $200 a head for each man on the enemy's vessels at the commencement of the engagement. It therefore prays that such bounty may be allowed to them; and that in estimating the numerical strength of the enemy, the court will take into consideration and adjudge that all persons engaged on land, as well as those on the water, in resisting the United States naval forces in that engagement, may be held to have been on board of the enemy's vessels, and treated as adjuncts to them; and, furthermore, as it will be difficult, and in some instances impossible, by reason of the lapse of time and from other causes, to show the number of men that were on and about the enemy's vessels when the engagement commenced, the libel prays that such forces may be estimated according to the complement of men allowed to vessels of the same capacity in the navy of the United States.

Upon this libel process was ordered to be issued to the Secretary of the Navy, notifying him of the commencement of the suit; and subsequently testimony in the case was taken, and such proceedings were had as resulted in a decree in favor of the libellants, by the Supreme Court of the District of Columbia, sitting in admiralty, and held by a single justice. The case being subsequently carried before the full court, the decree was reversed and the libel dismissed.

From the decree of dismissal the case was brought by appeal to this court.

Mr. Jerome F. Manning for the appellants.
The Solicitor-General, contra.

MR. JUSTICE FIELD delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

Two objections are made to the recovery of the bounty claimed by the libellants: one, that the destruction of the Confederate vessels was effected by the joint action of the army and navy; the other, that it took place on the inland waters of the United States.

For the determination of the first of these objections, it will be necessary to consider the movements of the fleet under command of Admiral Porter, immediately preceding the capture of Richmond. The record enables us to do this, although officers present on the vessels differ in their recollection of dates.

On the morning of April 2, 1865, General Lee, commanding the enemy's forces around Richmond, informed the Confederate authorities that he should immediately withdraw his lines and evacuate the city. The withdrawal and evacuation took place on the evening of that day. Information of his purpose was undoubtedly communicated to Admiral Porter soon after it was generally known in Richmond, which was before noon. At that time there were in James River, for some miles below Richmond, obstructions which the Confederates had placed to prevent the ascent of the Union fleet. Vessels filled with stone had been sunk, and numerous torpedoes planted in the stream. Batteries had also been erected along the river. Some of the obstructions were just above the lower end of what was known as Dutch Gap Canal, about sixteen miles by the river from

Richmond, which were originally placed there by the Confederates, and afterwards maintained by the forces of the United States. Two miles above them was Howlett's Confederate battery. Eight miles above the Dutch Gap Canal was Chaffin's Bluff; and one mile above that on the opposite side of the river was Drury's Bluff, seven miles below Richmond. General Lee's lines extended across the river between the two bluffs, and below them. Above the obstructions near Dutch Gap Canal several Confederate vessels of war were stationed. When General Lee was compelled to abandon his lines, orders were given that the batteries on James River should be withdrawn, and the Confederate vessels destroyed.

As soon as Admiral Porter, on the 2d of April, was informed, or had reason to believe, that General Lee intended to retreat from Richmond, he gave orders for the removal of the obstructions in the river, and for his vessels to open fire on the Confederate batteries within range, and to push on through the obstructions as fast as they were carried away, first sending boats ahead to remove the torpedoes. These orders were carried out with great gallantry and spirit; a heavy fire was opened on the batteries, and during the following night a channel was cut through the obstructions. Soon after the fleet opened fire, the enemy, to prevent the capture of his vessels, commenced destroying them, — setting fire to some of them, and blowing up others. On the next day, the 3d, the fleet passed through the obstructions, and moved up to Drury's Bluff, capturing one of the enemy's vessels which had not been destroyed, — the iron-clad ram "Texas." Another of the enemy's vessels, the "Beaufort," was subsequently captured further up the river. At Drury's Bluff the vessels were detained by the obstructions until the 4th. On that day the Admiral, accompanied by President Lincoln, proceeded up to Richmond.

Although, in the movements of the Admiral's fleet in its ascent of James River and in its attack on the batteries, he was not assisted by the actual presence of any portion of the army of the United States, so that the capture of the two vessels — the "Texas" and the "Beaufort" — and the destruction of the other vessels, may, in that sense, be said to have been effected by his fleet alone, yet, without the aid of the army the

result mentioned would not probably have been accomplished. Certainly, its movements contributed most essentially to the success of the fleet. For several months it had been lying near Richmond under the command of General Grant, with the avowed purpose of capturing that city, and of destroying the Confederate forces. The result of the battle of Five Forks, on the 1st of April, satisfied the Confederate commander that he could not hold his lines and protect Richmond. The withdrawal of his troops and the evacuation of Richmond followed. Had they not been thus forced to retire, and his lines had continued to cross James River between Chaffin's Bluff and Drury's Bluff, it would have been almost, if not quite, impossible for the fleet of Admiral Porter to ascend the river. The fire of the shore batteries, with the assistance of the Confederate troops near by, would have checked any advance, supported, as they would have been, by the Confederate vessels and the torpedoes in the stream. It is plain, therefore, that whatever was accomplished by the fleet of the Admiral in James River, on the second and third days of April, 1865, must be considered as the result of the co-operative action of both the army and the navy. It matters not that the movements of the army were miles distant from the operations of the fleet. They relieved that fleet from resistance which might and probably would have defeated any attempt to ascend the river above the shore batteries and destroy the armed vessels of the enemy.

Prize money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army. To win either, the navy must achieve its success without the direct aid of the army, by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the navy when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant conduct of its officers and men may justly entitle them to honorable mention in the history of the country. *The Siren*, 13 Wall. 389.

The second objection to a recovery, that the destruction of the Confederate vessels was effected upon inland waters of the United States, is equally clear, if the term "property," used in

the seventh section of the act of July 2, 1864, c. 225, can be construed — as counsel seem to take for granted — to embrace public vessels of the enemy. That act provides, among other things, for the collection of captured and abandoned property, and is in addition to the act on that subject of March 12, 1863, c. 120. The seventh section declares: "That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March twelve, eighteen hundred and sixty-three."

The term "inland" as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the sea-coast. In most instances property of the enemy on them could be taken, if at all, by an armed force without the aid of vessels of war. These were seldom required on such waters, except when batteries or fortified places near them were to be attacked in conjunction with the army. As observed by the court in *The Cotton Plant*, Congress probably anticipated, in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army. 10 Wall. 577.

James River is an inland water in any sense which can be given to the term "inland." It lies within the body of counties in Virginia. For miles below Richmond, and below the obstructions mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both. *United States* v. *Grush*, 5 Mason, 290.

Decree affirmed.

ALBRIGHT *v.* TEAS.

A suit, the parties thereto being citizens of the same State, was brought in a court thereof, for moneys alleged to be due to the complainant under a contract whereby certain letters-patent granted to him were transferred to the defendant. *Held*, that the suit, not involving the validity or the construction of the patents, is not one arising under a law of the United States, and cannot be removed to the Circuit Court.

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

This was a suit in equity originally brought in the Court of Chancery of the State of New Jersey by Teas, against Albright, Cahoone, and Tompkins. The bill alleges that he is the inventor and patentee of certain improvements in coach-pads, harness-saddles, and saddle-trees, covered by three certain letters-patent issued to him; that on Feb. 1, 1876, he made an agreement in writing of that date with Albright and Cahoone, which is in substance as follows: He agreed on his part to assign to them said letters-patent, and also certain other letters-patent for which he had made application to the Patent Office, and also any other patents which he might obtain for improvements in gig-saddles and coach-pads for harness; in consideration whereof they agreed that they would "use their best endeavors to have the aforesaid inventions worked, goods manufactured and sold to the best advantage of themselves and said Teas," and to pay him certain specified royalties for the use of the patented improvements, and pay "all just and necessary expenses for the purpose of procuring and sustaining all of said letters-patent against infringers," provided it be for the mutual interests and financial benefit of all the parties to the agreement.

The bill further alleges that Teas assigned the patents as stipulated in the agreement, and that the agreement was in full force; that a large amount of goods, in which the improvements covered by his patents are used, were manufactured by Albright and Cahoone under the name of the Cahoone Manufacturing Company, and by Tompkins, Albright, and Cahoone, under the firm name of Samuel E. Tompkins, Cahoone, & Co.;

that the defendants failed to render proper statements of the quantity of goods manufactured by them; that he believes there is a large amount due him under said contract for royalties, and that he tried without success to obtain an inspection of the account-books of defendants to ascertain what was so due him.

The bill prays for a discovery, an account of the sums due the complainant for royalties under the contract, and for a decree against Albright and Cahoone for the amount found to be due from them to him, and for general relief.

Albright and Cahoone filed a joint and several answer and Tompkins a several answer to the bill.

Albright and Cahoone, in their answer, neither admit nor deny that Teas is the original inventor of the patents assigned to them, but they deny that he had not free access to their books of account. They aver that they rendered full accounts and made all payments due to Teas under the agreement set forth in the bill; that disputes, if any exist between him and them, arose from his wrong construction of the agreement, and from his unfounded claims to rights under it; that at the time of the agreement they were in litigation with Tompkins in respect to certain patents held by him for improvements in saddle-trees; that the litigation and rivalry impaired the business of all three, and that in October, 1877, they settled their differences with Tompkins and united their business with his, and it had since been carried on by the firm of Tompkins, Cahoone, & Co., which was entitled to use all the patents of both parties, and that the new firm manufactured many goods without employing any of the improvements described in the patent of Teas, and manufactured many to which they applied the improvements covered by the Teas patents in connection with those covered by patents of Tompkins and others; that Tompkins always disputed the value and validity of the Teas patents, but that they, Albright and Cahoone, were anxious to fulfil their agreement with Teas, and paid royalties on all goods to the manufacture of which it could, by any reasonable construction, be claimed that the improvements covered by his patents had been applied, and that if he claims more it is because he insists that goods made

under the patents of Tompkins are infringements on his patents.

Tompkins makes substantially the same denials and averments in his answer. He also avers that he is not a party to the agreement with Teas, and denies all obligations under it. He alleges that though he always disputed the validity of the Teas patents, he desired to enable his partners, Albright and Cahoone, fairly to fulfil their agreement with Teas, and that it has been fulfilled, and all moneys have been paid him to which he was entitled for goods made under his patents.

Replications were filed to these answers, and the parties proceeded to take testimony. While the taking of the testimony was going on, some correspondence took place between their counsel, in which counsel for defendants specified a large number of articles which they admitted that the defendants were manufacturing under the Teas patents, and gave a list of nineteen other articles manufactured by the defendants, which they contended were not made under the patents of Teas, and did not, therefore, fall within the agreement between him and Albright and Cahoone. Thereupon the defendants filed a petition for the removal of the cause to the Circuit Court of the United States, in which they alleged that all the parties to the suit were citizens of the State of New Jersey, but that the suit was one arising under the patent laws of the United States, and exclusively within the cognizance of the courts of the United States, and removable under the act of March 3, 1875, c. 137. Upon this petition the cause was removed to the Circuit Court of the United States for the District of New Jersey. By consent of parties an interlocutory order was made in the Circuit Court referring the cause to a master to report the amount, if anything, due the complainant for royalty upon the articles, enumerating them, in the manufacture of which his patented improvements were used.

Upon final hearing, the testimony having been closed, the counsel for the complainant moved the Circuit Court to remand the cause. That court held that it had no jurisdiction, and that the State court had full and exclusive cognizance of the suit, inasmuch as it did not arise under any of the laws of the United States, but was one for an accounting and

relief and for the settlement of controversies under a contract. An order was thereupon entered remanding the suit. From this order Albright, Cahoone, and Tompkins appealed to this court.

Mr. Anthony Q. Keasbey and *Mr. Joseph C. Clayton* for the appellants.

Mr. Walter H. Smith for the appellee.

MR. JUSTICE WOODS delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

The contention of the appellants is that the case is one "arising under the . . . laws of the United States," and was, therefore, properly removable from the State to the United States courts, and should not have been remanded.

It is clear, from an inspection of the bill and answers, that the case is founded upon the agreement in writing between the appellee and the appellants Albright and Cahoone, by which the former, for a consideration therein specified, transferred to the latter his interest in certain letters-patent. The suit was brought to recover the consideration for this transfer, and was not based on the letters-patent.

The appellants insist, however, that evidence was taken in the cause by the appellee for the purpose of proving that they were using his patented improvements in the manufacture of goods for which they paid him no royalty, and which they contended did not embody the improvements covered by his patents; that the testimony developed a controversy on the question whether the goods which they manufactured under other patents owned by them were or were not infringements on his patents; consequently, that questions of infringement and of the construction of the claims of his patents were necessarily involved in the case, and, therefore, it was one arising under the patent laws of the United States.

We search the bill of complaint in vain to find any averments raising these questions. It makes no issue touching the construction of the patents granted the appellee, or their validity, or their infringement. The only complaint made in the bill is that the appellants were fraudulently excluding the appellee from an inspection of their books of account, and refusing to pay him the sums due for royalties under his contract

And the prayer of the bill was for a discovery, an account of what was due the appellee under his contract, and a decree for the amount found to be due him.

On the face of the bill, therefore, the case is not one arising under the patent laws of the United States. *Wilson* v. *Sandford*, 10 How. 99.

The testimony on which the appellants rely to show the jurisdiction of the Circuit Court is not before us; but conceding that it discloses the controversy which they assert that it does, the question arises, Does this fact give the courts of the United States jurisdiction of the case?

Tompkins is the only one of the appellants who questions the validity of the appellee's patents. But he is not a party to the contract between the appellee and Albright and Cahoone, and no relief is prayed against him by the bill; and though he says in his answer that he had always disputed the value and validity of those patents, he raises no issues thereon. The fact that he is made a party defendant to the bill can, therefore, have no effect on the question in hand.

In passing on the question of jurisdiction, the case is to be considered as if Albright and Cahoone were the only defendants.

The appellee, before the commencement of the suit, sold and transferred to Albright and Cahoone all his title and interest in the inventions covered by his patents. The transfer was absolute and unconditional. No right, therefore, secured to the appellee in the patent by any act of Congress remained in him. He had no right to prosecute any one for infringements of his patents, or to demand damages therefor, or an account of profits.

He was entitled to the royalties secured by his contract, and nothing more. And the only question raised by the bill of complaint and the answer of Albright and Cahoone was simply this: What is the sum due the appellee from Albright and Cahoone for his royalties under his contract? In ascertaining this amount, it, of course, became necessary to inquire what goods were manufactured by the appellants under the patents of the appellee. In prosecuting this inquiry, an incidental question might arise, namely, What goods were manufactured

by the appellants under other patents of which they were the owners or licensees? But this incidental and collateral inquiry does not change the nature of the litigation. The fact that Albright and Cahoone had licenses to use other patents under which they were manufacturing goods, does not give them the right to litigate their cause in the United States courts because certain goods, which they asserted were made under the other patents, the appellee asserted were really made under his. The suit, notwithstanding the collateral inquiry, still remains a suit on the contract to recover royalties, and not a suit upon the letters-patent. It arises solely upon the contract, and not upon the patent laws of the United States.

In fact, it does not appear that there is any dispute whatever between the parties in reference to the construction of the patents of the appellee. The controversy between them, as stated by the appellants themselves, is whether certain goods manufactured by them embody the invention covered by the appellee's patents. This does not necessarily involve a construction of the patents. Both parties may agree as to what the patented invention is, and yet disagree on the question whether the invention is employed in the manufacture of certain specified goods. The controversy between the parties in this case is clearly of the latter kind.

The case cannot, therefore, be said to be one which grows out of the legislation of Congress. Neither party asserts any right, privilege, claim, protection, or defence founded, in whole or in part, on any law of the United States.

We are, therefore, of opinion that, even if we go outside the pleadings and look into the testimony, the case is not one arising under the laws of the United States, and, consequently, that the courts of the United States had no jurisdiction to entertain it.

The cases adjudged by this and other courts of the United States sustain this conclusion. In the case of *Wilson* v. *Sandford*, *ubi supra*, the object of the bill was to set aside a contract made by the appellant with the appellees, by which he had granted them permission to use, and vend to others to be used, one of Woodworth's planing-machines in the cities of New Orleans and Lafayette, and also to obtain an injunction against

the further use of the machine, on the ground that it was an infringement of his patent-rights. Upon this cause the court, speaking by Mr. Chief Justice Taney, said: "The dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

The case of *Hartell* v. *Tilghman*, 99 U. S. 547, is also in point. In that case Hartell, the complainant, alleged that he was the original patentee and inventor of a process for cutting and engraving stone, glass, metal, and other hard substances by what is known as the sand-blast process; that the defendants had paid him a considerable sum for machines necessary in the use of his invention, and had also paid him during several months the royalty which he asked for the use of the invention described in and secured by his patent; that the defendants refused to do certain other things, which he charged to have been a part of the consideration of the contract between them, whereupon he had forbidden them further to use his invention, and that they had disregarded this prohibition. The bill prayed for an injunction, an account of profits, and damages.

The defendants admitted the validity of the patent, their use of it, and their liability for its use under their contract with the complainant, and offered to perform all that the contract required them to perform. All the parties were citizens of the same State.

Upon this case the question of the jurisdiction of the United States courts was raised; and this court, after a review of several cases bearing on the subject, held that the suit was not one arising under the laws of the United States, and that the Circuit Court had no jurisdiction of the case. The decree was reversed, and the cause remanded with directions to dismiss the bill.

The argument against the jurisdiction in the case under consideration is stronger than in the two cases above referred to. In each of these cases the object of the complainant in filing

the bill was to go behind the agreement under which the defendant had contracted for the right to use the complainant's invention, and to obtain an injunction against the defendant as an infringer. In this case, the appellee admits the contract to be in force, and simply seeks to compel its performance.

The following cases, cited by this court in *Hartell* v. *Tilghman*, are in accord with the views we have expressed: *Goodyear* v. *India-Rubber Company*, 4 Blatchf. 63; *Merserole* v. *Union Paper Collar Co.*, 6 id. 356; *Blanchard* v. *Sprague*, 1 Cliff. 288; *Hill* v. *Whitcomb*, 1 Holmes, 317.

From the conclusions reached by us, it follows that the decree of the Circuit Court remanding the cause to the State court must be

Affirmed.

UNITED STATES v. WILSON.

Certificates of indebtedness issued by a person or a corporation are not taxable as "circulation," under sect. 3408, Rev. Stat., unless they were calculated or intended to circulate or to be used as money.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

In a foreclosure suit, commenced Oct. 24, 1874, against the Saint Louis and Southeastern Railway Company, the court appointed a receiver to manage the affairs of the company and issue certificates of indebtedness. The order appointing him was modified, Dec. 7, 1874, so as to authorize and allow him "for the purpose of providing money to make payments on account of the balance of purchase-money due the State of Tennessee for the road sold as the Edgefield & Kentucky Railroad, from time to time to issue his certificates, which, altogether, shall not exceed two hundred and fifty thousand dollars on so much of the road mentioned in the pleadings as lies and is situated in the State of Tennessee, in such general form as may be approved of by complainants, providing for the payment thereof out of any of the moneys as are applicable for that purpose, which certificates shall bear interest at a rate not ex-

ceeding ten per cent. per annum, and the sums represented by such certificates shall, unless previously discharged, be paid out of any moneys realized upon a foreclosure and sale of the mortgaged property within the jurisdiction of this court equally with any other liability incurred by the receiver in the management of said railroad and the protection of the said property coming into his hands as receiver aforesaid. And it is further ordered that said certificates may be sold below par if necessary so to do."

Certificates in the following form —

"No. 3491.] [1874.

"SAINT LOUIS AND SOUTHEASTERN RAILWAY COMPANY.

"Certificate of indebtedness, good for twenty dollars, to H. W. Gardiner, paymaster, or bearer, payable at the office of the treasurer, Saint Louis, Mo., four months after date, with interest at the rate of ten per cent. per annum. Good only when countersigned by the paymaster of the company.

"J. F. ALEXANDER, *Treasurer.*

"I. P. HAINS, *Auditor.*

(On margin:) "Countersigned:

"H. W. GARDINER, *Paymaster.*

"148. $20.00.] [Due Dec. 6, 1874.

"Twenty-five per cent. of freight bills due the company may be paid in these certificates at their face value before maturity thereof."

— were, from October, 1873, to November, 1874, issued for labor done and supplies and machinery furnished the company. The receiver accepted them when overdue for freights and debts accruing to the company, or paid them out at their face value with interest.

The United States filed a petition against Wilson, the receiver, praying for leave to intervene, and alleging that the company was indebted to it in an amount assessed by the Commissioner of Internal Revenue on account of circulating certificates of indebtedness, from October, 1873, to May, 1875, and also for the month of May, 1875, and for interest and penalties by reason of Wilson's failure to pay the same on notice and demand. The United States insisted that the amount due

was a prior claim upon the fund in his hands, and that he be directed to pay the same.

The court dismissed the petition, and the United States appealed.

The Solicitor-General for the United States.

There was no opposing counsel.

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

We are not satisfied that the certificates of indebtedness, on account of which the United States have assessed the taxes petitioned for, were calculated or intended to circulate or to be used as money. They were not, therefore, taxable as "circulation" under the third clause of sect. 3408 of the Revised Statutes.

Decree affirmed.

COUNTY OF MADISON *v.* WARREN.

Where, in a case tried by the court below, the record does not affirmatively show a written stipulation waiving a jury, the questions decided at the trial cannot be re-examined here on a writ of error.

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

The case is stated in the opinion of the court.

Mr. Charles P. Wise for the plaintiff in error.

Mr. T. C. Mather for the defendant in error.

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

This is a case tried and determined by the court without the intervention of a jury. The record does not show any stipulation in writing waiving a jury. The errors assigned all relate to rulings of the court on the trial, excepted to at the time, and presented by a bill of exceptions. The rule is well settled, that if a written stipulation waiving a jury is not in some way

shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error. *Kearney* v. *Case*, 12 Wall. 275; *Gilman* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *Boogher* v. *New York Life Insurance Co.*, 103 id. 90; *Hodges* v. *Easton*, *ante*, p. 408.

For this reason, and without passing on any of the questions presented by the assignment of errors, the judgment is

Affirmed.

NOTE. — *County of Alexander* v. *Kimball*, error to the same court as the preceding case, was submitted by *Mr. William B. Gilbert* for the plaintiff in error, and by *Mr. T. C. Mather* for the defendant in error. It involved the precise question decided in that case, and a judgment to the same effect was rendered.

RUSSELL v. WILLIAMS.

1. Section 21 of the act of July 14, 1870, c. 255, which provided that, in lieu of the duties then imposed by law, certain duties specified should thereafter be imposed on certain enumerated articles, did not repeal, as to such articles, sect. 6 of the act of March 3, 1865, c. 80, which declared that there should be thereafter paid on all goods the growth or produce of countries east of the Cape of Good Hope, when imported from countries west of that Cape, a duty of ten per cent *ad valorem* in addition to the duties imposed thereon when imported directly from the place of their growth or production.
2. The latter provision is a general commercial regulation, made to encourage direct importation from countries east of the Cape, as well as to benefit American shipping, and is applicable without regard to the regular duties imposed for purposes of revenue, and even where the articles are otherwise entirely free of duty.

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

The case is stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

Mr. Charles Levi Woodbury for the defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action brought for the recovery of duties alleged to have been illegally imposed.

The following is the agreed statement of facts, so far as necessary to understand the case.

Williams & Hall, in February and April, 1871, imported into the port of Boston from Liverpool nine hundred and eighty-eight packages of tea, the product of China, and entered the same in warehouse under bond. At various subsequent dates they withdrew the tea for consumption. Russell, the collector of customs, assessed, and they paid him, duties thereon at the rate of fifteen cents per pound, and in addition a duty of ten per cent *ad valorem*, paying the latter amount under protest. The defendant assessed and exacted the duty of fifteen cents per pound under the provisions of sect. 21 of the act of July 14, 1870, c. 255, which provides that after the thirty-first day of December, 1870, in lieu of the duties now imposed by law on the articles thereinafter enumerated or provided for imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say, on teas of all kinds, fifteen cents per pound. Russell assessed and exacted the additional duty of ten per cent *ad valorem* under the provision of sect. 6 of the act of March 3, 1865, c. 80, which provides that "there shall be hereafter collected and paid on all goods, wares, and merchandise of the growth or produce of countries [east] of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine) when imported from places west of the Cape of Good Hope, a duty of ten per cent *ad valorem* in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

The Circuit Court gave judgment against Russell, and he brought this writ of error.

The sole question is, whether the additional duty of ten per cent *ad valorem* was or was not lawfully exacted; and this depends on the question whether the provision of the act of 1865, for the payment of ten per cent on goods produced in countries east of the Cape of Good Hope when imported from places west of the Cape, was a general commercial regulation for the encouragement of direct trade with

those countries, as well as for the benefit of American shipping, or whether it was intended simply as an increase of duties for purposes of revenue. If the former, it would be independent of the duties imposed on the articles, and would not be repealed by a modification of them; if the latter, the result might be different. We are of opinion that it was intended as a general regulation of commerce. The object of the law was to favor direct importation from countries east of the Cape, without regard to the amount of duties imposed on the articles imported. These might be more, or might be less, or might be nothing; yet, the ten per cent *ad valorem* was to be paid if the articles were imported from places west of the Cape. This would incidentally benefit our own shipping, as that principally employed in the direct trade; whereas importation of the same goods to European ports, and thence to this country, would generally be made in foreign vessels.

The law in various forms has been in existence since 1861. The successive enactments were as follows: —

"That all articles, goods, wares, and merchandise imported from beyond the Cape of Good Hope in foreign vessels, not entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, and all other articles, goods, wares, and merchandise not imported direct from the place of their growth or production, or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, shall be subject to pay, in addition to the duties imposed by this act, ten per centum *ad valorem: Provided*, that this rule shall not apply to goods, wares, and merchandise imported from beyond the Cape of Good Hope in American vessels." Sect. 3 of the act of Aug. 5, 1861, c. 45.

"That, from and after the day and year aforesaid, there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent. *ad valorem*, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." Sect. 14 of the act of July 14, 1862, c. 163.

Section 2 of the act of March 3, 1863, c. 77, simply exempted from the operation of the law cotton and raw silk as reeled from the cocoon.

The eighteenth section of the act of June 30, 1864, c. 171, repealed and re-enacted the Cape law of 1862, only changing the words "beyond the Cape" to "east of the Cape," and the words "this side" to "west."

Section 6 of the act of March 3, 1865, c. 80, which is the law now under consideration, is set out in the statement of facts. It remained in force until supplied by the third section of the tariff act of 1872, which was couched in the same terms (only adding wool to the excepted articles), and is still in force.

It will be observed that the first of these laws, which was enacted in 1861, imposed the additional ten per cent *ad valorem* on goods imported in foreign vessels from beyond the Cape, unless they were exempt from discriminating duties by reciprocal treaty, and goods imported in American ships were *ex industria* exempted from the burden. But it is obvious that this law would have failed to reach the object intended, since it would have been a dead letter in all cases where we had reciprocal treaties with other nations placing their ships on an equality with our own. The next enactment, therefore, left out the reference to foreign ships and adopted the regulation in the form which has ever since been substantially followed. It imposed the additional ten per cent *ad valorem* on the products of countries beyond, or east of, the Cape of Good Hope, when imported from places this side, or west of, the Cape. By this means the direct trade was distinctly favored, and, without expressly making any discrimination between domestic and foreign vessels, the desired encouragement in favor of the former was substantially attained.

It will also be observed that the provision was successively renewed in the different customs laws without regard to the modifications made in the duties themselves, or the changes made in the free list.

It was very early contended by importers that the law was not intended to affect goods which were on the free list, and exempt from any duty, — a position somewhat plausible from the words of the law, which were these: "A duty of ten per cent

ad valorem in addition to the duties now imposed on any such articles." It was argued that the ten per cent could not be said to be "*in addition* to the duties now imposed," where no duties were imposed. But such a construction would evidently have defeated the purpose of the law; and, accordingly, it was decided by this court in *Hadden* v. *The Collector*, 5 Wall. 107, that the act of 1862 (which was then under consideration) applied to goods which at the date of the act were duty free, as well as to those which were subject to duty. Reliance was placed in that case, it is true, on the literal phraseology of the law; but the judgment of the court was in conformity with the clear intent of the legislature, as we have supposed it to be.

The same conclusion was come to in the case of *Sturges* v. *The Collector*, 12 id. 19, in expounding the act of 1865, the one now before us. The court, speaking through Mr. Justice Clifford, referred to the evident purpose of Congress, not only to augment the revenue, but to make a discrimination "in favor of the direct trade." pp. 26, 27.

In conformity with the principle of these decisions, we are of opinion that the law in question continues in force in reference to all goods not expressly exempted from its provisions, whether dutiable or free, and whether new duties imposed are declared to be in lieu of all other duties, or not. Such a declaration is a mere formula to indicate that the duties newly imposed are to take the place of and supersede the previous duties specially imposed in the tariff schedules, and not to abrogate any general commercial regulations not expressly mentioned. The duties on tea have been several times changed since 1861; but, in our view, these changes had exclusive reference to the ordinary duties imposed for the purposes of revenue only, and not to the standing regulation which we are considering. In 1861, the regular duty on tea was fixed at fifteen cents per pound; in 1864, at twenty-five cents; in 1870, at fifteen cents; and in 1872 it was placed with coffee on the free list. In 1861, 1864, and 1870, the duty was fixed in the general tariff laws of those years respectively; the first two of which also contained the Cape clause discriminating in favor of direct importation. The tariff act of 1870 did not re-enact this clause,

but neither was it repealed; it remained in force as enacted in 1865 until re-enacted in the general tariff act of 1872. We do not think that it was necessary to re-enact it in 1870 in order to make it operative upon those imports within its scope, the duties on which were revised by that act. The object of that revision was to readjust the regular schedule of duties, not to interfere with the Cape rule as a regulation of commerce, or any other general regulation not expressly mentioned or referred to in the act, and not repugnant to its provisions. Both laws could stand together without repugnancy. The Cape rule contained in the act of 1865 could only be regarded as repealed by implication, if repealed at all; and, considering the object and purpose of the rule, such an implication was not necessarily involved in the act of 1870, and therefore will not be inferred.

It is urged, however, that *Gautier* v. *Arthur*, 104 U. S. 345, decides adversely to the view now expressed. But an examination of that case will show that the principle of construction which we have suggested was approved in the opinion of the court. That was the case of plumbago imported in a French vessel direct from Ceylon in 1873. The act of June 6, 1872, had exempted plumbago from all duty; but the seventeenth section of the act of 1864 had imposed a discriminating duty of ten per cent *ad valorem*, in addition to the duties imposed by law on all goods imported in foreign vessels, except where by treaty such vessels were entitled to the same privileges as American vessels. The court intimated that if the act of 1872 had done nothing more than to exempt the article from duty, the act of 1864 would still be operative. The court, in its opinion, says: "A construction of the section, in harmony with this view, is not an unreasonable one. In our judgment it best carries out the purposes of the act imposing a discrimination; and it conforms to the construction which this court, in *Hadden* v. *The Collector*, reported in the 5th of Wallace, gave to the succeeding section of the same act." The opinion then goes on to notice that the act of 1872 does contain something more; that the general repealing clause repeals all acts and parts of acts inconsistent with its provisions, excepting certain other acts, among which the discriminating section of the act of 1864 is not mentioned; and the opinion adds: "Both from

the general language of the repealing clause, and the enumeration of the provisions of acts excepted from it, we are forced to conclude that it was the intention of Congress to put an end, so far as the free list in the fifth section of the act of 1872 is concerned, to the operation of the discriminating act of 1864." It is only necessary to observe that the act of July 14, 1870, c. 255, on which the defendants in error rely in respect to the duty on teas, contained no such repealing clause. We do not see, therefore, that *Gautier* v. *Arthur* contravenes the conclusion to which we have come.

Judgment reversed, and cause remanded with directions to award a new trial.

UNITED STATES *v.* HARRIS.

1. The omission to state, in the certificate of division of opinion between the judges of the Circuit Court in a criminal proceeding, that the point of difference is certified "upon the request of either party or their counsel," is not fatal to the jurisdiction of this court where such request can be fairly inferred.
2. Section 5519 of the Revised Statutes (*post*, p. 632) is unconstitutional.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Western District of Tennessee.

At the November Term, 1876, of the Circuit Court of the United States for the Western District of Tennessee an indictment, based on sect. 5519 of the Revised Statutes, was returned by the grand jury against one R. G. Harris and nineteen others. The indictment contained four counts. The first count charged as follows: "That R. G. Harris" (and nineteen others, naming them), "yeomen, of the county of Crockett, in the State of Tennessee, and all late of the county and district aforesaid, on, to wit, the fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-six, in the county of Crockett, in said State and district, and within the jurisdiction of this court, unlawfully, with force and arms, did conspire together with certain other persons whose names are to the grand jurors aforesaid unknown, then and there, for the purpose of

depriving Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, then and there being citizens of the United States and of said State, of the equal protection of the laws in this, to wit, that theretofore, to wit, on the day and year aforesaid, in said county, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, having been charged with the commission of certain criminal offences, the nature of which said criminal offences being to the grand jurors aforesaid unknown, and having upon such charges then and there been duly arrested by the lawful and constituted authorities of said State, to wit, by one William A. Tucker, the said William A. Tucker then and there being a deputy sheriff of said county, and then and there acting as such; and having been so arrested as aforesaid, and being then and there so under arrest and in the custody of said deputy sheriff as aforesaid, they, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, were then and there by the laws of said State entitled to the due and equal protection of the laws thereof, and were then and there entitled under the said laws to have their persons protected from violence when so then and there under arrest as aforesaid. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said R. G. Harris" (and nineteen others, naming them), "with certain other persons whose names are to the said grand jurors unknown, did then and there with force and arms unlawfully conspire together as aforesaid then and there for the purpose of depriving them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, of their rights to the due and equal protection of the laws of said State and of their rights to be protected in their persons from violence while so then and there under arrest as aforesaid and while so then and there in the custody of the said deputy sheriff, and did then and there deprive them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, of such rights and protection and of the due and equal protection of the laws of the said State, by then and there, while so under arrest as aforesaid and while so then and there in the custody of the said deputy sheriff as aforesaid, beating, bruising, wounding,

and otherwise ill-treating them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count charged that the defendants, with force and arms, unlawfully did conspire together for the purpose of preventing and hindering the constituted authorities of the State of Tennessee, to wit, the said William A. Tucker, deputy sheriff of said county, from giving and securing to the said Robert R. Smith and others, naming them, the due and equal protection of the laws of said State, in this, to wit, that at and before the entering into said conspiracy, the said Robert R. Smith and others, naming them, were held in the custody of said deputy sheriff by virtue of certain warrants duly issued against them, to answer certain criminal charges, and it thereby became and was the duty of said deputy sheriff to safely keep in his custody the said Robert R. Smith and others while so under arrest, and then and there give and secure to them the equal protection of the laws of the State of Tennessee; and that the defendants did then and there conspire together for the purpose of preventing and hindering the said deputy sheriff from then and there safely keeping, while under arrest and in his custody, the said Robert R. Smith and others, and giving and securing to them the equal protection of the laws of said State.

The third count was identical with the second, except that the conspiracy was charged to have been with the purpose of hindering and preventing said William A. Tucker, deputy sheriff, from giving and securing to Robert R. Smith alone the due and equal protection of the laws of the State.

The fourth count charged that the defendants did conspire together for the purpose of depriving said P. M. Wells, who was then and there a citizen of the United States and the State of Tennessee, of the equal protection of the laws, in this, to wit: said Wells having been charged with an offence against the laws of said State, was duly arrested by said Tucker, deputy sheriff, and so being under arrest was entitled to the due and equal protection of said laws, and to have his

person protected from violence while so under arrest; and the said defendants did then and there unlawfully conspire together for the purpose of depriving said Wells of his right to the equal protection of the laws, and of his right to be protected in person from violence while so under arrest, and "did then and there deprive him of such rights and protection, and of the due and equal protection of the laws of the State of Tennessee, by then and there, and while he, the said P. M. Wells, was so then and there under arrest as aforesaid, unlawfully beating, bruising, wounding, and killing him, the said P. M. Wells, contrary to the form of the statute in such case made and provided," &c.

Section 5519 of the Revised Statutes is in the following words: "If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." This section was originally a part of sect. 2 of the act of April 20, 1871, c. 22.

The defendants demurred to the indictment on several grounds, among them the following:

1. "Because the offences created by section 5519 of the Revised Statutes of the United States, and upon which section the aforesaid four counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the rights reserved to the several States, and inhibited to Congress by the Constitution of the United States;" and, —

2. "Because the said section 5519, in so far as it creates

offences and imposes penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people thereof."

The case was heard in the Circuit Court on the demurrer to the indictment, and, as the record states, "came the district attorney, on behalf of the United States, and came also the defendants indicted herein, by their attorneys, when this case came on to be heard before the Honorable John Baxter, circuit judge, and the Honorable Connally F. Trigg, district judge, presiding, on the demurrer of the said defendants, filed herein on the fifth day of February, A. D. 1878, to the indictment herein, and the said judges being divided in opinion on the point of the constitutionality of the section of the Revised Statutes of the United States on which the said indictment is based, being section number 5519 thereof, . . . after argument, hereby direct the said point . . . to be certified to the Supreme Court of the United States for its decision thereon, and the same is accordingly ordered. And it is further ordered by the court that this case be continued until the decision of said Supreme Court in the premises."

Section 651 of the Revised Statutes, which authorizes certificates of division of opinion, declares: "Whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court, upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The Solicitor-General for the United States.

There was no opposing counsel.

MR. JUSTICE WOODS delivered the opinion of the court, and, after making the foregoing statement, proceeded as follows: —

The certificate of division of opinion in this case does not

expressly state that the point of difference between the judges was certified "upon the request of either party or their counsel." Neither party challenges the jurisdiction of this court, but it has occurred to us as a question, and we have considered it, whether this omission in the certificate is fatal to our jurisdiction, and we have reached the conclusion that it is not.

It fairly appears from the certificate that the point upon which the judges differed in opinion was stated, under their direction, in the presence of the counsel of both parties, without objection from either, and it is expressly stated that the cause was continued until the decision of this court upon the point of difference between the judges could be rendered. Had no certificate of division of opinion been made, the result must have been adverse to the sufficiency of the indictment, although the difference of opinion arose upon the demurrer of the defendants, for no judgment could have been given against them, if the judges were not agreed as to the constitutionality of the law upon which the indictment was based. Hence it became the duty of the prosecuting officer, and the interest of the government which he represented, to request a certificate of division of opinion for the determination of the question by this court. The case is brought to this court by the counsel for the United States upon the point stated in the certificate; the case is suspended until our decision upon the point certified is made; and he asks us to decide the question upon which the judges of the Circuit Court differed. These circumstances, all of which appear of record, considered in connection with the fact that the court made the certificate, raise the legal presumption that a request for the certificate was duly preferred. The record evidence of the fact of the request by counsel for the United States is incontrovertible.

It is suggested that under sect. 649 of the Revised Statutes, which provides that a jury may be waived "whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury," this court has decided that the fact that the stipulation was in writing and filed with the clerk must appear of record in order to entitle the party to the review of the rulings of the court in the progress of the trial

provided by sect. 700, and, therefore, that in the present case the record should distinctly show the request. But sect. 649 expressly requires that the waiver of the jury shall be in writing and filed with the clerk. The section which provides for a certificate of division of opinion makes no such requirement in relation to the request for a certificate.

In one case the jurisdictional fact is the filing of a certain paper writing with the clerk; in the other, the making of a request, which may be oral, to the court. In either case, when the jurisdictional fact fairly appears by the record, our jurisdiction attaches. So, in this case, if the request may be fairly inferred from such circumstances as we have mentioned, that is all that is necessary to satisfy the statute. In *Supervisors* v. *Kennicott*, 103 U. S. 554, this court held that when a stipulation in writing was filed with the clerk, by which it was provided that the case might be submitted to the court on an agreed statement of facts, but which contained no express waiver of a jury, yet this amounted to a waiver sufficient to meet the requirements of sect. 649. And though the right of trial by jury is a constitutional one, yet this court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception, a waiver of his right to a jury trial would be presumed, and he would be held in this court to the legal consequences of such waiver. *Kearney* v. *Case*, 12 Wall. 275.

We are, therefore, of opinion that the request by counsel of the United States for a certificate of division is sufficiently shown by the record in this case, and that our jurisdiction is clear.

We pass to the consideration of the merits of the case. Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the government of the United States is one of delegated, limited, and enumerated powers. *Martin*

v. *Hunter's Lessee*, 1 Wheat. 304; *McCulloch* v. *State of Maryland*, 4 id. 316; *Gibbons* v. *Ogden*, 9 id. 1. Therefore every valid act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: Section 1 of the first article declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." Article X. of the amendments to the Constitution declares 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."

Mr. Justice Story, in his Commentaries on the Constitution, says: "Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." Sect. 1243, referring to Virginia Reports and Resolutions, January, 1800, pp. 33, 34; President Monroe's Exposition and Message of May 4, 1822, p. 47; 1 Tuck. Black. Comm. App. 287, 288; 5 Marshall's Wash. App., Note 3; 1 Hamilton's Works, 117, 121.

The demurrer filed to the indictment in this case questions the power of Congress to pass the law under which the indictment was found. It is, therefore, necessary to search the Constitution to ascertain whether or not the power is conferred.

There are only four paragraphs in the Constitution which can in the remotest degree have any reference to the question in hand. These are section 2 of article 4 of the original Constitution, and the Thirteenth, Fourteenth, and Fifteenth

Amendments. It will be convenient to consider these in the inverse of the order stated.

It is clear that the Fifteenth Amendment can have no application. That amendment, as was said by this court in the case of *United States* v. *Reese*, 92 U. S. 214, "relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude." See also *United States* v. *Cruikshank*, id. 542; s. c. 1 Woods, 308. Sect. 5519 of the Revised Statutes has no reference to this right. The right guaranteed by the Fifteenth Amendment is protected by other legislation of Congress, namely, by sects. 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sects. 5506 and 5507 Revised Statutes.

Section 5519, according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment, by the United States or States, on account of race, color, or previous condition of servitude, the right of citizens of the United States to vote.

It is, however, strenuously insisted that the legislation under consideration finds its warrant in the first and fifth sections of the Fourteenth Amendment. The first section declares "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 fifth section declares "the Congress shall have power to enforce by appropriate legislation the provisions of this amendment."

It is perfectly clear from the language of the first section that its purpose also was to place a restraint upon the action of the States. In *Slaughter-House Cases*, 16 Wall. 36, it was held by the majority of the court, speaking by Mr. Justice Miller, that the object of the second clause of the first section of the Fourteenth Amendment was to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States; and this was conceded by Mr. Justice Field, who expressed the views of the dissenting justices in that case. In the same case the court, referring to the Fourteenth Amendment, said that "if the States do 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."

The purpose and effect of the two sections of the Fourteenth Amendment above quoted were clearly defined by Mr. Justice Bradley in the case of *United States* v. *Cruikshank*, 1 Woods, 308, as follows: "It is a guaranty of protection against the acts of the State government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offences; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require or authorize Congress to perform "the duty that the guaranty itself supposes it to be the duty of the State to perform, and which it requires the State to perform."

When the case of *United States* v. *Cruikshank* came to this court, the same view was taken here. The Chief Justice, delivering the opinion of the court in that case, said: "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guarantee against any encroachment by the States upon the fundamental rights which belong to every citizen as a

member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty." 92 U. S. 542.

So in *Virginia* v. *Rives*, 100 id. 313, it was declared by this court, speaking by Mr. Justice Strong, that "these provisions of the Fourteenth Amendment have reference to State action exclusively, and not to any action of private individuals."

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the Fourteenth Amendment.

The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

Section 5519 of the Revised Statutes is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.

In the indictment in this case, for instance, which would be a good indictment under the law if the law itself were valid, there is no intimation that the State of Tennessee has passed

any law or done any act forbidden by the Fourteenth Amendment. On the contrary, the *gravamen* of the charge against the accused is that they conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee.

As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

We are next to consider whether the Thirteenth Amendment to the Constitution furnishes authority for the enactment of the section. This 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." "Congress shall have power to enforce this article by appropriate legislation."

It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swayne, in *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; Mr. Justice Bradley, in *United States* v. *Cruikshank*, 1 Woods, 308.

Congress has, by virtue of this amendment, declared, in sect. 1 of the Act of April 9, 1866, c. 31, 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 none other.

But the question with which we have to deal is, does the

Thirteenth Amendment warrant the enactment of sect. 5519 of the Revised Statutes. We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the Thirteenth Amendment would justify. Under that section it would be an offence for two or more white persons to conspire, &c., for the purpose of depriving another white person of the equal protection of the laws. It would be an offence for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave. Even if the amendment is held to be directed against the action of private individuals, as well as against the action of the States and United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between two free white men against another free white man to deprive him of any right accorded him by the laws of the State or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons — as, for instance, the right to make a contract, bring a suit, or give evidence — clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.

Those provisions of the law, which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized, cannot be sustained.

Upon this question, *United States* v. *Reese*, 92 U. S. 214, is in point. In that case this court had under consideration the constitutionality of the third and fourth sections of the act of May 31, 1870, c. 114, now constituting sects. 2007, 2008, and 5506 of the Revised Statutes. The third section of the act made it an offence for any judge, inspector, or other officer of election, whose duty it was, under the circumstances therein stated, to receive and count the vote of any citizen, to wrongfully refuse to receive and count the same; and the fourth section made it an offence for any person by force, bribery, or other unlawful means to hinder or delay any

citizen from voting at any election, or from doing any act required to be done to qualify him to vote.

The indictment in the case charged two inspectors of a municipal election in the State of Kentucky with refusing to receive and count at such election the vote of William Garner, a citizen of the United States, of African descent. It was contended by the defendants that it was not within the constitutional power of Congress to pass the section upon which the indictment was based. The attempt was made by the counsel for the United States to sustain the law as warranted by the Fifteenth Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that amendment. The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting, on account of his race, color, or previous condition of servitude, but also those who hindered or delayed the free white citizen. The court, speaking by the Chief Justice, said: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. But if Congress steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon must, annul its encroachment upon the reserved rights of the States and the people."

And the court declared that it could not limit the statute so as to bring it within the constitutional power of Congress, and concluded: "We must, therefore, decide that Congress has not as yet provided by appropriate legislation for the punishment of the offences charged in the indictment."

This decision is in point, and, applying the principle established by it, it is clear that the legislation now under consideration cannot be sustained by reference to the Thirteenth Amendment to the Constitution.

There is another view which strengthens this conclusion. If

Congress has constitutional authority under the Thirteenth Amendment to punish a conspiracy between two persons to do an unlawful act, it can punish the act itself, whether done by one or more persons.

A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder. If, therefore, we hold that sect. 5519 is warranted by the Thirteenth Amendment, we should, by virtue of that amendment, accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded. Thus, under a provision of the Constitution which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest Congress with power over the whole catalogue of crimes. A construction of the amendment which leads to such a result is clearly unsound.

There is only one other clause in the Constitution of the United States which can, in any degree, be supposed to sustain the section under consideration; namely, the second section of article 4, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." But this section, like the Fourteenth Amendment, is directed against State action. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation against them by other States. *Paul* v. *Virginia*, 8 Wall. 168.

Referring to the same provision of the Constitution, this court said, in *Slaughter-House Cases*, *ubi supra*, that it "did not create those rights which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your

own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the State of which they were both residents, on all its citizens alike.

We have, therefore, been unable to find any constitutional authority for the enactment of sect. 5519 of the Revised Statutes. The decisions of this court above referred to leave no constitutional ground for the act to stand on.

The point in reference to which the judges of the Circuit Court were divided in opinion must, therefore, be decided against the *constitutionality of the law.*

MR. JUSTICE HARLAN dissented on the question of jurisdiction. He expressed no opinion on the merits.

ROGERS *v.* DURANT.

1. The loss of a draft is not sufficiently proved, to support a suit in equity thereon against the drawer or acceptor, by evidence that it was left with a referee appointed by order of court to examine and report claims against an estate in the hands of a receiver, and that unsuccessful inquiries for it have been made of the referee, the receiver, and the attorney for the present defendant in those proceedings, without evidence of any search in the files of the court to which the report of the referee was returned, or any application to that court to obtain the draft.
2. A decree of the Circuit Court, dismissing upon the merits a bill of which this court on appeal holds that there is no jurisdiction in equity, will be reversed, and the cause remanded with directions to dismiss the bill without prejudice to an action at law, and with costs in the court below, and each party to pay his own costs on the appeal.

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

The case is stated in the opinion of the court.

Mr. Lewis L. Coburn and *Mr. Henry C. Whitney* for the appellant.

Mr. Charles B. Laurence for the appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, by which Rogers seeks to recover of Durant and seven others, as copartners under the name of James W. Davis & Associates, the amount due upon several drafts, some drawn, and some accepted or promised to be accepted, by that firm, and all alleged to have been held by the plaintiff and lost without his fault after maturity.

The defence of Durant is twofold: First, to the jurisdiction, because there is no sufficient proof of the loss of the drafts; second, to the merits, because he was never a member of the firm of James W. Davis & Associates. The court below, while inclining to the opinion that it had no jurisdiction, did not decide the case upon that ground, but upon the merits, and dismissed the bill generally.

The testimony introduced to show the loss of the drafts, construing it most favorably for the plaintiff, proves no more than this: In a former suit in the Supreme Court of New York to wind up the affairs of the firms of James W. Davis & Associates and of Davis, Sprague & Company, a receiver was appointed, and the claims of creditors, including the plaintiff's, were presented to a referee appointed by the court, and by him reported to the court, and a dividend ordered and paid in part thereof. The drafts in question were handed by the plaintiff to Steiger, his attorney in New York, to be filed before the referee, and were so filed, and were afterwards delivered by the referee to the receiver; neither the plaintiff nor Steiger had since seen them or known where they were; and Steiger had applied for them to the receiver, to his clerk, to the referee, and to Bell, Durant's attorney in New York, and believed, without any foundation beyond his own suspicion, that they were in Bell's possession.

The original papers presented to the referee would properly be returned with his report to the files of the court which appointed him. Yet no search appears to have been made in those files, nor any application presented to that court for

the delivery of the drafts to the plaintiff or his attorney. The plaintiff, having made no inquiry in the place in which the drafts would be most likely to be found, utterly fails in his attempt to prove their loss.

There being no sufficient evidence of loss, there can be no doubt that the case is one within the exclusive jurisdiction of a court of law; and it becomes unnecessary to consider the varying decisions in England and in this country upon the question under what circumstances a court of equity has jurisdiction of a suit upon a lost bill or note; or the voluminous proofs contained in the record upon the question whether Durant was a member of the firm of James W. Davis & Associates, a question of which, for the reason already given, we have no jurisdiction in this case, and which, being a pure question of fact, can never be brought to this court in any future action at law.

The decree of the Circuit Court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed, and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law. *Horsburg* v. *Baker*, 1 Pet. 232; *Barney* v. *Baltimore City*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423. In accordance with the spirit of the twenty-fourth general rule of this court, and under the discretionary power therein reserved, costs should not be allowed to the plaintiff, because, so far as concerns the present suit, the decree is wholly against the relief that he seeks; but the dismissal is to be with costs in the court below, and each party is to pay his own costs on this appeal.

Decree accordingly.

THE "STERLING" AND THE "EQUATOR."

1. A decree against two vessels at fault should be, not *in solido* for the full amount of damages sustained by the libellant, but severally against each for one-half of his damage and costs, any balance which he shall be unable to enforce against either vessel to be paid by the other or its stipulators, to the extent of her stipulated value beyond the moiety due from her.
2. Inasmuch as the form of the decree was not in this case called to the attention of the Circuit Court, the parties are required to pay their respective costs in this court.

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

The case is stated in the opinion of the court.

Mr. J. Warren Coulston and *Mr. William L. Putnam* for the appellant.

Mr. Joseph P. Hornor and *Mr. William S. Benedict* for the appellee.

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

This was a suit in admiralty against the ship "Sterling" and tow-boat "Equator," for damages sustained by the bark "Sif" in a collision. Both the ship and tow-boat were found to be in fault, and they were condemned *in solido* for the whole amount of the loss. From a decree to that effect this appeal was taken.

It is conceded that upon the facts found the owners of the "Sif" are entitled to a decree against the ship and the tow-boat, as both were in fault. The well-established rule in such cases is to apportion the damages equally between the two offending vessels, the right being reserved to the libellant to collect the entire amount from either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion. *The Washington and The Gregory*, 9 Wall. 513; *The Alabama and The Gamecock*, 92 U. S. 695; *The Virginia Ehrman and The Agnese*, 97 id. 309; *The City of Hartford and The Unit*, id. 323. As in this case the decree was against both vessels for the full amount of the loss, it should be modified so as to be against the "Sterling" and the

"Equator," and their respective stipulators, severally, each for one-half of the entire damage and costs, any balance of such half which the libellant shall not be able to enforce against either vessel to be paid by the other vessel or her stipulators, so far as her stipulated value extends. As it does not appear from the record that the attention of the court below was called to this objection to the form of the decree, each party will be required to pay his own costs in this court.

Decree reversed, and cause remanded with instructions to enter a new decree in accordance with this opinion, adding interest to the date of such entry.

FITZPATRICK v. FLANNAGAN.

1. Leave to amend the affidavit, by inserting a new ground for an attachment sued out in Mississippi, is not the subject of a valid exception, it not appearing that the defendant was thereby prejudiced.
2. Where a firm is dissolved by the death of one of its members, and no bill is filed by his representatives, or by the firm creditors seeking the intervention of a court of equity to wind up the business of the firm, marshal its assets and apply them to the firm debts, the surviving partner may, by paying his individual indebtedness with those assets, make a disposition of them, which is not a fraud in law upon the firm creditors, nor, in the absence of an actual intent to defraud, a just ground for suing out an attachment under the statute of Mississippi.
3. Section 1420 of the Code of Mississippi of 1871, *post*, p. 658, did not forbid an insolvent debtor to give a preference to one or more of his creditors, if it were *bona fide* and with no intent to secure a benefit to himself.
4. A continued recognition of his liability, and his agreement to discharge it after he has a full knowledge of all the facts in relation to which the alleged false representations were made at the time of his original promise, estops the party from setting them up as a defence to an action on that promise.
5. According to the practice of the Circuit Court in Mississippi, the judgment sustaining the attachment and the personal final judgment on the merits against the defendant are separate, and may be considered here separately on a writ of error brought to review the latter judgment.

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. Alfred B. Pittman for the plaintiff in error.

Mr. Jefferson Chandler and *Mr. William K. Ingersoll* for the defendants in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action of assumpsit commenced by Charles M. Flannagan and George M. Flannagan, copartners, doing business under the firm name and style of C. M. & G. M. Flannagan, by the issuing of a writ of attachment, according to the practice as prescribed by the law of Mississippi, they being citizens of Missouri. The process of attachment was founded on an affidavit, which set forth that John J. Fitzpatrick, as the surviving partner of the firm of Fitzpatrick Brothers, composed of himself and his brother James C. Fitzpatrick, deceased, was the legal owner of the partnership property; that he, as such survivor, was indebted to the plaintiffs in several sums, evidenced by partnership obligations, as well as in a sum of $6,000, for a debt contracted by James C. Fitzpatrick and Eugene A. Forbes, then partners under the name of Forbes & Fitzpatrick, and which had, on the dissolution of that firm, by the retirement of Forbes, been assumed by the firm of Fitzpatrick Brothers, which debt was evidenced by the promissory note of Forbes & Fitzpatrick, held by the plaintiffs. The whole indebtedness, for which suit was brought, was alleged to amount to $15,936.55. The affidavit then charged that "the said John J. Fitzpatrick has property or rights in action which he conceals and unjustly refuses to apply to the payment of his debts, and that he has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; and that he has converted, or is about to convert, his property into money, or evidences of debt, with which to place it beyond the reach of his creditors." And suggesting that John McGinty, Edward McGinty, and George M. Klein, cashier of the Mississippi Valley Bank, are indebted to him, or have property of his in their hands, &c., the affidavit prays for a summons against them as garnishees.

The statutory bond having been given, a writ of attachment was issued, which the marshal returned as served by levying upon and taking possession of certain personal property, according to an inventory attached, as the property of the defendant; and that afterward Edward McGinty, having made claim that he was the owner of the property attached, and the same

having been valued, and a claimant's bond given and accepted, he had turned said goods over to said McGinty, and had summoned the defendant and the garnishees.

The defendant then, in due time, filed a plea in abatement to the writ, denying the several grounds thereof as alleged in the affidavit; and on the same day the plaintiffs, by leave of court, filed an amendment to the affidavit, setting forth "that the firm of Fitzpatrick Brothers, composed of defendant and James C. Fitzpatrick, deceased, and of which he is the surviving partner, fraudulently contracted the debt or incurred the obligation for which suit has been brought." The granting of this leave to amend the affidavit was objected to by the defendant, and is the subject of an exception, and assigned for error. But sect. 1483 of the Code of Mississippi of 1871 expressly authorizes amendments to defective affidavits, and we see no objection on principle, under such a provision, to an amendment adding a new ground for the attachment. There was no claim on the part of the defendant of being taken by surprise or put to any disadvantage by reason of the amendment, and we fail to perceive how, in any way, he could have been prejudiced. In point of fact, he immediately filed his plea in abatement, traversing the additional allegations of the amendment; and the cause being at issue upon the pleas in abatement was submitted to a jury, according to the practice authorized by the statute. There was a verdict finding "that the attachment herein was rightfully sued out;" and the defendant thereupon had leave to plead to the merits, and filed with a plea of *non assumpsit* several special pleas, which it is not necessary now to notice. The cause having upon these issues been tried by a jury, there was a verdict for the plaintiff, whereon judgment was rendered. The present writ brings up for review these proceedings and judgment, errors having been assigned upon bills of exception duly taken to the rulings of the court upon both trials.

Upon the trial of the issues of fact arising upon the pleas in abatement, evidence was introduced, as appears by the bill of exceptions, by the respective parties, tending to prove the following state of facts: —

In March, 1878, the defendant purchased the interest of

Forbes in the firm of Forbes & Fitzpatrick, wholesale grocers, and formed with the latter person the partnership of Fitzpatrick Brothers, which, by the terms of the purchase, assumed the liabilities of Forbes & Fitzpatrick, including, among others, about $15,000 due to the plaintiffs. These liabilities, as was afterwards ascertained, exceeded the value of the assets of the original firm. James C. Fitzpatrick died in September, 1878, leaving in the hands of the defendant, as surviving partner, the partnership property, and the concern insolvent. The defendant continued the business, sold out in part the old stock, purchased other goods to replenish it to the amount of more than $12,000, partly on credit, partly for cash, putting the goods indiscriminately in stock with those on hand. The firm of Fitzpatrick Brothers, during its existence, paid part of the debt due to the plaintiffs, assumed by it, and contracted with them, for goods bought and money loaned, an indebtedness for about the same amount as that paid. The deceased partner, before his death, had drawn out of the partnership more than his interest therein, and was indebted to it. On Dec. 3, 1878, the defendant, being very much pressed to pay some maturing bills to the Mississippi Valley Bank, being debts created by the firm of Fitzpatrick Brothers, borrowed $5,700 from John McGinty, giving his note, at one day's date, verbally promising to repay the amount speedily out of the assets of the late firm. This money was used by him in paying partnership debts. Fitzpatrick Brothers owed John McGinty, besides, two notes, one for $2,500, and one for $5,200. Being unable to repay the borrowed money to John McGinty, the defendant, on Dec. 19, 1878, sold to Edward McGinty, a relative of John McGinty, his entire stock of goods, amounting to $6,633.46, at cost and ten per cent added, and the partnership accounts, amounting to $10,222.06, for which Edward McGinty paid $8,200 in cash, and assumed to pay obligations due in part from Fitzpatrick Brothers, and in part from the defendant, for commercial debts contracted by him since the death of his partner, to the amount of $6,974.16. This price was the full and fair value for the goods and accounts, and in fact Edward McGinty paid out several thousand dollars more on the debts assumed than he had collected out of the assets transferred.

This sale to Edward McGinty was made with the knowledge of John McGinty, who, in fact, advanced the money to complete it, Edward being without means, and upon an understanding that the money should be paid to John McGinty on account of the debts due to him; and accordingly the $8,200 cash was returned to him in payment of the two notes for $2,500 and $5,700, respectively. Immediately after the sale, Fitzpatrick was employed by Edward McGinty as a clerk to carry on the business, at a salary of $2,500 per annum, and shortly afterwards a partnership between them was advertised. The assets of the firm of Fitzpatrick Brothers on hand at the time of the death of James C. Fitzpatrick, together with after-acquired goods and moneys, were applied indiscriminately by the defendant to the payment of debts of the firm, and of those contracted by him in the subsequent course of business; and it appeared that he had paid as much at least on account of partnership debts, as he had realized from partnership assets, and that he had applied all the proceeds of the business, after paying its necessary expenses, to the payment of the debts of the late firm, and of his own, contracted in carrying on the business as surviving partner.

The second issue, upon the pleas in abatement, was upon the allegation of the affidavit, that "the defendant had assigned and disposed of, or was then about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them."

Upon the first branch of this issue — whether the defendant had disposed of any of his property with intent to defraud his creditors — the court charged the jury as follows: —

"If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick Brothers, with intent to prevent the creditors of the firm of Fitzpatrick Brothers, or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm; and if he appropriated any part of them to the payment of his individual

debts, it was a fraud upon the firm creditors, whether he so considered it or not, and, if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act. The defendant being liable for the debts of the firm, could not, by borrowing money and paying the debts of the firm, create himself a creditor of the firm, or subrogate himself to the rights of the creditors as paid."

And to the giving of this instruction an exception was taken.

The ground on which this part of the charge appears to rest is, that a surviving partner, although invested with the legal title to the partnership property, on the dissolution of the firm, by the death of his copartner, is not the beneficial owner, but a mere trustee to liquidate the partnership affairs, by selling the assets and applying them to the payment of the partnership debts; that the continuance of the business by means of the partnership assets is a breach of that trust, and, if it results in diverting any of the partnership property from the creditors of the firm, is a fraud upon them. And yet, upon that supposition, it deserves consideration, whether the allegation made in the affidavit as the ground of the attachment — that the defendant has disposed of his own property to defraud his creditors — can be supported by proof, of a disposition of property, belonging to the firm, in order to defraud the creditors of the firm; especially, in view of the result, that, if the attachment is sustained, it not only subjects the partnership property, but also takes the individual property of the defendant, from individual creditors, for the payment of the firm debts. The writ runs against his individual property alone, and upon the sole ground that he has sought fraudulently to withdraw it from the claims of his individual creditors. This incongruity is sufficient, at least, strongly to suggest the suspicion that the proceeding itself, and the grounds on which it has been sustained, are based upon a misconception of the law which governs the case.

And this will be confirmed by a critical examination of the charge.

Upon the state of the evidence, as disclosed by the bill of

exceptions, the jury may have found that the defendant, as surviving partner, with the assent, either express or tacit, of the personal representatives of his deceased copartner, had been left in possession of the firm property, for the purpose of continuing the business; that, in doing so, in good faith he raised money upon the individual credit given him, by reason of his possession and control of property, which he was allowed to deal with as his own, and applied it to the purpose of paying the debts due from the firm of which he was the surviving partner; and yet felt compelled, under this charge, to find that an appropriation out of the property which had come to him as such survivor, to repay such a loan, without any actual fraudulent intent, would be a fraud in law upon every creditor of the partnership, justifying a seizure, on attachment for that cause, of all his property, whether formerly belonging to the partnership, or since acquired, and that although his individual additions to his stock in trade were, at least, equal to what had been taken for the payment of individual debts.

It is fair to consider this charge, although not so qualified, in connection with the facts, in reference to which there was evidence, that the firm of Fitzpatrick Brothers, and its individual members, were insolvent, in the sense of not being able to pay their debts, during the whole period of its existence, and the additional fact, that the deceased partner had before his death drawn from the partnership more than his interest therein, and was indebted to the firm.

The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself "retains an interest in the firm assets, as a partner, a court of

equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration." Such was the language of this court in *Case* v. *Beauregard*, 99 U. S. 119, in which Mr. Justice Strong, delivering its opinion, continued as follows: "It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodiam legis*." Hence it follows that, "if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end." In that case it was held, in respect to a firm admitted to be insolvent, that transfers made by the individual partners of their interest in the partnership property converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt, the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm.

Another case between the same parties came again for consideration before the court, which reaffirmed the decision, and held that in such a case the bill might be properly filed by a creditor, without first reducing his claim to judgment. *Case* v. *Beauregard*, 101 U. S. 688.

The same doctrine has been fully sanctioned by the Supreme Court of Mississippi in *Schmidlapp* v. *Currie*, 55 Miss. 597, where it is said, that "the doctrine that firm assets must first be applied to the payment of firm debts, and individual prop-

erty to individual debts, is only a principle of administration adopted by the courts where, from any cause, they are called upon to wind up the firm business, and find that the members have made no valid disposition of or charges upon its assets. Thus, where, upon a dissolution of the firm by death, or limitation, or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners." In that case one of two partners, but with the assent of the other, and without any fraudulent intent, transferred the whole business and stock of the firm to a third person in payment of an individual debt. A creditor of the partnership sued out a writ of attachment against them, and caused it to be levied on the goods in the possession of the purchaser, upon the ground that the transfer of the firm goods in satisfaction of the individual debt of one of the partners was fraudulent and void as against firm creditors. The right to do so was denied.

The same principle applies in case of a dissolution of the partnership. "It is competent," says Mr. Justice Story, Partnership, sect. 358, "for the partners, in cases of a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and if this agreement be *bona fide* and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors. The like result will arise from any stipulation to the same effect, in the original articles of copartnership, in cases of a dissolution by death or by any other personal incapacity."

And, in case of dissolution by the death of one of the partners, without any previous agreement as to the mode of liquidation, the only difference is, that the joint creditor may, at his election, institute proceedings, by filing a bill in equity against the personal representatives of the deceased partner, and the survivors, to wind up the partnership business, to marshal the assets, and appropriate the partnership property to the payment of the joint debts. Story on Partnership, sects. 347, 362. Although, in Mississippi, it is denied that a court of equity has jurisdiction to entertain a suit on behalf

of a firm creditor at large against a partnership, whether it be an existing one, or one that has ceased by limitation or by the withdrawal or death of one of the partners. *Roach* v. *Brannon*, 57 Miss. 490; *Freeman* v. *Stewart*, 41 id. 138.

And unless a partnership creditor, or the personal representatives of the deceased partner, commence such a proceeding, to liquidate the affairs of the partnership, there is nothing to prevent the surviving partner from dealing with the partnership property as his own, and, acting in good faith, to make valid dispositions of it. *Locke* v. *Lewis*, 124 Mass. 1. And if, in like good faith, with the acquiescence of the personal representatives of the deceased partner, he uses the firm property, to continue the business on his own account and in his own name, he does it without other liability than to be held accountable to the estate of his deceased partner for a share of the profits; or, as we have seen, upon a bill filed for that purpose, by the personal representatives of the deceased partner or a partnership creditor, to wind up the firm business and apply its assets to the payment of its debts. Any intermediate disposition of the property, made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual; and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud in law upon partnership creditors. Accordingly, in *Roach* v. *Brannon*, 57 Miss. 490, the Supreme Court of Mississippi said: "If, then, a firm creditor may sue out and levy an attachment upon firm assets in the hands of a surviving partner, upon what grounds must he proceed? Must he aver and prove one of the specific grounds of attachment laid down in the statute, or will it be sufficient to show that the surviving partner is acting in violation of that *quasi* trust imposed upon him by law for the benefit of firm creditors? We have no hesitation in saying that he must bring his case strictly within the letter of the statute."

The next assignment of error is based on an exception to the following instruction, being in continuation of that just considered: —

"5th. The latter clause of this issue is as to whether or not

the disposition made by the defendant of the assets was with the intention of giving an unfair preference to some of his creditors over others. It is difficult to determine what particular acts will constitute such preference. I am of the opinion that the legislature meant something by this expression, but it has never been construed by the Supreme Court of the State. In the absence of such construction, I will instruct you that when a debtor is insolvent, and knows that he will be unable for a great length of time to pay all his debts, and disposes of his means to one or more of his creditors, to the exclusion of others, and with the design that those unpaid shall remain so, it will constitute an unfair preference within the meaning of this clause of the statute. You will, therefore, apply this rule to the facts in proof under this issue."

The language of the Mississippi Code of 1871, describing one of the grounds for which an attachment might issue, was that "the debtor has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors or give an unfair preference to some of them." Code of 1871, sect. 1420. This provision, it is said, so far as it relates to an "unfair preference," was first introduced into the statutes of the State by the code of 1857, art. 2, p. 372. It is said by the Supreme Court of Mississippi, in *Eldridge* v. *Phillipson*, 58 Miss. 270, that "the right of a debtor, insolvent or in failing circumstances, to give a preference to one or more of his creditors, if it be *bona fide* and with no intent to secure a benefit to himself, is a firmly established rule in the jurisprudence of this State," and many cases are cited, occurring both before and after the adoption of the code of 1857, in support of the statement. It was well settled, therefore, that whatever else the prohibition against unfair preferences might be supposed to include, it certainly did not make all preferences illegal. But the necessary result of preferring one or more creditors by a debtor unable to pay all, would be that the rest should remain unpaid, and for an indefinite length of time; and as the preference is supposed to have been designed, it could well be said, in every such case, that the debtor making it also designed its natural and expected consequences. It follows, therefore, if the part

of the charge of the court now under examination be correct, that all preferences are unfair, and being unfair, are illegal, — a conclusion which we have seen is opposed to the settled law of Mississippi.

In the case just referred to, of *Eldridge* v. *Phillipson*, the question was presented directly for decision for the first time to the Supreme Court of that State. It was then decided that no preference could be held to be unfair which, tested by the rules of law, is legal; and that as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preferences is mere surplusage. This construction is confirmed by the fact that the words in question have been omitted from the code of 1880 by the legislature of Mississippi.

In our opinion, this interpretation of the statute is correct, and we accordingly adopt it. The ruling of the Circuit Court, to the contrary, we adjudge, therefore, to be erroneous.

The cause came on for further trial upon the issues raised by the pleas to the merits. Besides the general issue, the defendant pleaded, as to the note for $6,000 made by Forbes & Fitzpatrick, the defence of the Statute of Frauds, that the alleged promise was not in writing, and, also, that the sole consideration therefor was the sale to him by Forbes of his interest to the partnership of Forbes & Fitzpatrick, and that the promise to pay the same, as one of the debts of that firm, was procured from him by means of false and fraudulent misrepresentations made to him by Forbes as to the value of that interest.

On the trial, as appears from the bill of exceptions, there was evidence tending to show that, although the original assumption by the firm of Fitzpatrick Brothers of the debts of Forbes & Fitzpatrick was verbal, yet, that afterwards it was repeated in writing in sundry letters by the defendant, written after he had full knowledge of the character and condition of the assets, property, and business which he had purchased from Forbes.

The court instructed the jury as follows: —

"The plea of the defendant alleges, as to the $6,000 note of Forbes & Fitzpatrick, that its payment was assumed as part consideration of a purchase by him from Eugene A. Forbes,

and that said purchase was made on fraudulent misrepresentations as to the character and value of the things sold. If you believe this, and that the defendant was thereby injured, you will deduct from said note the amount of his damages by reason of such misrepresentations, unless you shall find that the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiffs, and promised to pay, after he had acquired such knowledge, in which case he will be estopped to make such defence."

To this portion of the charge an exception was taken, and instructions of an opposite tenor asked to be given, which were refused, but which it is not necessary to notice specially, as they are directly negatived by the instruction given, and are disposed of if that be correct. And of its correctness we have no doubt. A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one, acting with full knowledge, can justly say that he has been deceived by false representations. *Volenti non fit injuria.*

We are advised that, according to the practice in Mississippi, as authorized by its statutes (Code of Miss. of 1880, sect. 2434), which, by sects. 914 and 915, Rev. Stat., are adopted as the practice of the Circuit Court of the United States in that district, the proceeding which resulted in the verdict sustaining the attachment, and the verdict and judgment on the merits of the cause of action are separate, and, consequently, may be separately considered on error. The judgment on the plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause; but a writ of error upon the final judgment brings up the whole record, and subjects to review all the proceedings in the cause. As we find no error in the personal judgment against the defendant, ascertaining the existence and amount of the debt due from him, and awarding execution therefor, the same will be affirmed; but the judgment overruling the pleas in abatement and sustaining the attachment must be reversed, and the cause remanded with instructions to set aside the verdict upon the issues arising upon the pleas in abatement of the writ of attachment, and to grant a new trial thereof.

Judgment accordingly.

McGinty v. Flannagan.

The court below instructed the jury that it was the duty of a surviving member of a firm to convert its property into money, collect debts due to it, and first apply them to the payment of its debts due, and that if he mingled the goods of the firm with his own so that they could not be identified, he rendered his own liable for the firm debts; and that the application of the proceeds of the goods to the payment of his individual debts was a fraud upon the firm creditors. *Held*, that the instruction was erroneous.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated in the opinion of the court.

Mr. Alfred B. Pittman for the plaintiff in error.

Mr. Jefferson Chandler and *Mr. William K. Ingersoll* for the defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This is an action which arose in the course of the proceedings considered in *Fitzpatrick* v. *Flannagan*, *ante*, p. 648. Edward McGinty, the plaintiff in error, having in that cause appeared as a claimant of the goods seized under the attachment, the same was delivered by the marshal to him, on his giving a bond conditioned, should his claim not be sustained, to pay to the plaintiffs in the attachment such damages as might be awarded against him, or to return the goods. Thereupon, in accordance with the statutory practice in such cases in Mississippi, an issue was joined between the plaintiffs in attachment and him, to try their respective titles to the property. Upon this issue, evidence was submitted by the parties, tending to show substantially the same state of facts as appears in the principal case.

The court refused to give instructions asked on his behalf, and in lieu thereof, among others not necessary to be considered, gave the following: —

"2. It was the duty of J. J. Fitzpatrick, as such surviving partner, to sell and convert into money the goods and property belonging to said firm, and to collect the debts due the firm, and first apply the same to the payment of the debts due by the firm, and not to mingle the same with his own goods, so

that they could not be identified, he being by law created a trustee for this purpose; but if he mingled them with other goods, so that they could not be identified, he thereby rendered his own goods liable for the debts of the firm, or [as?] those originally owned by the firm; and if he applied the proceeds of the sale of such goods, either originally owned by the firm or those afterwards purchased and mixed up with them, so that they could not be identified, to the payment of his private debts, such disposition operated as a fraud upon the rights of the creditors of the firm of which he was surviving partner, and as to him rendered the sale void."

There was a verdict and judgment for the plaintiffs in the attachment, which are brought into review by this writ of error.

The charge above quoted goes further than that which was considered and adjudged to be erroneous in the principal case. For here the jury were instructed that it was a fraud upon partnership creditors to apply to the payment of individual debts goods belonging to the surviving partner, which never belonged to the partnership, but were his own individual property, merely because they had been mingled with the stock formerly belonging to the firm. This is an error, in any view that can be taken of the rights of the parties. Even on the supposition that the partnership stock was held under an express and positive trust for partnership creditors, equity would give the latter only so much of the fund as represented the partnership property, and would divide it as to values between the parties beneficially interested, even although the specific goods might not be separable.

This being so, it could hardly be charged, as a matter of law, that an appropriation of the mingled stock to the extent of a value no greater than would be allowed in equity to individual creditors, in marshalling the assets for distribution between them and the creditors of the partnership, amounted to a fraud upon the latter.

For this, as well as for reasons stated in the opinion in the former case between the original parties, we hold this instruction to be erroneous.

Judgment reversed, and cause remanded with instructions to grant a new trial.

CHICKAMING *v.* CARPENTER.

1. Where the amount involved is sufficient, the citizen of a State other than Michigan, who holds bonds of a municipal corporation in Michigan, may, in the proper Circuit Court of the United States, maintain an action against it on them, or on the coupons thereto attached, although each is payable to a citizen of the State or bearer, or to bearer.
2. By the terms of the act of Michigan of March 22, 1869, township bonds in aid of a railroad company are not invalid because they were issued after the expiration of sixty days from the date when the vote in favor of issuing them was cast by the electors.
3. In Michigan, where the execution of the instrument sued on is not put in issue by an appropriate plea, verified by affidavit, proof thereof is not required. The effect of the pleadings in this suit is to raise the question whether the bonds, if issued after such period of sixty days, are valid.
4. Such bonds may be delivered to a corporation lawfully formed by the consolidation of a corporation with that to which they were voted.

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

This was an action by Carpenter against the township of Chickaming, Michigan. The declaration alleges that under an act of the legislature of that State of March 22, 1869, the township, pursuant to a vote of the electors thereof, issued certain bonds and coupons to the Chicago and Michigan Lake Shore Railroad Company, and delivered them to the treasurer of State; that the latter delivered them to the company; that Carpenter is the lawful holder of them for value; and that they are due and unpaid.

The following is a copy of one of the bonds: —

JUNE 1ST, 1869.

"UNITED STATES OF AMERICA. STATE OF MICHIGAN.

"No. 7.] COUNTY OF BERRIEN, TOWNSHIP OF CHICKAMING. [$1,000.

"Authorized by a vote of the people of the Township of Chickaming.

"Know all men by these presents that the Township of Chickaming hereby acknowledges to owe and promises to pay to the Chicago and Michigan Lake Shore Railroad Company, or bearer, one thousand dollars, lawful money of the United States of America, on the first Monday of February, in the year of our Lord one thousand eight hundred and seventy-two, at the office of the treas-

urer of the county of Berrien, with interest at the rate of ten per centum per annum, payable annually on the first Monday of February in each year on the surrender of the annexed coupons as they severally become due.

"This bond is executed and issued under the provisions of and in conformity to an act of the Legislature of the State of Michigan, entitled 'An Act to enable any township, city, or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized, or that may be hereafter organized under and by virtue of the laws of the State of Michigan, in the construction of its road,' approved March 22, 1869.

"In testimony whereof the supervisor of said township and the township clerk thereof have signed their names hereto, as required by the act aforesaid, and dated the bond as authorized by the vote of the people.

"OLIVER L. NEWKIRK,
"*Supervisor of Chickaming Township.*
"O. C. GILLETTE, *Township Clerk.*"

The following is a copy of a coupon attached to the bond: —

"$100.] [No. 7.

"The Township of Chickaming will pay to the bearer, at the office of the treasurer of the county of Berrien, on the first Monday of February, 1875, one hundred dollars, interest due on their bond.

"OLIVER L. NEWKIRK,
"*Supervisor of Township.*
"O. C. GILLETTE, *Township Clerk.*"

The township pleaded the statutory general issue, with notice of certain special defences authorized by the statute of Michigan.

There was a verdict for Carpenter, and judgment having been rendered thereon, the township brought this writ of error.

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

Mr. Edward Bacon for the plaintiff in error.

Mr. Mitchell J. Smiley for the defendant in error.

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

The assignment of errors in this case presents the following questions: —

1. Whether an action at law can be maintained in the Circuit Court of the United States against a municipal corporation of Michigan upon municipal bonds or the coupons for interest attached thereto;

2. Whether the Circuit Court of the United States has jurisdiction of a suit brought by a citizen of a State other than Michigan to recover the amount due on an obligation of a municipal corporation of Michigan, for the payment of a sum of money to a corporation of Michigan or bearer, or to bearer;

3. Whether the obligations and coupons sued on in this case could be introduced in evidence under the pleadings, without proof that the person who signed them as township clerk actually held that office at the time his signature was affixed and the obligations were delivered; and,

4. Whether, since the obligations were not delivered to the corporation to which they were voted by the township, but to a corporation created by the consolidation of that corporation with another, they are valid.

1. As to the right to sue a municipal corporation of Michigan in the courts of the United States on an obligation for the payment of money.

If we understand correctly the cases in the courts of Michigan to which our attention has been directed, they decide no more than that in the courts of the State the remedy for the recovery of money from a municipal corporation on a liquidated demand is by *mandamus* against the proper officer, to require him to do his duty under the law with respect to the discharge of the obligation which has been entered into, and that for such purposes, in that jurisdiction, an independent judgment in an action at law against the corporation is not necessary. There is no law of the State prohibiting such a suit. All that has been determined is that, in the courts of the State, a judgment is not necessary to lay the foundation for a writ of *mandamus* to require the officer to do his duty.

In the courts of the United States, however, a *mandamus* can only be granted in aid of an existing jurisdiction, and in this class of cases a judgment against the corporation is an essential prerequisite to such a writ, although in the courts of

the State it is not. This whole subject was fully considered at the last term in *Davenport* v. *County of Dodge*, 105 U. S. 237, where the other cases establishing the rule are cited.

2. As to the jurisdiction of the courts of the United States in a suit by the assignee of an obligation of a municipal corporation of a State payable to a citizen of the same State or bearer, or to bearer.

This question was decided at the present term in *Thompson* v. *Perrine*, *ante*, p. 589. The act of March 3, 1875, c. 137, which provides, sect. 1, that the District and Circuit Courts of the United States shall not "have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange," is certainly not a limitation on the Judiciary Act of Sept. 24, 1789, c. 20, which provided, sect. 11, that the same courts should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Under the act of 1789 it was always held that an obligation payable to bearer, or to an individual or bearer, did not come within the prohibition of suits by assignees. *Bank of Kentucky* v. *Wister*, 2 Pet. 318; *Bushnell* v. *Kennedy*, 9 Wall. 387; *City of Lexington* v. *Butler*, 14 id. 282.

3. As to the necessity for proving that the township clerk whose signature appears on the bonds and coupons was in fact township clerk when he affixed his signature.

The name of the person who signed the bonds as clerk is O. C. Gillett. That O. C. Gillett signed the bonds was admitted, but it was denied under oath that he was clerk of the township prior to the end of the summer of 1869, which was more than sixty days after the bonds were voted by the town. The statutes of Michigan and the rules of the Circuit Court in force when this cause was tried provided that upon the plea of the general issue in an action upon any written instrument, under seal or without seal, the plaintiff should not be put to the

proof of the execution of the instrument or the handwriting of the defendant unless the plea was verified by affidavit. In this case the suit was on a written instrument, and the plea was the general issue. This plea, however, was not verified in broad terms; but an affidavit was filed to the effect, argumentatively, that the township clerk, whose signature was necessary under the law to the due execution of the bonds, could not have signed them before the end of the summer of 1869, because he was not clerk until after that time. The law, under which the bonds were issued, provided that if any township voted the aid to railroads, which was authorized, it "shall, within sixty days after the question of aid is determined by a vote of the electors, . . . issue its coupon bonds for the amount so determined to be granted."

The effect of the affidavit was to raise the question whether the bonds were valid if issued after the sixty days. The affirmative of showing that they were issued within the sixty days was probably put by the pleadings on the plaintiff. This showing he did not make. Consequently the objection to the admissibility of the bonds resolved itself into the question of their validity, issued as they were after the time.

We see nothing in the statutes which takes away from the township authorities the right to execute and deliver bonds, if for any reason it is not done within the time named. The word "shall" as used in the statute undoubtedly gives the township officers the whole of the sixty days to get the bonds out, but it certainly does not imply that if they fail to do it voluntarily within the time they cannot be compelled to do so afterwards. And if they can be compelled to do so, it necessarily follows that they should do it voluntarily. We have not been referred to any decisions by the courts of Michigan to the contrary, and construing the statute for ourselves, we think that valid bonds may be issued after the time. This being so, the antedating does not invalidate the bonds. In this suit no attempt is made to recover for interest accruing before actual delivery.

4. As to the issue to the consolidated company.

This precise question was before us at the last term in *New Buffalo* v. *Iron Company*, 105 U. S. 73, and decided adversely

to the claim of the plaintiff in error. We see no reason for reconsidering that case, and this cannot be distinguished from it.

Judgment affirmed.

COUNTY OF KANKAKEE *v.* ÆTNA LIFE INSURANCE COMPANY.

1. The charter of the Kankakee and Illinois River Railroad Company does not limit the operation and effect of the general laws of Illinois, which confer power upon counties to subscribe for stock in railroad companies and issue bonds in payment therefor.
2. The county of Kankakee, in that State, having been organized under the act of April 1, 1851, to provide for township organization, it was the duty of its board of supervisors to discharge the duties enjoined by the general laws upon the county courts in those counties which did not adopt that organization.
3. The bonds issued by that board to pay for the subscription to the stock of that company are valid obligations of the county.

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

The case is stated in the opinion of the court.

Mr. Francis H. Kales for the plaintiff in error.

Mr. O. J. Bailey and *Mr. James H. Sedgwick* for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The judgment sought to be reviewed by this writ of error was rendered upon coupons attached to municipal bonds purporting to be issued by the plaintiff in error. The cause was tried by the court without the intervention of a jury, and the facts appear in a bill of exceptions. Each bond of the issue bears date Sept. 20, 1870, and contains a recital that it "is issued under and pursuant to orders of the board of supervisors of Kankakee County, Illinois, for subscription to the capital stock of the Kankakee and Illinois River Railroad Company, as authorized by virtue of the laws of the State of Illinois authorizing cities and counties to subscribe capital stock to aid and

construct railroads; also in accordance with the provisions of an act of said State of Illinois entitled 'An Act to fund and provide for paying the railroad debt of counties, townships, cities, and towns,' in force April 16, A. D. 1869."

The bonds were sealed with the county seal, signed by the chairman of the board of supervisors, and countersigned by the clerk of the county court, under the order of the board of supervisors of the county, Sept. 20, 1870.

The defendant in error is a *bona fide* holder for value, having purchased them before their maturity in the open market and without notice of any defence.

The defence made, however, and overruled in the court below, is matter of law, and alleges that the bonds are void, in whosesoever hands, first, because the county had no power under the law to issue them at all, and, second, because they were issued by the board of supervisors of the county, who were not the representatives of the county empowered to bind it.

Section 16 of the charter of the Kankakee and Illinois River Railroad Company, in force April 15, 1869, provides that "to further aid in the construction of said railroad, townships, corporate towns, and cities on or along the line of said railroad may subscribe to the capital stock of said company in sums not exceeding one hundred thousand dollars respectively," if such subscription shall have been authorized by a majority of the legal voters at an election called and held for that purpose. In that event, bonds of such township, corporate town, or city shall be issued in payment thereof to the railroad company. Sect. 17 of the same act declares that "nothing herein contained shall prevent counties and cities from taking and voting for subscriptions in the stock of said company, under the general laws of this State."

The general laws referred to include "An Act supplemental to an act entitled 'An Act to provide for a general system of railroad incorporations,'" which took effect Nov. 6, 1849. Laws of 1849, 2d Sess. p. 33. That act authorizes every county to subscribe for stock in any railroad company, already or thereafter to be organized or incorporated, under any law of the State, to the extent of $100,000, and, for the payment of

the same, expressly empowers the judges of the County Court to borrow money, at a rate of interest not exceeding ten per cent per annum, and to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, or, if they shall deem it most advisable, they are authorized to pay for such subscription in bonds of the county, bearing interest not exceeding the rate aforesaid; and the railroad company is also authorized, by a separate section of the act, to receive such bonds in payment of such subscriptions.

The contention now is on the part of the plaintiff in error, that the language quoted from the seventeenth section of the charter of the Kankakee and Illinois River Railroad Company is a reservation merely of the power given by the general laws of the State to counties to subscribe for stock; and as the power to issue bonds in payment therefor is a distinct power, it is not included in the reservation, and therefore ceased to exist on the passage of the act, so far as the present transaction is concerned.

But the obvious meaning of the clause relied on to accomplish that result is merely that the general laws of the State authorizing counties to subscribe for stock in that railroad company shall remain unaffected by the charter, which conferred similar power on townships, corporate towns, and cities on the line of the road, and not in any manner to limit the operation and application of those general laws upon the subject. The very purpose of the proviso seems to us to have been to exclude the very conclusion now sought to be drawn from it.

Indeed, if the argument be good for anything at all, it results that, under the operation of this reservation, the naked power to subscribe for stock remains in the counties, without any authority, and therefore without any obligation, to pay for it; for if the power to issue bonds is taken away, so also is the power to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, — a pledge which means, of course, that payment shall be made out of the revenues of the county derived from taxation.

As such a construction of law confesses its own absurdity, it is not necessary to make any formal refutation of it.

It is further contended on the part of the plaintiff in error,

that if, at the date of these bonds, Kankakee County had corporate power to execute and issue them, it could only be done by the county court according to the terms of the statute conferring that power. Such, in fact, is the language of the general law of 1849, from which the power is derived.

But the county of Kankakee, it is admitted, was organized under the act of April 1, 1851, to provide for township organization. Laws of 1851, p. 35. Under that mode of organization the corporate powers of counties, otherwise exercised by the judges of the county court, are devolved upon a board of supervisors, such as, in the present instance, executed and issued the bonds in question. Art. 15, sect. 4, of that act declares that "the powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted." And art. 16, sect. 4, provides that "the board of supervisors of each county in this State shall have power, at their annual meetings, or at any other meeting, . . . to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this State to the county courts."

In *Green* v. *Wardwell*, 17 Ill. 278, it was said that the board of supervisors were the legal successors to the county commissioners court, as had been previously decided in *The People* v. *Thurber*, 13 Ill. 554. In *Prettyman* v. *Supervisors of Tazewell County*, 19 Ill. 406, the very point here raised was decided, and it was held that under the act of 1851 it was the duty of the board of supervisors to act instead of the county court in calling an election to vote on the question, in making the subscription for the stock, and in issuing county bonds in payment therefor. The act of April 1, 1861, "to reduce the act to provide for township organization and the several acts amendatory thereof into one act and to amend the same" (Session Laws of Illinois, 1861, pp. 216–237), removes all doubt on the subject. It confers (art. 14, sect. 6, 8th clause) upon the board of supervisors authority "to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this State, *or which are enjoined upon county courts, when holding terms for the transaction of county business in those counties not adopting township organization.*" This act was in

force when the bonds sued upon in this case were issued, and they are governed by it. The case of *Gaddis* v. *Richland County*, 92 Ill. 119, relied upon by counsel for plaintiff in error on this point, is not inconsistent with this result in the present case, because that decision is based on the words of the charter of the railroad company conferring the authority to subscribe to its capital stock, which, in the opinion of the court, expressly limited the exercise of the power to the county court. The same comment may be made upon the case of *Supervisors of Schuyler County* v. *People, ex rel. Rock Island & Alton Railroad Co.*, 25 Ill. 181.

We find no error in the record, and the judgment of the Circuit Court is accordingly

Affirmed.

HAYWARD *v.* ANDREWS.

1. The assignee of a chose in action cannot proceed in equity to enforce, for his own use, the legal right of his assignors, merely upon the ground that he cannot maintain an action at law in his own name. *So held*, where the owner of letters-patent assigned them, together with all claims for damages by reason of the previous infringement of them, and the assignee filed his bill to recover such damages.
2. *Root* v. *Railroad Company*, 105 U. S. 189, cited and approved.

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

The case is stated in the opinion of the court.

Mr. Gilbert M. Speir, Jr., *Mr. Ephraim Banning*, and *Mr. Thomas A. Banning* for the appellant.

Mr. L. L. Bond and *Mr. E. A. West* for the appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This appeal brings into review the decree dismissing, on a general demurrer, the amended bill of Hayward, the complainant, for want of equity.

The case made by the amended bill and exhibits is this:

Aaron H. Allen was the owner of reissued patent No. 1126, granted to him upon the surrender of original patent No. 12,017, dated Dec. 5, 1854, for a new and useful improvement in seats for public buildings. It was extended for seven years from Dec. 5, 1868, and consequently expired by limitation Dec. 4, 1875. By virtue of certain written instruments, set out as exhibits to the bill, the complainants claimed to be the sole and exclusive owner in equity of all claims for damages arising out of, or occasioned by, infringements of the reissued patent, committed after Sept. 18, 1869, and of all claims for gains and profits, derived by others by reason of such infringement.

The first of these instruments is dated Sept. 18, 1869. Allen thereby grants to J. W. Schermerhorn & Co. "the sole right and privilege of manufacturing and selling school furniture, made according to" the reissued patent, "for a tilting seat on the lever principle," subject to the terms and conditions of an indenture between the parties, which, however, is not set out. On April 22, 1881, John H. Platt, as assignee of James W. Schermerhorn, George M. Kendall, and George Munger, bankrupts, transfers to the complainant all the interest of the bankrupts in the Allen patent, and all causes of action arising to him, as assignee of the bankrupts, by reason of his interest in the said patent, and especially his claim in a certain suit then pending, brought by Allen in the Circuit Court of the United States for the Southern District of New York against the city of New York.

The second and only other instrument of title exhibited is an assignment from Allen, the patentee, to the complainant, dated March 8, 1880, whereby Allen transfers to him and to his assigns all his right and interest in the suit, mentioned in the assignment from Platt, against the city of New York, "together with all claims for damages arising since the eighteenth day of September, 1869, against any persons, firms, or corporations, by reason of infringements of letters-patent of the United States for a tilting seat supported on the lever principle," being the reissued patent specified in the bill. And the complainant is thereby further constituted the attorney in fact of Allen, irrevocably, in his name, to demand and recover all such dam-

ages, for his own use, paying all expenses, but accounting for thirty per cent of all sums recovered, to Allen, until the latter shall have received $6,600, and no longer.

It is alleged in the amended bill that in the suit against the city of New York a decision was reached sustaining the validity of the patent, but no final decree therein has been entered; and that, owing to the delays incident to that litigation, while waiting for a decision upon the validity of the patent, neither Allen nor the complainant has been in a situation to prosecute other infringers, or sooner to file this bill.

It is also alleged in the amended bill that the defendants have infringed the said letters-patent since Sept. 18, 1869, and until the expiration thereof, and in violation thereof "have manufactured, sold, and used the said invention for improvements in seats for public buildings, patented as aforesaid, whereby great injury resulted to your orator, and great gains and profits accrued to the said defendants," for which, accordingly, an account is prayed, and a decree for the amount thereof and for damages.

The original bill was filed Dec. 1, 1881, Allen being a co-complainant, and the amended bill May 25, 1882, the original bill having been dismissed as to him.

It is manifest that the right claimed by the complainant receives no support from any title derived from Allen through J. W. Schermerhorn & Co., for the right of the latter under the instrument of Sept. 18, 1869, was that of mere licensees. They could maintain no action for damages or profits against infringers, for they had no interest in the patent, nor was there any assignment to them of any right of action accrued or to accrue to Allen. In addition to this, the license itself only extended to the manufacture and sale of school furniture, and there is no allegation in the amended bill that the defendants had infringed the patent in that respect. That branch, therefore, of the complainant's bill is removed from the case, and he is relieved from the embarrassment which, it is alleged in argument, is occasioned by the uncertainty produced by alternative and inconsistent titles, and which is made one of the grounds for claiming the right to resort to equity.

The case, then, is left to stand upon the right derived under

the contract between Allen and the complainant of March 8, 1880, and the single question remains, whether the assignee of a chose in action may proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name.

It is admitted that, according to the rule declared and established in *Root* v. *Railway Company*, 105 U. S. 189, the patentee could not, in his own name and right, maintain the present suit, and the original bill was accordingly dismissed as to him. To permit the appellant to proceed in equity, upon the mere ground of the assignment to him, would be substantially to abrogate that rule. The principle was stated to be that the relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, was "incidental to some other equity, the right to enforce which secures to the patentee his standing in court;" that "the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise other than by way of injunction;" and among these, by way of illustration, was mentioned that "where the title of the complainant is equitable merely;" but it is the obvious meaning of the passage to limit the exception to cases where the purpose and necessity of the resort to a Court of Chancery are to enforce the peculiar equity personal to the complainant, and not merely the legal right of which he is the beneficial owner. If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a Court of Chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor the disputed right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could

not be recognized, and that in cases where the only matters in controversy would be purely legal rights.

In opposition to this view, a passage from Story, Eq. Jur., sect. 1057 *a*, is cited and relied on in argument, in which that learned author, after stating that it had been "recently held that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervened which show that his remedy at law is, or may be, obstructed by the assignor," adds, that "this doctrine is apparently new, at least, in the broad extent in which it is laid down, and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has), then a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title." In the next paragraph, however, it is admitted that, "if the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, then, unless some obstruction exists to the remedy at law, it would seem that a court of equity ought not, or might not, interfere to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide. But the same objection would not lie to an assignment of a bond or other security for a fixed sum."

The doctrine referred to in this passage, as "apparently new," is that stated by Vice-Chancellor Shadwell, in *Hammond* v. *Messenger*, 9 Sim. 327, 332, where he said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff, who had obtained from certain persons to whom a debt was due, a right to sue in their name for the debt. It is quite new to me, that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated, and it is represented that notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor

will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance to compel the debtor to pay the debt to the plaintiff, especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

And, accordingly, the Supreme Judicial Court of Massachusetts, in *Walker* v. *Brooks*, 125 Mass. 241, held, that "a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy." And Gray, C. J., delivering its opinion in that case, referring to the passage from Story to the contrary, said: "But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of *Hammond* v. *Messenger* is amply sustained by earlier authorities in England and in this country." This conclusion he then verifies by a review of the cases from the time of Lord Chancellor King, whose decision in *Dhegetoft* v. *London Assurance Co.*, Mos. 83, was affirmed in the House of Lords; 4 Bro. P. C. (2d ed.) 436; followed by Lord Hardwicke, in *Motteux* v. *London Assurance Co.*, 1 Atk. 545; and Lord Loughborough, in *Cator* v. *Burke*, 1 Bro. Ch. 434, to Vice-Chancellor Knight Bruce, in *Rose* v. *Clarke*, 1 You. & Col. C. C. 534; and in this country from *Carter* v. *United Insurance Co.*, 1 Johns. (N. Y.) Ch. 463, by Chancellor Kent; and *Ontario Bank* v. *Mumford*, 2 Barb. (N. Y.) Ch. 596, 615, by Chancellor Walworth; including several others in various States. He then points out that in *Riddle* v. *Mandeville*, 5 Cranch, 322, the principal case cited by Mr. Justice Story in support of his statement, a bill in equity by an indorsee of a promissory note against a remote indorser was sustained by this

court, upon the ground that in Virginia, the law of which governed the case, no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that, in that particular case, the intermediate party was insolvent; and that Mr. Chief Justice Marshall, who delivered the opinion in that case, did not consider it as establishing the general proposition for which it was cited, was manifest from his opinion in the later case of *Lenox* v. *Roberts*, 2 Wheat. 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "as the act of incorporation had expired, no action could be maintained at law by the bank itself."

The same doctrine had received a pointed application by this court in the case of *Thompson* v. *Railroad Companies*, 6 Wall. 134. That case was commenced in the State court in Ohio, by the parties in interest, in their own name, although only beneficially entitled, in accordance with the code of the State. It was removed into the Circuit Court, where the plaintiffs filed a bill in equity, because their title was equitable merely. A decree in their favor, on appeal, was reversed by this court. Mr. Justice Davis remarking, in the opinion, that "this case does not present a single element for equitable jurisdiction and relief," and added: "The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a Court of Chancery was not necessary, in order to enable the railroad companies to collect their debt."

That decision has been cited with approval in the subsequent cases of *Walker* v. *Dreville*, 12 Wall. 440; *Van Norden* v. *Morton*, 99 U. S. 378; and *Hurt* v. *Hollingsworth*, 100 id. 100.

In the present case, the complainant had a plain and adequate remedy at law by an action in the name of Allen, whose willingness to permit his name to be so used, in accordance with his agreement to that effect, is manifest, from the fact that in the original bill he was named as one of the complain-

ants. There was, therefore, no error committed by the circuit court in dismissing the amended bill for want of jurisdiction in equity.

Decree affirmed.

GAY *v.* PARPART.

1. When a party offers in evidence an instrument concerning real estate which has been acknowledged or proved so as to be admitted to record, and read in evidence, the burden of proof is on the party denying its execution. The fact that a person whose name is signed as a subscribing witness is alive and is not called to testify, leaves a strong inference that its execution cannot be disproved.
2. A woman married a man by whom she became the mother of two children. She subsequently discovered that he had a wife living from whom he had not been divorced. He then made to her an assignment of a mortgage. *Held,* that the assignment was a meritorious act and not impeachable for immorality of consideration.
3. The difference between a judgment and writ of partition at common law, and a partition by decree in chancery as it affects the title, is, that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment.
4. Some of the States confer upon their Chancery Courts authority to make such a conveyance by a master commissioner, or they provide that the decree itself shall operate as such conveyance and vest the title in the parties to whom the premises have been severally allotted; but where, in a suit in equity for partition, no such authority or provision exists, the proceeding, while it may be effectual as a division and an allotment of the property, does not pass the title thereto.
5. Where a decree erroneously declared the nature of the estate of each cotenant, and three days thereafter deeds *inter partes* were made which do not follow the decree, and where, twelve years afterwards, a bill in chancery was brought to perfect the partition by compelling conveyances in accordance with the decree, the court may inquire into the equities of the parties arising out of the surrounding circumstances, and refuse to order conveyances in accord with the title as found by the former decree, when it would be inequitable to make such order.
6. If such former decree was made by consent of the party against whom the error was committed, and who received no valuable consideration, and if no one is interested but volunteers, or those who purchased with full notice of the facts, no order for conveyances will be made, but the parties will be left to rely for their title on those which were interchangeably made to each other in accordance with the respective allotments.
7. No person can be an innocent purchaser for value under the first decree who was attorney for the plaintiff, and who purchased from him while the suit to enforce it was pending.

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

The case is stated in the opinion of the court.

Mr. Arthur W. Windett and *Mr. Edward S. Isham* for the appellants.

Mr. John S. Miller and *Mr. Lawrence Proudfoot* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The issues raised by the pleadings in this suit are so well stated in the opinion of the district judge, sitting in the Circuit Court where the decree was rendered, that we cannot do better than to state them in his language.

"By the original bill the complainant, Elizabeth Flaglor, charged that she was the sole surviving child of Charles D. Flaglor, deceased; that one Augustus Garrett died in the city of Chicago some time in the year 1848, seized of lot 25, in block 9, in the Fort Dearbon addition to Chicago, together with a large amount of other real estate, leaving Eliza Garrett his widow, and no children nor descendants of a child or children, and leaving a will, which was duly probated in Cook County, whereof said widow Eliza Garrett, James Crow, and Thomas G. Crow were duly appointed executors, in which will said Garrett duly disposed of and devised his estate, and among other devisees in said will was the said Charles D. Flaglor; that in the year 1851 a bill for partition was filed in the Circuit Court of Cook County by said Eliza Garrett, James Crow, and Thomas G. Crow against Letitia Flaglor, Frederick T. Flaglor, and Charles D. Flaglor, and Lucy Louisa Flaglor and Elizabeth Flaglor, children of said Charles D., all of whom, it was alleged, were interested in said will; that upon the answers of the defendants to said bill, proofs taken, and the report of commissions, a decree was entered that partition be made of the real estate of which said Augustus Garrett died seized, among the persons to whom the same was devised by said will, and said lot 25, in block 9, was allotted and set apart to said Letitia Flaglor during her life, remainder over to said Charles D. Flaglor for his life, remainder in fee to his children him surviving, and on failure of children him surviving the fee to

said James Crow and Thomas G. Crow; that the parties entered into possession of the several parcels of real estate as set apart to them, and executed and delivered to each other interchangeably deeds of conveyance so as to invest each of the parties to said bill with the title in severalty to the portions of said estate so set apart and allotted to them, and also a certain written contract in regard to the interests of the children of said Charles D. in the property set off to said Letitia and Charles D.

"The bill then alleged the death of said Letitia and Charles D. Flaglor, and that complainant Elizabeth was the sole surviving child of said Charles D., and entitled as such to an estate in fee to the lands so set off and allotted by said decree to said Letitia and Charles D., and prayed that said James and Thomas G. Crow, as surviving executors of the will of said Garrett, be required to execute proper deeds of conveyance of the fee to said lot 25 to said complainant Elizabeth, and that said Jessell and the other tenants in possession account for and pay over to complainant the rents, issues, and profits of said lot by them received after the death of said Charles.

"The bill also charged that said Charles D. Flaglor, on or about the nineteenth day of August, 1857, made and executed to Frederick T. Flaglor, his father, a certain mortgage deed of said lot 25, to secure the payment of the sum of $20,000, on the first day of November, 1867, together with interest thereon at the rate of six per cent. per annum, payable annually, and that said defendant Catharine Reid was the holder of said mortgage.

"Soon after filing the original bill, the said Elizabeth Flaglor, complainant, died, leaving a will, whereby she devised all her estate to her mother, Lucy C. Flaglor, and by order of court said Lucy C., who has since intermarried with one Gay, was made complainant, and the suit has since proceeded in her name. James and Thomas G. Crow were served with process, but made no defence. Jessell appeared and answered. Catharine Reid, being a non-resident, was brought into court by publication, under the statute of Illinois, and such steps were taken that the case on the original bill was brought to hearing before the Superior Court of Cook County, at the August Term, 1872, and a decree made directing said James and Thomas G. Crow,

as executors, to convey to complainant the title in them, as surviving executors and trustees of Augustus Garrett, and that Jessell, who was a tenant of the premises under an unexpired lease from said Charles D. Flaglor, surrender possession to complainant, and that the defendant Catharine Reid release the said mortgage made by said Charles D. to Frederick T. Flaglor, and that said mortgage be held void as against the estate of said complainant in said premises. In October, 1873, said Catharine Reid, by the name of Catharine Parpart (she having intermarried with Lewis Parpart), appeared in said cause, and on her motion said decree was opened, and she was let in to defend in said cause, whereupon she filed her answer.

"And afterwards, on the first day of February, 1875, she filed her cross-bill, alleging that said Charles D. Flaglor made and delivered said mortgage in fee to his father, Frederick T. Flaglor, and that said Frederick T., on the first day of August, 1863, duly assigned said mortgage and the indebtedness thereby secured, to her, the said Catharine, and that the same was then held and owned by her, and that the whole of the principal sum of $20,000, together with interest from the second day of June, 1862, remained unpaid. To this cross-bill Arthur W. Windett, the Connecticut Mutual Life Insurance Company, and others were made defendants, and a foreclosure of said mortgage was prayed. To this cross-bill answers were filed by Mr. Windett and the Connecticut Mutual Life Insurance Company, alleging, in substance, that, by the will of Augustus Garrett, said Charles D. Flaglor was only devised a life estate after the death of his mother, Letitia Flaglor, in the lands devised to him by said will, and that it was agreed between said Eliza Garrett, widow, and James Crow, Thomas G. Crow, and said Letitia Flaglor, Frederick T. Flaglor, her husband, and said Charles D., that a partition should be made among them of the property devised by said will, and that by such partition only a remainder for life, after the death of said Letitia, should be vested in said Charles D., and that on his death the fee of the property so allotted to said Letitia and Charles should go to the children of said Charles D.; that, in pursuance of said agreement, the bill for partition was filed in

the Cook County Circuit Court, and that said Charles by his answer appeared and consented to a decree, and that the decree in said partition cause was made in pursuance of such consent, and that said Charles was bound thereby and precluded from asserting or claiming any other than a life estate in said lands, and that said Frederick T. Flaglor and said Catharine Reid were bound by such decree. That said mortgage was given by said Charles to said Frederick without consideration, and that said Catharine was not a *bona fide* assignee for good or valuable consideration, and that said mortgage only conveyed the life estate of said Charles D. in the mortgaged premises.

"Before the answer of the insurance company was filed the cause was, on petition of said company, removed to this court, and on the 5th of November, 1877, the said Catharine, by leave of this court, filed her amended cross-bill, alleging that all the title and interest of Mr. Windett and the insurance company and the other defendants were acquired after and were subject and subordinate to the said mortgage held by her, and further alleged that said Charles was, by the will of said Garrett, given an estate in fee after the death of his mother Letitia; that no agreement was ever made by Charles to accept an estate for life, and that the fee should go to his children; that said Charles never consented to said decree in said partition case awarding him only a life estate in the property set off to him; that the deeds made interchangeably between the devisees of Garrett and the contract between said parties made at the same time were not made in pursuance of or for the purpose of satisfying said decree; that said Charles had never ratified said decree nor accepted a life estate in lieu of a fee in the lands set off to him, and that said decree was fraudulent and void as against said Charles.

"The answers of Mr. Windett and the insurance company to the amended cross-bill denied all frauds or mistake in the decree in the partition suit, and insisted that Charles and the cross-complainant were bound thereby, and also insisted that said decree was in accordance with and in furtherance of the interest of the will of said Garrett, so far as it related to the estate of said Charles in the lands allotted to him."

On a final hearing upon the pleadings and proofs, the Circuit Court rendered a decree in favor of Catharine Parpart, establishing the validity of the mortgage set out in the cross-bill and its assignment to her, adjudging to her the amount of the bond, with interest, declaring it to be a lien on the property in controversy paramount to that of all other parties to the suit, and providing that unless the amount was paid the property should be sold to satisfy the debt.

From this decree Arthur W. Windett, Lucy Flaglor Gay, and the Connecticut Mutual Life Insurance Company took an appeal, which brings it before us for review. The case, as it presents itself to us, concerns the interest of no other parties but these, and is limited to the proceeding growing out of the cross-bill.

The first question raised by these issues is the validity of the mortgage made by Charles D. Flaglor to Frederick T. Flaglor, his father, and of the assignment of that mortgage to Mrs. Parpart, then Catharine Reid. If this be decided in her favor, a second question is, whether at the date of the mortgage the estate of Charles Flaglor was a fee-simple in the property mortgaged or only an estate for life.

As the least difficult of these questions, and the one which in the natural order of discussion should be first disposed of, we will consider the validity of the mortgage and its assignment.

There is but little question raised that as between Charles and Frederick Flaglor the transaction was an unexceptionable one. At that time, whether the estate was a fee simple or a life estate, certain transactions took place between them by which Charles became indebted to his father in the sum of $20,000. This sum the father seemed disposed to permit to remain in the hands of his son on the security of a mortgage on this property. He accordingly, in the year 1857, took from Charles his bond for that sum, payable ten years after date, with annual interest at the rate of six per cent, secured by this mortgage. The interest was promptly paid, notwithstanding the death of Charles in 1858, up to the death of his father in 1865. There is no reason, therefore, to doubt the validity of the mortgage as between the parties thereto.

The assignment of the bond and mortgage by Frederick T.

Flaglor to the present appellee is assailed on several grounds, which resolve themselves into a denial of the execution of the assignment and the immorality of the consideration on which it was made.

The assignment itself is on a separate piece of paper from the mortgage and the bond, and the signature is made by the cross-mark of Flaglor, instead of being in his own handwriting. As he was a man of some education, and it is shown that about that time he was in the habit of writing letters and signing his own name to them, that circumstance is deemed suspicious.

The relations at that time existing between him and Catharine Reid, which will be hereafter considered, are supposed to increase the force of these suspicions; also the fact that the bond and mortgage were permitted to remain in his possession.

In answer to this, it is to be considered that he was a very old man, easily shaken by illness, and it was probably during some such attack, when he might not have been able to write, that he determined to make the assignment which his sense of justice dictated. Original specimens of his signature, written within a short time of this transaction and produced to this court, show a shaky and difficult handwriting, and lead to the conclusion that if he was ill it would be extremely natural to have somebody write his name, which he authenticated by making a cross under it.

Its execution is attested as sealed and delivered in his presence by W. G. McDonald as a witness, and the original paper produced before us shows that the name of Flaglor is in the same handwriting as that in the body of the instrument, which is apparently that of the witness.

There is another consideration, however, of very great weight in favor of the validity of the assignment. Its execution was proved shortly after the date it bears, before a justice of the peace, in accordance with the laws of the State of New York, where Flaglor then resided. The certificate of this fact, with that of the clerk of the proper court, was such that by the laws of Illinois the assignment was admitted to record in the county of Cook of that State, and is *prima facie* evidence of its execution by Flaglor. When this assignment and certificate were produced in evidence, the *onus* of proving that it was not the

act and deed of Flaglor devolved on the appellants. The witness was living at the time that the deposition of the appellee was taken in New York to prove the execution of the paper. He was competent to prove what was done in regard to its execution, and the fact that the appellants, with a knowledge of the case made by the positive testimony of Catharine Reid and the certificate, did not call the man whose name was affixed to the paper as a subscribing witness, leaves but little doubt that it could not be thus successfully impeached.

Reverting to the question of the consideration moving Flaglor to make this assignment, the facts seem to be that Catharine Reid had been for several years a domestic in his family while he was married to and living with a second wife, and she left his service while he and his wife were yet living together at Newburg, in the State of New York. Not long after this he separated from his wife and went to live in St. John, New Brunswick. After being there some time he wrote to Catharine Reid that he was not in good health and needed somebody to take care of him, and requesting her to come and do so. With this request she complied, and, according to her testimony, he, after she arrived there, informed her that he had a divorce from his wife and requested her to marry him. The certificate of the clergyman of St. John, with both her signature and his to the fact, leaves no doubt that they were married in that place on the 23d of January, 1862.

The fruits of this marriage were two children, both girls. Flaglor and Catharine returned to Newburg a year or so after this, and there she ascertained that he had not been divorced from his wife, and of course understood at once that her children were illegitimate, and that their father was liable to a prosecution for bigamy. He at that time, as we have said, was a very old man, and it does not appear that he and this family of his had any other means of support than the interest accruing on this mortgage.

Notwithstanding the assault made upon Catharine Reid in reference to her chastity, and the probability of illicit intercourse with Flaglor previously to this marriage, and the fact much relied on that she had an undue influence over him at the time the assignment was made, we cannot doubt that in

executing and delivering it to her he did a meritorious act, honorable and just, as the only atonement he could make for the deception he had practised upon her, and as placing in her hands the means of supporting the children of whom he was the father. It was not the case of a contract for future illicit intercourse of the class which the authorities hold to be against public policy, but an appropriate means of providing for the support of a woman whom he had married while he had a wife living, and of the children resulting from that marriage.

We are satisfied from these considerations that the mortgage in question was a valid instrument in the hands of the appellee, Catherine Parpart, and a lien upon such interest in the property which it conveyed as Charles D. Flaglor had at the time he made it.

As we have already said, the question on this branch of the subject is whether Charles D. Flaglor at the time he made the mortgage owned a fee-simple in the property conveyed by it or a life estate. Such interest as he had came to him primarily by the will of Augustus Garrett.

The first six sections of this will mention the beneficiaries of his bounty as regards the *income* of his estate until the death of his wife Eliza, Mary Banks, and Letitia Flaglor, and throws very little light upon the question we are considering. The seventh section, which provides for the final disposition of his property after their decease, contains the language to be construed. It reads as follows: "Upon the death of my wife Eliza and of Mary Banks and Letitia Flaglor, I direct that the whole of my estate shall then be equally divided between Charles D. Flaglor, son of said Letitia, if he or his legitimate children survive said Letitia (in case he be dead, his legitimate children shall take as their father would if alive), and the said James Crow, and the said Thomas G. Crow, each taking one-third of the whole. But if Charles D. Flaglor be at that time dead, leaving no legitimate children, the whole of my said estate shall be divided between the said James Crow and Thomas G. Crow. In all cases the heirs and devisees of the said James Crow and the said Thomas G. Crow, respectively, shall succeed to the right and portion which their ancestor and

decedent would have received had he been alive, and in all cases the heirs and devisees of the said James and Thomas, respectively, and the children (legitimate) of said Charles D. Flaglor, shall only succeed to and take the share or portion of income and of estate in general which their ancestor or decedent would have had, taking *per stirpes* and not *per capita*."

The precise question here raised has been repeatedly before the courts of Illinois, as has the whole subject of Charles D. Flaglor's interest under this will, and we think it may be affirmed, that by several well-considered opinions of the Supreme Court of that State, a construction has been established which gives to him, on the death of his mother Letitia, a fee-simple estate under that will. Indeed, we do not understand counsel here to seriously controvert that such is a true construction of that instrument, and as this accords with our own, we adopt it without further discussion.

On the death of Garrett his will was admitted to probate on the 28th of February, 1849, and his widow, Eliza Garrett, having renounced the benefits of its provisions, asserted her right to dower, whereby she became entitled to one-half of the estate. In 1851, long before her death or that of any of these devisees, the parties interested determined to have a partition by a proceeding in chancery in the Superior Court of Cook County. In that proceeding the property, which is now in controversy, was allotted to the share which went to Letitia Flaglor during her life, and after her death to Charles D. Flaglor.

Under the construction of the will which we have just adopted, Charles D. Flaglor was, at the time of making the mortgage to his father, the owner in fee of the property conveyed by it, and there can be no doubt that the mortgage constituted a lien paramount to everything else in the way of a claim or title to the property.

The appellants here rely upon the decree of partition to which we have alluded, and on certain deeds and agreements alleged to have been made by Charles D. Flaglor in connection therewith, as establishing and limiting his interest in this property to a life estate, with remainder in fee to his children on his death, and whether this contention be well founded or

not, presents the main controversy in the case. That decree of partition, dividing the estate into three parts, does unquestionably declare "that the real estate by said commissioners set off and allotted to Letitia Flaglor, Charles D. Flaglor, and his children, if he die leaving any child or children, be and the same is hereby set off and allotted and the income thereof to the said Letitia Flaglor during her life, and the said Charles Flaglor, if he survive said Letitia, during his life, and the child or children of said Charles D., if he die leaving any child or children, in fee."

The first thing which suggests itself as proper to be considered in the solution of this question is to ascertain what was the law of the State of Illinois on the subject of partition at the date of that decree. Looking at the statutes of the State as we find them in the revision of 1880, with references to the sources from which this revision is taken, we find that they made provision distinctly for two modes of effecting a partition, one of which, as declared by the statutes of 1845, was by bill in chancery as theretofore, and the other by petition to the Circuit Court of the proper county. Very little is said on the subject of partition in chancery, as the provisions of the statutes are more specifically directed to the forms of proceeding by petition in the proper court.

The proceeding which we are now to consider declares itself on its face to be in chancery, and the Supreme Court of the State, in reference to this very decree, decides it to be so. *Wadhams* v. *Gay*, 73 Ill. 415. We take it for granted that the statute of Illinois, in making this provision and in leaving the parties to proceed by bill in chancery, intended that such a proceeding should have the force and effect of a partition in the High Court of Chancery of England, and in the main conform to the established chancery practice. That system does not deal with or decide questions of controverted title. Its purpose is to make division among the parties before the court, of real estate in which they had interests or estates that were not in controversy as among themselves.

It is another principle of the chancery jurisdiction in partition that a decree itself does not transfer or convey title even after the allotment of the respective shares of each of the

parties to the proceeding, but that the legal title remains as it was before.

In this respect a decree is unlike the writ of partition at the common law, which in such cases operates on the title only by way of estoppel. In chancery, however, this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other, and they may be compelled to do so by attachment, imprisonment, and other powers of the court over them in person.

In many of the States of the Union, where the equity powers of the courts have been aided by statutes to get rid of the difficulty of compelling parties in person to execute conveyances, the court is authorized to appoint a commissioner to execute the conveyances in the names of the parties. In other cases the statute declares that such a decree itself shall operate as a conveyance of the title.

At the time that the decree was rendered in the Superior Court of Cook County, which we are considering, we are not aware that any statute existed which gave such effect to the decree of the Chancery Court in partition. We find by the Revised Statutes to which we have alluded, sect. 29, on partition, that in the year 1861, ten years after this decree was passed, it was enacted that in suits for the partition of real estate, whether by bill in chancery or by petition, the court may investigate the question of conflicting or controverted titles, and remove clouds on the title of any of the premises sought to be partitioned, and invest titles by their decrees in the parties to whom the premises are allotted, without the forms of conveyance of "infants, unknown heirs, and other parties to the suit." Other powers are also conferred on the courts in such cases.

In the case of *Whaley* v. *Dawson*, 2 Sch. & Lef. 367, Lord Redesdale says: "Partition at law and in equity are different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties, and if the parties be not competent to execute the conveyances, the partition cannot be effectually had."

And in his work on Pleadings in Chancery, he gives this clear statement of the nature of the equity jurisdiction in partition: —

"In the case of the partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partition, which are effected by first ascertaining the right of the several persons interested, and then issuing a commission to make the partition required, and upon the return of the commission and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotment made to the several parties. But if the *infancy of any of the parties*, or other circumstances, prevent such mutual conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made.

"If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause be shown, or if the cause shown should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined, in either of which cases a supplemental bill will be necessary to carry the decree into execution." Mitford's Pleadings, Jeremy's edition, 120. See *Attorney-General* v. *Hamilton*, 1 Madd. 214; *Cartwright* v. *Pultney*, 2 Atk. 380; Story's Equity Jurisprudence, sects. 652, 653.

Mr. Adams, in his admirable condensation of the equity jurisdiction, says: "The confirmation" (of the commissioner's report) "does not, like the judgment on a writ of partition, operate on the actual ownership of the land, so as to divest the parties of their individual shares and reinvest them with corresponding estates in their respective allotments, but it requires to be perfected by conveyances; and the next step, therefore, after confirmation of the return is a decree that the plaintiffs and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto, and

that in the mean time the allotted portions shall respectively be held in severalty." Adams, Equity, 231.

This is precisely what was done in this case, except that no day in court was given to the infant children of Charles D. Flaglor, nor any decree for conveyances by them or by the other parties to the suit.

That decree, therefore, did no more than to make a division and allotment of the land, and had no effect upon the actual ownership or upon the title of the parties, and did not even contain an order for possession in severalty.

We must, therefore, look to the conveyances, which were made three days after this decree was entered, for any limitation of Charles D. Flaglor's interest to an estate for life in the share allotted to him and his mother, if any such there be.

In reply to this view of the effect of the decree, it is said that it was a consent decree, and must be held binding on him by reason of that consent. It is certainly true that on the face of the proceeding, as evidenced by the bill of Eliza Garrett and the two Crows and the answer of Charles D. and Letitia Flaglor, the partition was one previously agreed on by all these parties, and the bill itself gives a schedule of the different parcels of the property to be allotted by the decree to each of the three interests concerned in it. The bill also sets forth very explicitly the interest of Charles D. Flaglor as being a life estate, with remainder in fee to his children, two of whom were then alive.

To this bill an answer on behalf of Frederick T. Flaglor, Letitia Flaglor, and Charles D. Flaglor was filed by their solicitors, Arnold and Lay. It might admit of some question whether this answer was intended to admit that the estate of Charles D. Flaglor was merely a life estate; but as the Supreme Court of Illinois, in the case of *Flaglor* v. *Crow*, has decided that it shows consent, we assume it to be so. 40 Ill. 414.

Waiving at present the question on which there is much conflicting testimony, whether Charles D. Flaglor authorized these attorneys to assent for him to that construction of his interest in the property, we remark that the decree itself was incomplete and did not purport to transfer the title between

parties, nor did it order or direct that such conveyance should be made in accordance with its provisions. This decree, however, was entered of record on May 26, 1851, and deeds were made *inter partes* on May 29. These deeds do not refer to the decree in any manner, nor do the deeds of the other parties to Letitia and Charles Flaglor profess to describe their interests in the property, and the deed as found in the record from the Crows is to Charles D. Flaglor alone, and none of the deeds mention his children.

The agreement of the same date was executed by all the parties to the partition, except the children of Charles D. Flaglor, and seems to have two purposes, explanatory of the deeds of conveyance made at the same time. The first of these purposes was to declare the proportion of the debts of the estate of Augustus Garrett which should be charged upon the interest of each of the parties, and the second to make some explanation of the relations to the estate of Charles D. Flaglor and his children.

The purpose of the provision on this latter subject was to have Letitia and Charles D. Flaglor and Frederick "to save and keep harmless the shares and portions of the estate allotted to Eliza Garrett, James Crow, and Thomas G. Crow from all claim or claims which any child or children of Charles D. Flaglor may have or become entitled to under the said will or decree of any court now made or hereafter to be made." There is also a previous reference in said instrument to the interests of the children and descendants of Charles D. Flaglor which, under said will, such children or descendants may have or at any time be entitled to.

This court agrees with counsel for appellee that there is nothing in these deeds or this contemporary agreement by which Charles D. Flaglor agrees or binds himself, or consents that his interest in the property is a life estate. The deeds of conveyance are absolutely silent on the subject, and do not mention the children at all, but convey the estate to him and Letitia Flaglor. The explanatory agreement was evidently intended to refer this question to the true construction of the will, mentioning the rights of the children to be such as they may have under that will, and guaranteeing Eliza Garrett and the Crows

against the effect of such construction of it as would make his interest a life estate, with remainder to his children.

Assuming, then, that these conveyances *inter partes* were made as a part of the partition proceedings, they fail to carry into effect that part of them which declares as between Charles D. Flaglor and his children that his estate was an estate for life. It was undoubtedly in this view of the subject that, after the death of Charles D. Flaglor and his mother, the advisers of Elizabeth Flaglor, his only surviving child, caused the commencement of the suit in chancery, in her name, of which the present cross-bill has become a part.

This bill of Elizabeth, upon its face, recites the proceedings in the original partition suit, and the contemporary conveyances and agreement, and the death of Letitia and Charles D. Flaglor and of one of his children; and considering the imperfection and insufficiency of all these proceedings to vest in the complainant, his surviving child, the title to the real estate allotted to him and his mother in the decree, it demands of all the other parties to make such conveyances as will perfect her title, and it prays for an account of rents and profits from those who have had the property in possession. To this bill Catharine Reid, now Catharine Parpart, was made a defendant under allegations setting out the mortgage on which the present decree was rendered, and alleging it to be a cloud on the title of the complainant, and praying that it be held to be no lien on the property.

Much of the argument of counsel in this case and the testimony on which the case was heard in the court below has relation, on both sides, to the question whether Charles D. Flaglor authorized his attorneys to give the consent to the limitation of his estate which is found in his answer to the original partition suit.

It is not to be denied that the testimony on this subject is conflicting, as were also his declarations and actions about the time of the rendition of that decree. We do not deem it material to the case before us to decide this question, because, as neither the decree itself, nor the deeds made three days after, nor the article of agreement assented to by the parties at the same time, made any actual transfer of title different from that

which resulted from the will of Augustus Garrett, and as the very purpose of Elizabeth Flaglor's suit is to effect that which was not done by that decree, the only effect which the consent of Charles D. Flaglor to it could have, if he ever consented, would be to have estopped him, or some one claiming under him, from contesting the force of the decree.

In this view of the subject it is important to recur to what took place very soon after this decree was rendered. As soon as Charles D. Flaglor became aware of the construction which was put upon the decree as regards his estate in the property, he filed his bill of review, on the sixteenth day of April, 1853, in the proper court, to set aside and correct it, so far as it concerned that matter. To this bill his mother and father and two children were made defendants. A decree was rendered on the eleventh day of May, 1854, in which the former decree in that respect was reversed and the one-sixth allotted to the Flaglors was declared to be vested in Letitia Flaglor, for and during the term of her natural life, with remainder in fee to Charles if he survived her. This decree remained in full force until after the death of both Letitia and Charles, when, in April, 1866, a writ of error was sued out of the Supreme Court of Illinois in the name of Elizabeth Flaglor, by James Link, her next friend, on which the decree on the bill of review was reversed, on the sole ground that the original decree of partition was by consent, and that such consent cured all errors.

It will be observed that the decree on the bill of review remained in force for over twelve years, that during two years of that time Charles D. Flaglor had come into the seisin of the fee-simple estate, which both that decree and the will declared to be in him, and that it was during this period that the mortgage was made by him on which the decree we are now considering is founded.

Very shortly after this reversal in the Supreme Court, the original bill in the present case was filed by Elizabeth Flaglor, which was prosecuted in her name until August, 1867, when she died, leaving a will by which she devised all her property to her mother, Lucy C. Flaglor, now Lucy Flaglor Gay, one of the present appellants.

Early in 1872 the suit was revived in the name of Lucy Flaglor. By amended bills in her name and by the cross-bill of Catharine Parpart, formerly Catharine Reid, the issues in regard to the controversy now before us were finally raised.

No person now interested in this controversy obtained any interest whatever in this property by any purchase or by any transaction by which they parted with money or other valuable consideration until the purchase by Arthur W. Windett from Lucy Flaglor after her bill of revivor had been filed, and no one else but him and the Connecticut Mutual Life Insurance Company, another one of the appellants, has ever parted with anything of value on the faith of any of the transactions previously recited, except it be Frederick T. Flaglor, who loaned his son Charles the money on the mortgage now in question.

It is impossible to see how the doctrine of estoppel can operate in favor of any of these appellants. Such interest as Elizabeth Flaglor and Lucy Flaglor, her mother, had or acquired was by inheritance or devise. Neither of them ever paid a dollar or parted with anything of value or did anything to their detriment by reason of any act or deed of Charles D. Flaglor, nor by reason of the original decree of partition and the deeds made under it. The one was his child and took under his rights, the other was his wife and the mother of his child, and took under her will. Windett is, therefore, the first person who can pretend to have parted with any consideration for the title which he asserts to this property, and the insurance company holds under him. But both these parties became purchasers and acquired their interests during the pendency of this suit, and were bound to know that they purchased subject to its result. The existence of the mortgage which they now contest was recited in the original bill by Elizabeth Flaglor and in the bills of revivor and supplemental bills filed by Lucy Flaglor, and Catharine Parpart was a party to all those bills, and her right to a paramount lien was referred to and she was made a party in regard to it in them all.

It is urged in favor of the appellants that a decree *pro confesso* by a default on the publication of notice was made against Catharine Parpart declaring her claim invalid, and that very soon after this and before that default was set aside, Windett

received his deed from Lucy Flaglor. It is strenuously urged that this fact confers upon him the character of an innocent purchaser for value, and removes him from the category of a purchaser *pendente lite*. But this argument is not sound.

The decree *pro confesso*, taken without any actual service on Parpart, could, within a period fixed by the laws of Illinois, be set aside upon her appearance and motion to that effect, and it was so done in this instance, and she was permitted to come in and file her answer and cross-bill.

Windett was bound to know, when he purchased, the inconclusive character of the decree *pro confesso* on which he now relies, and that it was not in the power of himself and Lucy Flaglor to defeat the right which the law gave to the absent defendant and render it of no avail by this transfer of title. In addition to this, it is impossible, in any light, to regard Windett as an innocent purchaser, since he was the attorney and counsellor in that suit of Elizabeth Flaglor during her lifetime, and of Lucy Flaglor afterwards, and so remains to the present hour. It is also in evidence that he was well aware of the existence of the mortgage and its possession by Catharine, and at one time had promised that it should be paid, and at another time had entered into negotiations for its purchase, all of which was prior to the date of the deed from Lucy Flaglor under which he now asserts title.

The Connecticut Mutual Life Insurance Company also acquired its interest *pendente lite*. That interest arises under a mortgage given by Windett to secure the loan of money, and it appears by the record that in addition to this mortgage they took other security, in consequence of the uncertain condition of the title. They have also the security of Windett's personal obligation.

The only party in the litigation before us who has any just claim to the protection of an innocent purchaser without notice is the appellee Catharine Parpart. The mortgage which she now holds was given to Frederick T. Flaglor by his son Charles, for which the father gave full value at the time when Charles stood seized of the estate in fee-simple to the property in controversy, according to every source of information open to any one upon inquiry. Under the will of Augustus Garrett

the title of Charles was clear; under the conveyances made between parties subsequently to the decree of partition and the contemporary agreement, it was clear. The decree itself, the only thing which cast any shadow upon that title, had, upon bill of review, been set aside in that respect, and the title of Charles declared to be an estate in fee, and the remainder of the decree stood affirmed as a division of the property. Under these circumstances the right of Frederick T. Flaglor to feel secure in taking the mortgage on the property which he did from his son Charles, in the faith that he was secured by a good title, is much stronger than that of Windett and the insurance company, purchasing during the existence of the litigation which pointed out clearly the defect in their title.

Without deciding whether Charles D. Flaglor ever gave his consent to the original decree, we remark, in the first place, as we have said before, that that decree did not *proprio vigore* transfer title from or to any one. In that suit, as between him and his children, there were no adversary proceedings, and such decree as was had being dependent upon consent, did not operate as a judicial decision by the court of his rights and those of his children. There was, therefore, neither a judgment of the court nor any valuable consideration passing from the children to him to bind him to such consent, beyond that of an ordinary, gratuitous promise, which may be retracted before it is performed. The deeds and the agreement made three days after the decree show that if at any time he had given his temporary consent to the decree, he had determined so far to retract as to keep the matter in his own power; and the bill of review and the decree which he obtained upon that review, and all his subsequent conduct in regard to the property, left no doubt in the minds of any one that he had determined to assert his full right of ownership in fee-simple under the will.

It is in the face of all these circumstances that, many years after her father's death and many years after the execution of the mortgage in this suit, proceedings were commenced in the name of Elizabeth Flaglor, then a child, to secure the benefit which her advisers supposed the original decree of partition conferred on her.

Under all the circumstances of this case, the diligence with which Charles D. Flaglor repudiated the supposed consent and had it set aside by a regular bill of review, the long period of twelve or fifteen years in which the matter was permitted to lie in that condition, the fact that the daughter and her mother are all volunteers, and that Windett is a purchaser with notice of the litigation and taking part in it as an attorney in the case, and the insurance company holding their interest also with full notice of the facts, we think it would be inequitable to make a decree now to do what was left undone in a former decree and which seems to have been so left by the intention of the parties to it. We cannot better express ourselves than in the following language from the opinion of the court in the case before referred to: —

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection, so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem. In outward semblance this partition decree is a decision of court upon the relative rights of Charles D. Flaglor and his children under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor. And upon an appeal to equity by original bill to lend its assistance for carrying it into execution, because of an omission in the decree in providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension, *and want of consideration*, to remain passive." *Wadhams* v. *Gay*, 73 Ill. 415.

Decree affirmed.

GRAND TRUNK RAILWAY COMPANY *v.* CUMMINGS.

1. Although the refusal, at the close of the testimony for the plaintiff, to direct a verdict for the defendants would justify a reversal of a judgment against them, yet if they proceed with their defence and introduce testimony which is not in the record, the judgment on the verdict which the jury, under proper instructions, find against them will not be reversed on account of that refusal.
2. The plaintiff, in the course of his employment as an engine-driver for the defendant, a railroad company, was injured by the collision of the train on which he was with another train of the company. *Held*, that the court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable, notwithstanding the contributory negligence of his fellow-servant.

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

The case is stated in the opinion of the court.

Mr. John Rand for the plaintiff in error.

Mr. Almon A. Strout and *Mr. George F. Holmes* for the defendant in error.

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

This was a suit brought by Cummings, against the Grand Trunk Railway Company of Canada, to recover damages for an injury which in the course of his employment, as an engineman of the company, he sustained by a collision of a train on which he was with another train of the same company. His claim is that the collision was caused by the fault and neglect of the company; that of the company that it was caused by the negligence and disobedience of a fellow-servant of Cummings. This was the issue at the trial, and at the close of the testimony on the part of Cummings the company asked the court to instruct the jury to return a verdict in its favor, which being refused an exception was taken. All the testimony before the jury when this instruction was asked has been put into the bill of exceptions.

The company then introduced testimony touching the points covered by that on the part of Cummings. None of this testi-

mony is in the record. The company did not contend that he was guilty of contributory negligence.

At the close of the case on both sides the court gave to the jury sundry instructions, not excepted to, and then, at the request of Cummings, instructed them further, "that if Noyes [the person claimed to be a co-servant] was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes of itself does not exonerate them, if one of their own faults contributes." To this an exception was taken. The jury returned a verdict for Cummings, upon which a judgment was rendered against the company. To reverse that judgment the company brought this writ, and it assigns for error: 1, the refusal to direct a verdict for it at the close of Cummings's testimony; and, 2, the giving of the instruction which was excepted to.

It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defence and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.

The present case comes within this rule. The evidence introduced on the part of the company is not in the bill of exceptions, and the court was not asked to instruct the jury to find for the defendant on the whole case. Under such circumstances, it must be presumed, in the absence of anything to the contrary, that when the case was closed on both sides, there was enough in the testimony to make it proper to leave

the issues to be settled by the jury. In this we are not to be understood as saying that the instruction ought to have been given when it was asked.

In the instruction which was given we find no error. It was in effect that if the negligence of the company contributed to, that is to say, had a share in producing, the injury, the company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defence that another was likewise guilty of wrong.

Judgment affirmed.

APPENDIX.

In *United States* v. *Erie Railway Company*, error to the Circuit Court of the United States for the Southern District of New York, *ante*, p. 327, Mr. Justice Bradley, with whom Mr. Justice Harlan concurred, delivered the following opinion: —

I concur in the judgment of the court in this case, but not for the reasons given in *Railroad Company* v. *Collector*, 100 U. S. 595. I concurred in the judgment in that case, as in this, on grounds essentially different from those given by the court. I always regarded the tax which, by the one hundred and twenty-second section of the Internal Revenue Act of 1864, was laid upon the interest payable on the bonds and upon the dividends declared on the stock, of railroad and other corporations, as a tax on the incomes *pro tanto* of the holders of such bonds and stock. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 333; *Railroad Company* v. *Rose*, 95 U. S. 78. The interest payable on bonds was not a tax upon the companies in respect of a debt owed by them, nor upon the property represented thereby. The property obtained by the proceeds of the loans represented by the bonds was taxable (if not taxed) in another form, and consisted of the railroad tracks or canal, and other specific property of the companies respectively. If taxed directly, it was indirectly by means of the duty of two and a half per cent which was laid on their gross earnings. The tax laid upon their bonds was intended to affect the owners of them; and whilst the companies were directed to pay it, they were authorized to retain the amount from the instalments due to the bondholders, whether citizens or aliens. The objection that Congress had no power to tax non-resident aliens is met by the fact that the tax was not assessed against them personally, but against the *rem*, the credit, the debt due *to* them. Congress has the right to tax all property within the jurisdiction of the United States, with certain

exceptions not necessary to be noted. In this case, the money due to non-resident bondholders was in the United States, — in the hands of the company, — before it could be transmitted to London, or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal revenue law, by way of tax, stopped a part of the money before its transmission, namely, five per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the government are placed at his disposal for its security and collection.

Whether taxation thus imposed would be respected by foreign governments if the creditor could bring before their courts the debtor company or its property, does not concern us in considering the question now presented. There is nothing in the Constitution which authorizes this court, or any other court, to disaffirm the power of Congress to lay the tax. Congress is its own judge of the propriety or expediency of laying it.

Indeed, so far as the power of Congress is concerned, regarded in reference to any power the courts have to limit or restrain it, I see no reason why Congress may not lay a tax upon any property on which the government can lay its hands, whether within or without the jurisdiction of the United States. If, in imitation of the dues levied by Denmark upon vessels passing through the Cattegat Sound, Congress should levy a duty upon all vessels passing through the Strait of Florida, I do not know of any power which the courts possess to prevent it. It might create complications with foreign governments, it is true, and involve the country in war; but Congress has the power, if it chooses to take the responsibility, of creating, or giving occasion to such complications. The responsibility rests upon it alone.

So if, in taxing money due from citizens of the United States to foreign citizens, any complications arise with the governments to which the latter are subject, Congress alone has the responsibility, and is the only department of our government which has a right to take such a responsibility. In *State Tax on Foreign-held Bonds*, 15 Wall. 300, the State legislature had laid a tax on the interest payable upon the bonds of all corporations doing business in the State; and authorized the companies to retain the amount out of the interest payable to the bondholders without regard to their residence or nationality. I concurred in the judgment rendered in that case on the ground that the State, in passing such a law, appli-

cable to pre-existing contracts, exceeded its just powers under our form of government, and that the law, in its effect upon non-resident bondholders, impaired the obligation of the contract.

Considering, therefore, that if Congress chooses to take the responsibility of levying such a tax as the one in question, the courts have no power to control its action, or to give any relief to parties affected by it, I concur in the judgment of reversal.

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