UNITED STATES REPORTS

VOLUME 108

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1882

AND

RULES ANNOUNCED AT OCTOBER TERM, 1883

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON R. WAITE, Chief-Justice.
SAMUEL F. MILLER, Associate Justice.
STEPHEN J. FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM B. WOODS, Associate Justice.
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.

ATTORNEY-GENERAL.

Benjamin Harris Brewster.

SOLICITOR-GENERAL.

Samuel Field Phillips.

CLERK.

James H. McKenney.

MARSHAL.

John G. Nicolay.

The allotment of the Chief-Justice and Associate Justices to Circuits continues as announced in 107 U. S.

MEMORANDUM.

SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

Ordered by the court that the following letter, order and oath of office be entered upon the minutes of the court.

LETTER.

Washington, D. C., 8th October, 1883.

Sir:

I have the honor to tender my resignation of the office of Reporter of the Decisions of the Court, to take effect on the publication of Volume 107 U. S.

I am, sir,
Very respectfully,
Your obedient servant,
W. T. Otto.

The Honorable,
The Chief Justice.

ORDER.

Mr. William T. Otto having resigned the office of Reporter of the Decisions of this Court, Mr. J. C. Bancroft Davis is appointed in his place. Mr. Davis is charged with the duty of reporting the decisions of the present term from the beginning, and those of the last term not included in the volumes already published by Mr. Otto.

OATH.

I, J. C. Bancroft Davis, do solemnly swear that I will faithfully and impartially discharge and perform all the duties of the office of Reporter of the Supreme Court of the United States according to the best of my abilities and understanding, and that I will support the Constitution of the United States. So help me God.

J. C. Bancroft Davis.

Subscribed and sworn to in open court, this fifth day of November, A. D. 1883.

James H. McKenney,
Clerk of the Supreme Court of the United States.

The Reporter, with the consent of the Court, induced the publishers to try the experiment of issuing the reported cases in serial numbers. For obvious reasons the series began with cases adjudged at the current term, none of which had been reported. Thus the unreported cases of the last term were left to be printed by themselves in this volume ; and it happened that in carrying it through the press simultaneously with Vol. 109, the latter and a portion of Vol. 110 appeared before it.

Arguments of counsel are reported more fully than the Reporter can hope to do hereafter. The cases are arranged in the order in which the judgments were announced. The same arrangement will be observed in future volumes unless circumstances prevent.

In order that this volume may be properly cited, it is numbered only as a volume in the series of the United States Reports. It is the custom of the Court to cite decisions reported since Wallace only by the number in the official series, as "91 U. S.," "92 U. S.," &c. If counsel will do the same thing, it will aid in securing accuracy in reporting arguments. The proper citation for the cases reported in this volume is "108 U. S.," with the page added.

WASHINGTON, 20th March, 1884.

I.

CASES ADJUDGED

AT

OCTOBER TERM, 1882.

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CITED IN OPINIONS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1882.

IN THE MATTER OF AMENDMENTS TO RULES 1 AND 10.

November 26th, 1882.

Review of the legislation and practice of the court relating to taxation of the clerk's fees for printed copies of records. Change in rules announced.

MR. CHIEF JUSTICE WAITE.

Our attention has been called to the practice which prevails in the clerk's office of sending original records to the printer to be printed, and of taxing in the bills of costs a fee for one manuscript copy of the record, when no such copy is in fact made.

On investigation we find that the statute regulating the fees of the clerk was passed in 1799, and that under this statute a table of fees was prepared, many years ago, by or under the direction of the court, which has been followed by the clerk in the taxation of costs ever since. No provision was made, by rule or otherwise, for printing the records, until January term, 1831. Before that time the practice was, as we are informed, for the court to use the original record, and the clerk made two manuscript copies for the use of the parties. For these copies he charged the parties according to the established table of fees. At January term, 1831, the attorney-general, in behalf of the United States, applied to the court for leave to take the

original records in certain cases from the clerk's office to be printed, at the same time remarking that he had been informed that in such cases it had been the habit of the clerk to charge half fees. Chief Justice Marshall, speaking for the court, stated "that the clerk of this court had certain rights and fees of office (of which a fee for a copy of the record was one), which this court was not disposed to violate; and that the party could not withdraw the records without paying for the copies, but that any arrangement which the clerk saw proper to make would be satisfactory to the court." The original records in these cases were afterwards taken to the printer and printed, and the clerk charged and was paid full fees for one manuscript copy.

At the same term the first rule for printing the records was adopted, which provided for the taxation of the fees for one manuscript copy of the record in the bill of costs. When this rule was promulgated the court consisted of Chief Justice Marshall and Associate Justices Johnson, Story, Thompson, McLean, and Baldwin. Mr. Justice Baldwin dissented on this provision of the rule, for the reason, among others, that it allowed the clerk a fee for a copy whether one was made or not.

Under the rule thus adopted the printing of records began, and from the first the original records were sent to the printer, and a fee for one manuscript copy was charged in the costs, when in fact no copies were made. There is abundant evidence that at the outset this practice was directly or indirectly approved by the court. In 1839, the House of Representatives instructed the Judiciary Committee to "inquire what costs are charged against the United States for printed copies of records of suits pending in the Supreme Court which have been printed at the expense of the United States, ... and whether any legislation is necessary in relation to costs of suits in said court." The committee reported, submitting a statement of the clerk on the subject, and were discharged. From this statement of the clerk, and from other evidence on file, we are satisfied the committee, or some of its members, visited the office during the progress of their inquiries, and possessed

themselves fully of the mode of doing the business and of the compensation therefor.

In 1859, the rules were revised by Chief Justice Taney under the direction of the court, and the provision for printing the records was put into the form in which it now appears in paragraphs 2, 3, 4, and 5 of Rule 10. We are advised that prior to the death of Chief Justice Taney no manuscript copies of the records were ever made, and that the fee for one copy was always charged in the costs. Since the death of Chief Justice Taney, copies have in some cases been made. The present clerk has followed the practice of his predecessors.

We are entirely satisfied that the practice, as it now exists, is in all material respects what it has been for more than fifty years, and that at the beginning it received the approval of the court. No one now on the bench ever heard of any complaint or of any application for a retaxation of costs, on account of what was done, until late in the last term, when a motion for retaxation was made in the case of *James* v. *Campbell.*

There is an apparent conflict between the rules and the practice under them which ought not to exist. It is also evident that what was fifty years ago no more than a reasonable compensation for the important services of the clerk is now, under the operation of the rules as then construed and the practice then inaugurated, larger than it ought to be. To prevent misunderstandings in the future and to reduce the expenses of litigants without doing injustice to the clerk, it is ordered—

I. 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.

II. 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 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.

JOHNSON and Another *v.* WATERS, Administrator.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided October 16th, 1882.

Practice.

It appearing that a personal decree for money could not be given, and the circumstances of the parties not being shown to have changed since the security was taken, a motion for additional security on the supersedeas bond was denied.

Motion for additional security on the supersedeas bond.

Mr. H. B. Kelley for the motion.
Mr. J. A. Campbell against.

Opinion of the Court.

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

This motion is denied. It does not appear from the motion papers that the decree appealed from is collectible under ordinary execution. The fair inference from the statements in the papers is, that the suit was instituted to subject the lands in dispute to the payment of a debt, and that no personal decree for money can be given against the appellants. The controversy seems to be as to the rights of the appellee in the lands. The present bond is sufficient in amount to protect him against loss pending the suit from sales for taxes if he avails himself of the remedies by redemption and subrogation which the law affords. At any rate the circumstances of the parties do not appear to have changed in this particular since the security was taken originally.

CRANE IRON COMPANY *v.* HOAGLAND.

WURTS and Others *v.* SAME.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Decided October 23d, 1882.

Practice.

Motions to dismiss with which are united motions to affirm, to strike out certain assignments of error, and to advance, denied when, in the absence of a printed record, the assignment of errors in defendant's brief presents questions of which the court has jurisdiction.

The defendant moved to dismiss the writ of error, to affirm the decision below, to strike out assignments of error, and to advance the causes.

Mr. Theodore Little for the movers.
Mr. Shipman against.

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

These are writs of error to the Supreme Court of New Jersey, and the motions to dismiss are made because, as is

claimed, no federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the briefs. The assignment of errors has been printed in the brief for the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary we will presume they do. The motions to dismiss must therefore be overruled.

The questions involved are not of a character that we are inclined to consider on a motion to affirm, especially before the record is printed.

It will be time enough to consider the objections to the assignment of errors when the cases come on for hearing.

The motions to advance the cases cannot be granted upon the showing made.

Motions denied.

WAPLES *v.* HAYS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided November 6th, 1882.

Confiscation—Mortgage—Subrogation.

1. A mortgaged real estate in New Orleans to B. Proceedings being taken against it under the Confiscation Acts as the property of A, B intervened. The estate was condemned and sold to C, and the proceeds paid to B under decree of court. After the death of A, suit was brought on behalf of his heirs to recover possession of the property : *Held*, that C acquired the life estate of A; that the heirs of A were entitled to recover; and that neither the United States nor C was subrogated to the rights of B; also,
2. That under the practice of Louisiana, C could not, after going to trial on the petition, object that it was defective by reason of not setting forth the deed under which he claimed title.

The questions presented in this case arose on the following facts:

Argument for the Plaintiff in Error.

On the 7th of August, 1863, proceedings were begun in the District Court of Louisiana for the condemnation of three lots of ground in New Orleans seized under the act of July 17th, 1862, 12 Stat. 589, ch. 195, as the property of Harry T. Hays. The property when seized was encumbered by a mortgage from Hays to E. A. Bradford. On the 27th of November, 1863, Bradford appeared in the suit in response to the monition and filed a petition of intervention, in which, after setting up his mortgage, he asked to have his rights recognized as superior to the United States, and that the property confiscated might be sold and the proceeds applied to the payment of what was due to him. On the 23d of January, 1865, a sentence of condemnation was entered and a sale ordered, "the proceeds to be distributed according to law, the legal rights of the intervenors being reserved for further action hereafter." An order of sale was issued to the marshal on the same day the sentence of condemnation was granted. On the 23d of February a judgment was entered on the intervention of Bradford, in which it was "ordered, adjudged, and decreed that there be a judgment in his favor for the sum of six thousand dollars . . . . with special mortgage upon the three lots." After this judgment was entered, the marshal sold the property under the sentence of condemnation to Waples, the plaintiff in error, for six thousand dollars, and on the 27th of March, all the proceeds, except what were required for the costs, charges, and taxes, were paid over to Bradford, "in part satisfaction of his judgment and mortgage." The United States realized nothing from the condemnation. Harry T. Hays having died, the present suit was brought on behalf of his children to recover the possession of the property from Waples. Upon the trial, the foregoing facts appearing, the court charged the jury that the plaintiffs were entitled to a verdict. The verdict having been rendered in accordance with the charge and a judgment given thereon against Waples, he brought this writ of error.

Mr. Hornor for the plaintiff in error. The lien holder had the right to appear and intervene. *The Sallie Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 372, 375. Having intervened, he

was entitled to be paid out of the proceeds. *Alexander* v. *Jacob*, 5 Martin (La.) 632. On the other hand, the United States was bound to exhaust the property, in order to pay the mortgage. *United States* v. *Hawkins*, 4 Martin N. S. (La.) 317; *Thelussen* v. *Smith*, 2 Wheat. 396, 425; *Parsons* v. *Wells*, 17 Mass. 419, 425. Under these circumstances, the decree of condemnation was, in fact, a judgment of foreclosure, and left nothing in Hays. *Wallach* v. *Van Riswick*, 92 U. S. 202; *Pike* v. *Wassell*, 94 U. S. 711; *French* v. *Wade*, 102 U. S. 132. The ancestor having contingently alienated the land, the heirs cannot recover without first refunding the money. The pleadings preclude the defendants in error from setting up title.

Mr. Jonas and *Mr. Merrick* for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts as above, he said:

It was settled in *Bigelow* v. *Forest*, 9 Wall. 339, 350, and *Wallach* v. *Van Riswick*, 92 U. S. 202, that ordinarily the estate acquired by a purchaser of real property condemned and sold under the confiscation act of July 17th, 1862, terminates with the life of the person for whose act it was seized. The only question in the present case is whether Waples, the purchaser, occupies a different position because of what was done with reference to the Bradford mortgage. We think he does not. The sale was made on the sentence of condemnation alone. The only suit ever begun was that by the United States to secure a condemnation under the law. Bradford intervened for the protection of his interest in what was to be condemned. He could not in that suit foreclose his mortgage on the property. All he could get and all he sought to get was payment out of the proceeds of any sale ordered in consequence of the condemnation. His mortgage covered the fee, but the suit in which he intervened was in its legal effect only to subject the property for the life of the mortgagor. He was interested as well in what was to be condemned as in what remained after the condemnation was exhausted. As his lien was not condemned, his rights under it would have been superior to the title acquired by Waples but for his application

to be paid from the proceeds. Having made his application and got the proceeds, the interest in the land bought by Waples was relieved from his lien, but in no other respect was it enlarged. The only effect of the intervention was to give Waples the title to his tenancy for the life of Hays free of the lien of the mortgage. Whether Bradford can proceed against the property in the hands of the heirs for the recovery of the balance that remained due to him after the application of the proceeds of this sale, is a question we need not consider.

Neither are the United States or Waples subrogated to the rights of Bradford under this mortgage. To the extent of the proceeds actually received by Bradford his debt has been *paid* out of the mortgaged property. He got what he did because of the lien given him by Hays on the fee before the cause of forfeiture arose. This lien, it was adjudged in the condemnation suit, could not be condemned under the seizure that had been made, and so to secure to the purchaser a title to the property for the life of Hays the proceeds of the sale were applied to the extinguishment of the encumbrance that would otherwise have rested upon that estate for life. In this way Waples got all the title the United States undertook to convey; that is to say, an unencumbered right to the use and enjoyment of the property during the life of Hays. It is true that the United States realized no money from the sale for its own use, but that does not alter the rights of Waples. He bought the property for the life of Hays, and that was all he bought. His position was that of a tenant for the life of another. The death of Hays terminated his tenancy.

On the trial the plaintiffs offered in evidence the deed under which Hays took his title. This was objected to because it had not been set forth in the petition, and was not attached thereto, and the lots were not described in the petition as required by sec. 174 of the Code of Practice of Louisiana. This objection was properly overruled. It is well established in Louisiana that if the defendant goes to trial on a petition defective in this particular he waives the objection. *Smith* v. *Blunt*, 2 La. 133; *Maillon* v. *Boyce*, 14 La. Ann. 621.

The judgment is affirmed.

BIGELOW *v.* ARMES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided November 6th, 1882.

Equity—Specific Performance—Statute of Frauds.

A proposed in writing to B to exchange A's real estate for B's real estate with a cash bonus. B accepted in writing. A complied in full, B in part only. Suit was brought for specific performance of the remainder.

Held, That it was unnecessary to determine whether the memorandum was sufficient under the Statute of Frauds, as it was the duty of the court below on the facts disclosed, and in view of the full performance by A, to decree performance by B.

Bill in equity to enforce specific performance of an agreement to convey real estate. The following were the facts as stated by the court:

On the 22d of November, 1876, the parties to this suit made and signed the following memorandum in pencil:

"*November* 22d, 1876.

"I propose to give my house on 8th street, subject to $2,000, for one house on Delaware avenue, and one farm in Fairfax Co., Va., and $525 cash. "GEO. ARMES.

"Accepted: OTIS BIGELOW."

Both parties fully understood at the time that the property referred to was that described in the bill, and that an exchange was to be made on the terms stated in the memorandum. As the wife of Bigelow was absent, the contract entered into could not be consummated by an interchange of deeds until her return, which was not expected until some time in January following. Armes, however, was in need of the money which was to be paid him, or a part of it, and so on the 24th of November, two days after the memorandum was signed, he and his wife executed a deed, in accordance with the terms of the contract, conveying the house and lot on Eighth street to Bigelow. This deed Armes took to Bigelow and asked for $400 on account of the money he was to have, offering to deliver the deed if the payment was made. Bigelow accepted the offer,

paid the money, and took the deed, agreeing, however, on the request of Armes, not to have the deed recorded until the contract was otherwise performed. Nothwithstanding this agreement he did have it recorded at once. At the same time with the delivery of the deed Armes put Bigelow in possession of the property, and thus fully executed the contract on his part. Bigelow afterwards paid Armes $105 more on the cash payment he was to make, and delivered him the possession of the property on Delaware avenue. All this was done in part performance of the contract on his part, and it was so understood by both parties. Armes, after he got possession of the Delaware avenue property, made some repairs on the house with the knowledge of Bigelow. Afterwards Bigelow refused to carry out the contract on his part by delivering deeds for the Delaware avenue and Virginia property, and having the memorandum which had been signed in his possession, undertook to destroy it by tearing it in pieces and throwing the pieces into a waste-basket. The court below entered a decree for the conveyance to Bigelow, from which appeal was taken.

Mr. S. S. Henkle for appellant. The memorandum was defective. It was impossible to deduce from it essential parts of the contract. The defects could not be supplied by parol proof, and the contract was therefore void under the Statute of Frauds: *First Baptist Church* v. *Bigelow*, 16 Wend. 28; *Bailey et al.* v. *Ogden*, 3 Johns. 399, 419; *Hinde* v. *Whitehouse*, 7 East, 570; *Morton* v. *Deane*, 13 Met. 385; *Brodie* v. *St. Paul*, 1 Vesey, Jr. 326; Blackburn on Sales, 49–56; *Davis* v. *Shields*, 26 Wend. 341; *Wright* v. *Weeks*, 25 N. Y. 153. Brown on Statute of Frauds, 402, § 385; *Ferguson* v. *Staver*, 33 Penn. St. 411; *Soles* v. *Hickmann*, 20 Penn. St. 180; *Grafton* v. *Cummings*, 99 U. S. 100; *Barry* v. *Coombe*, 1 Pet. 640; *Williams* v. *Morris*, 95 U. S. 444. Part performance will not justify the introduction of parol proof to support a defective writing. *Brydell* v. *Drummond*, 11 East, 142; *Clynan* v. *Cooke*, 1 Schoale, Lefroy, 22. It is not necessary to plead the Statute of Frauds. *Artz* v. *Grove*, 21 Md. 456, 470; *Winn* v. *Albert et al.*, 2 Md. Ch. 169.

Mr. C. H. Armes for the appellee.

Opinion of the Court.

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

After stating the facts as above, he continued:

Upon these facts, in our opinion, it was the duty of the court below to enter the decree it did requiring a completion of the performance of the contract by Bigelow. Whether, in view of the requirements of the Statute of Frauds, the memorandum signed by both parties was of itself sufficient to support the bill, is a question we do not think it important to discuss, because, if the memorandum is not enough, the terms of the contract have been otherwise clearly established by the evidence, and there has been full performance by Armes and substantial part performance by Bigelow.

The decree is affirmed.

GRAY *v.* HOWE and Another.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Decided November 13th, 1882.

Practice.

Where the supreme court of a Territory on appeal reverses the judgment of a district court and sets aside findings of fact, and makes no new statement of facts in the nature of a special verdict, the judgment of the supreme court of the Territory must be affirmed on appeal.

Mr. R. N. Baskin for the appellant.

Mr. Z. Snow, for the appellees.

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

This is an appeal from the judgment of the Supreme Court of Utah, in a special statutory proceeding to settle a controversy between the parties as to their respective rights in the E. ½ of lot 3, block 104, plat A, Salt Lake City, under the trust created through the purchase, by the mayor of the city, from the United States, of the lands on which the city stands, in accordance with the provisions of the Town-site Act of March 2d, 1867, ch. 177, 14 Stat. 541. Gray, the appellant, claims the whole of the property. The appellees contest his title and

set up occupancy by themselves at the time of the purchase. The proceeding was begun in the probate court, where, after a hearing, the facts were found and a judgment entered in favor of the appellees, each for the part of the lot claimed by them respectively. Gray thereupon appealed to the district court of the Territory. This, it was held, in *Cannon* v. *Pratt*, 99 U. S. 619, might be done. Afterwards the district court heard the cause and found the facts and stated its conclusions of law thereon, as required by the Practice Act of the Territory. After the findings and conclusions were filed in the district court, the present appellees excepted, on the ground that the facts as found were contrary to the evidence, and also because the court refused to find facts as requested by them. A motion was also made to set aside the findings and grant a new trial. This motion was overruled and judgment entered in favor of the claim of Gray. Thereupon the present appellees appealed to the supreme court, both from the refusal to grant a new trial and from the judgment. This was allowable under the Practice Act of the Territory. The supreme court heard the case, reversed the judgment of the district court, and remanded the cause, with instructions to enter a judgment rejecting the claim of Gray and allowing the claims of the appellees. From this judgment of the supreme court Gray took the present appeal. The supreme court made no "statement of the facts of the case in the nature of a special verdict," as required by the act of April 7th, 1874, ch. 80, 1 Sup. Rev. St. 13; and as that court must have set aside the findings of the district court in order to render the judgment it gave, there is nothing here which we can re-examine. Since the act of 1878, *supra*, the evidence at large is not to be transmitted here from the courts of the Territories, but in lieu of the evidence "a statement of the facts of the case in the nature of a special verdict." In *Stringfellow* v. *Cain*, 99 U. S. 610, it was held if the findings of the district court were sustained and a general judgment of affirmance rendered in the supreme court, the findings of the district court, thus approved by the supreme court, would furnish a sufficient statement of facts for the purposes of an appeal to this court. So, too, if there is a reversal and another judgment rendered

on the facts as found. But here the only exceptions to the findings below were that they were contrary to the evidence, and a judgment has been rendered by the supreme court in every way inconsistent with those findings. The necessary inference, therefore, is that the findings sent up to that court were set aside and the case disposed of on the evidence. This, it was also said in *Stringfellow* v. *Cain*, might be done in this class of cases.

As the only exceptions taken in the rulings of the district court were by Howe, in whose favor judgment has finally been rendered in the supreme court, they need not be considered here.

It follows that the judgment of the Supreme Court of the Territory must be affirmed.

So ordered.

FEIBELMAN *v.* PACKARD and Others.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided November 13th, 1882.

Error—Practice.

A writ of error sued out by one of two or more joint defendants without a summons and severance or equivalent proceeding, must be dismissed.

Mr. J. Ray, and *Mr. R. G. Colb* for plaintiff.
Mr. Beckwith for defendant.

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

Moses Feibelman and George Voelker, as partners, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the District of Louisiana. A judgment was rendered against them. Their interests in the suit were joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and

severance or other equivalent proceeding. It follows that the writ must be dismissed, on the authority of *Williams* v. *Bank of the United States*, 11 Wheat. 414; *Masterson* v. *Herndon*, 10 Wall. 416; *Simpson* v. *Greeley*, 20 Wall. 152; and it is

So ordered.

WOOLF *v.* HAMILTON et al.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Decided November 10th, 1882.

Error—Practice—Statutes.

A case not tried in a territorial court by a jury cannot be brought for review by a writ of error.

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

This writ of error is dismissed on the authority of *Hecht* v. *Boughton*, 105 U. S. 235. The case was not tried in the court below by a jury. This, under the act of April 7th, 1874, c. 80, 18 Stat. 27, made it necessary to bring the judgment here for review by appeal and not by writ of error.

Dismissed.

CITY OF NEW ORLEANS *v.* NEW ORLEANS, MOBILE & TEXAS RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Argued November 14th and 15th, 1882.—Decided November 20th, 1882.

The board of liquidation of the city debt of New Orleans, a corporate body created by the legislature of Louisiana, created pending the appeal of this suit, appeared and claimed authority over the subject-matter of the controversy. The court refused to enter judgment according to the terms of stipulation made with the attorney of the city of New Orleans by authority of the city council, without first giving the board opportunity to be heard.

Motion to dismiss the appeal.

Mr. J. L. Cadwalder and *Mr. Bayne* in support of the motion.

Mr. H. O. Miller and *Mr. Richard T. Merrick* against it.

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

This case was continued at the request of the parties on the 10th of October. The appellee now presents a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans, pursuant to the terms of a compromise of the matter in dispute made with the city council, and asks to have the appropriate order entered upon that stipulation. The board of liquidation of the city debt of New Orleans comes to resist the entry of any such order, on the gronnd that, during the pendency of the appeal in this court, authority over the subject-matter of the controversy has been transferred from the city council to that board, and that the compromise which has been effected is not binding. The board also asks permission to prosecute the appeal in the name of the city.

It is conceded that the city council made the compromise which is claimed, and that the appellee is entitled to a dismissal of the appeal if the council had authority to do what it has done and the compromise was fairly made. The dispute as to the authority of the council presents questions too important to be settled summarily on these motions.

It is, therefore, ordered that the cause and pending motions be continued until the next term, and that the appeal be then dismissed, in accordance with the stipulation on file, unless the board of liquidation begin and prosecute, without unnecessary delay, in some court of competent jurisdiction, an appropriate proceeding to set aside the compromise which has been made with the city council.*

* The board of liquidation appeared, and on the 12th of November, 1883, after argument, the decree below was affirmed. See 109 U. S. 221.

MAYER and Another *v.* WALSH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Decided December 18th, 1882.

Practice.

In the absence of a printed record the court will not grant a motion to dismiss when the motion papers disclose equitable reasons why it should not be granted.

Motion to dismiss.

Mr. C. W. Hornor for appellants.
Mr. P. Phillips and *Mr. W. Hallett Phillips* for appellee.

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

This is a cross-appeal and the record has not been printed. As the case is here on the original appeal by the present appellee, we are not inclined to grant this motion in the absence of the printed record. It appears from the motion papers that the present appellant pleaded prescription, and we infer that this plea was not sustained. By his other defences he defeated the claim in part. To review the decree so far as it is affected by these defences, the present appellee appealed. If, on that appeal, these defences are overruled, it may be important to the present appellant to insist on his defence of prescription against a claim that will then amount to more than five thousand dollars. Had not the other side appealed, the present appellant could not, because the decree against him is less than five thousand dollars. Under the circumstances, it may be that this appeal was well taken. Without, however, deciding that question, we postpone the further consideration of the motion until the hearing on the merits.

CHICAGO & ALTON RAILROAD COMPANY v. WIGGINS FERRY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Decided January 29th, 1883.

Constitutional Law—Removal of Causes—Practice.

1. When the courts of one State give to the statutes of another State a different construction from that given by the courts of the State in which the laws were enacted, no case arises under the removal act for the transfer of the cause to the federal courts. The remedy, if any, is by writ of error after final judgment.
2. A judgment of a State court set up as an estoppel cannot be corrected in a collateral proceeding in a court of the United States. Until reversed or brought for review in the manner provided by law, it is entitled to the same effect in the courts of the United States as in the courts of the State.

Appeal from an order remanding the cause to the State court.

This is a suit begun in a State court of Missouri by the Wiggins Ferry Company, an Illinois corporation, against the Chicago & Alton Railroad Company, another Illinois corporation, to recover damages for the breach of a contract by which, as is alleged, the railroad company bound itself not to employ any other means than the ferry company's ferry for the transportation of passengers and freight, coming and going on its railroad, across the Mississippi at St. Louis. The railroad company defends on the ground, among others, that if the agreement actually entered into by the parties contains by construction any such provision as is claimed, it is in violation of the laws of Illinois, and in excess of the corporate powers of the company as an Illinois corporation. To avoid the effect of this defence the ferry company sets up, by way of estoppel, a judgment in another suit in a State court of Missouri, between the same parties, where precisely the same question was raised on the same contract, and in which it was decided that the railroad company did have the corporate authority under the laws of Illinois to make the contract. As soon as the pleadings

in the case developed this issue, the railroad company petitioned for the removal of the suit to the Circuit Court of the United States for the Eastern District of Missouri, the proper district, on the ground that "full faith and credit has not been given to the public acts of the State of Illinois by the Supreme Court of the State of Missouri in the adjudication aforesaid, and that by reason of the facts herein set forth, and of such adjudication, and the pleading thereof as an estoppel, in the manner set forth in the plaintiff's amended petition, this suit is one arising under the Constitution and laws of the United States." The facts set forth in the petition were the charter and laws of Illinois, which governed the powers of the railroad company as an Illinois corporation.

The State court, on the filing of the petition for removal, accompanied by the necessary bond, stopped proceedings, but the circuit court, when the record was entered there, remanded the cause. From an order to that effect this writ of error has been taken, and is now for hearing on the merits under the operation of Rule 32, adopted at the last term, with a view to facilitating the final determination of questions of removal under the act of March 3d, 1875, c. 137, 18 Stat. 470.

Mr. C. H. Krum for the plaintiff in error. 1. This motion is not within the rules. To grant the motion would decide the whole legal merits of the case, which the court has said it will not do on such a motion. *Hecker* v. *Fowler*, 1 Black, 95. 2. The record presents a case which arises under the Constitution of the United States. This court has held that "a case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. . . That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but where a question, to which the judicial power of the Union is extended by the Constitution, forms an

ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Railroad Company* v. *Mississippi*, 102 U. S. 135, 141. The plaintiff in error having undertaken to limit itself to one mode of crossing the river at St. Louis, whatever might be the requirements of railroad transportation and whatever the instructions or the interests of shippers and passengers, brought itself at once within the prohibition of the policy of the State, as expressed not only in the statute, but in the declarations of its court of last resort. *Chicago, &c., Railroad Company* v. *People*, 56 Ill. at 378, 379; *Peoria & Rock Island Railroad Company* v. *Coal Company*, 68 id. 489; *Thomas* v. *Railroad Company*, 101 U. S. 71. Such being the laws and policy of the State of Illinois, the plaintiff in error invokes the protection of the Constitution, which requires "full faith and credit" to be given in each State to the public acts of every other State. It maintains that the same effect must be given to its charter and the laws of Illinois in Missouri as is given to them in the State of Illinois. The protection of the Constitution cannot be had, because of the estoppel pleaded by the plaintiff in error. From the time this estoppel was pleaded a federal question necessarily became involved.

Mr. C. Beckwith for plaintiff in error. The more important question relates to the right of removal, claimed under the act of March 3d, 1875. In *Railroad Company* v. *Mississippi*, it was held that a suit might arise under the Constitution when the defendant invoked the aid of any of its provisions as a defence. That was done below by the plaintiff in error as defendant. The plaintiff in error was incorporated by the State of Illinois. The interpretation of the acts of incorporation by the court of Illinois is as much a part of them as if incorporated in the acts themselves. The plaintiff in error insists upon its right to have full faith and credit given in the State of Missouri, to these public acts of the State of Illinois, as interpreted by its courts. It is for a federal tribunal to determine what such public acts are, and the interpretation thereof. *Jefferson*

Branch Bank v. *Skelly*, 1 Black, 436. Counsel for defendant admit the power of the federal courts to correct errors in this respect. The power of the federal government in this respect is coextensive with the provisions of the Constitution. In *Railroad Company* v. *Mississippi*, 102 U. S. 135, the removal of the cause from the State court was sustained on the ground that if the decision should be in favor of the State on the first ground of defence, the court would be obliged to meet and determine the operation of an act of Congress. The case is in some respects like the case under consideration. It appears from the records that the plaintiff in error insisted that the construction given to the contract sued on by the defendant in error was an erroneous one, and that, under its true legal construction, the same had not been violated. It further appears that the plaintiff in error also insisted that if it should be held that the construction sought to be placed upon the contract by the defendant in error was its proper and legal one, that such a contract was not authorized by the public acts of the State of Illinois, as interpreted by its courts, and was forbidden by such acts, so interpreted. These allegations would have been sufficient to have brought the cases under consideration within the established rule. *Railroad Company* v. *Mississippi*, 102 U. S. 135. It being conceded that the language of the Constitution of the United States authorizing the passage of a statute for the removal of a cause from a State court to a federal court at any stage of its progress, whenever any question is raised requiring the judgment of the judicial power of the Union as to the true meaning of such Constitution, or as to its proper enforcement, although other questions of fact or of law may be involved, it necessarily follows that such other questions of fact or of law are of a secondary nature. By these well established rules, it became the duty of the Circuit Court of the United States for the Eastern District of Missouri to ascertain and judicially determine what the public acts of the State of Illinois were, so far as they related to the contract sued upon, and to declare the operation and effect of such laws upon the contract. And it further became the duty of such court to give force and effect to its determination

as to the true meaning of such public acts, as interpreted by the courts of the State of Illinois.

Mr. S. T. Glover and *Mr. J. R. Shepley* for the defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language cited above, he continued:

In our opinion this is not a suit arising under the Constitution or laws of the United States, within the meaning of that term as used in the removal act. If the courts of Missouri gave a wrong construction to the laws of Illinois in the judgment set up as an estoppel, that error cannot be corrected by means of a transfer of this suit from the State court to the Circuit Court of the United States. So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether as a judgment it operates as an estoppel does not depend on the Constitution or laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the Constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri. The public acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court, in the judgment which has been rendered, that may entitle the railroad company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made.

Another ground taken in support of the jurisdiction of the

circuit court upon the removal is, if we understand the argument of the counsel for the plaintiff in error, that the laws of Illinois, rightly construed, prohibit such a contract as it is alleged has been made, and as the Missouri court decided the other way when the former judgment was rendered, a transfer may be made so as to avoid a like error in this suit. The question thus presented is not what faith and credit must be given the public acts of Illinois in Missouri, but what the public acts of Illinois, when rightly interpreted, mean. That does not depend on the Constitution or laws of the United States, but on the Constitution and laws of the State alone.

It is not even alleged in the petition for removal, or claimed in argument, that the courts of Illinois have as yet actually given the statutes in question any such construction as it is contended they should have. The most that can be insisted upon from all the allegations is, that on account of what has been done in other cases, the railroad company expects, when an opportunity occurs, the courts of Illinois will decide that the laws of that State gave the company no power to bind itself in the way the Missouri court has determined it did. So that the position of the railroad company on this application seems to be, that, while the questions arising on the effect of the public acts are apparently open in the courts of Illinois, and nothing has been done which, even on the principles of comity, can bind the courts of Missouri, a suit pending in a Missouri court may be removed to a court of the United States, because the Missouri court, on a former occasion, construed a public law of Illinois, which is involved, differently from what it should have done. To allow a removal upon such grounds would be to say that a suit arises under the Constitution and laws of the United States whenever the public acts of one State are to be construed in an action pending in a court of another State. Clearly this is not so. Even if it be true, as is contended by the counsel for the plaintiff in error, that a suit can be removed as soon as a federal question becomes involved, it is sufficient to say that in this case such a question has not arisen. Until the Missouri court fails, in this suit, to give full faith and credit to the public acts of Illinois, no case has arisen to which the jurisdic-

tion of the courts of the United States can attach, and then only for the correction of the errors that have been committed. It is not enough that in other cases decisions have been made which, if followed in this, will be erroneous. Until the error has actually been committed in this case, a federal question has not become involved. The presumption in all cases is that the courts of the States will do what the Constitution and laws of the United States require, and removals cannot be effected to the courts of the United States because of fear that they will not.

The order remanding the cause is affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD CO. *v.* SOUTHERN EXPRESS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Decided January 29th, 1883.

Appeal—Equity—Final Decree—Supplemental Order.

1. A decree is final, for the purposes of appeal, when it terminates the litigation between the parties on the merits, and leaves nothing to be done but enforce by execution what has been determined.
2. Matters relating to the administration of the cause, and accounts to be settled in accordance with the principles fixed by the decree are incidents of the main litigation which may be settled by supplemental order after final decree.

Motion to dismiss an appeal. The facts necessary for understanding the merits of the motion are stated thus by the court.

The Southern Express Company, an express carrier, filed its bill in equity against the St. Louis, Iron Mountain & Southern Railway Company, in the Circuit Court for the Eastern District of Missouri, to enjoin the railway company from interfering with or disturbing the express company in the enjoyment of the facilities it then had for the transaction of its express business over the railway company's railroad, so long as the

express company conformed to the regulations of the railway company and paid all lawful charges for the business. A preliminary injunction was asked for, and, in this connection, the bill prayed that if any dispute or disagreement should arise between the parties during the pendency of the suit, upon the question of compensation to be paid for transportation, the express company might be permitted to bring the same before the court for decision by way of an interlocutory application. On the filing of the bill the preliminary injunction was granted, which was afterwards modified in some particulars affecting the compensation to be paid and the mode of doing the business.

On the 25th of March, 1882, the court entered a decree containing the following provisions:

"V.—That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

"X.—Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

"XI.—That the defendant, its officers, agents, servants, and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the

transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account or for any other express or other corporation, or for private individuals, reserving to either party a right, at any time hereafter, to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

"It is further ordered, adjudged, and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

On the 29th of March, the railway company prayed an appeal, which was allowed, and on the 15th of May perfected by the approval of the necessary bond. During the same term of the court, but after the appeal bond was accepted and approved, the express company moved the court to grant it the benefit of a reference authorized by sections V. and X. of the decree, and a master was appointed to inquire into and report on the matters alleged.

The cause having been duly docketed here, the express company moved to dismiss the appeal, on the ground that the decree appealed from was not a final decree.

Mr. John F. Dillon and *Mr. Wager Swayne* filed a brief for the railroad company, citing *Ray* v. *Law*, 1 Cranch C. C. 349;

Forgay v. *Conrad*, 6 How. 201; *Thomson* v. *Dean*, 7 Wall. 342; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Stovall* v. *Banks*, 10 Wall. 583, 587; 2 Daniel's Chancery Practice, 641; *Mills* v. *Hoag*, 7 Paige, 19.

Mr. Broadhead and *Mr. Hœussler* filed a brief for the same, citing in addition *Barnard* v. *Gibson*, 7 How. 650, 657; *Whiting* v. *Bank of the United States*, 13 Pet. 6, 15; *Railroad Company* v. *Swasey*, 23 Wall. 405; *Green* v. *Fisk*, 103 U. S. 518; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Bronson* v. *Railroad Company*, 2 Black, 524, 531.

Mr. Glover, *Mr. Shepley*, *Mr. S. M. Breckenridge*, *Mr. Clarence A. Seward*, and *Mr. F. E. Whitfield* filed briefs for the motion, contending, I. The appeal is a matter of statutory right, and in equity lies from final decrees only, Rev. St. § 692, and the court can proceed only as the law prescribes. *Barry* v. *Mercein*, 5 Howard, 103, 119; *Durousseau* v. *United States*, 6 Cranch, 307, 314; *United States* v. *Curry*, 6 How. 106, 113; *Ex parte Vallandingham*, 1 Wall. 243, 251; *United States* v. *Young*, 94 U. S. 258. II. The motion may properly be made at this time. *Clark* v. *Hancock*, 94 U. S. 493; *Ex parte Russell*, 13 Wall. 664, 671; *National Bank* v. *Insurance Company*, 100 U. S. 43. III. The motion is based upon the record, and in part upon certificates of the clerk of the court below, which show that proceedings have been taken in the court below since the decree appealed from. The court should receive these in support of the motion. *Hudgins* v. *Kemp*, 18 How. 530, 534; *Ex parte Bradstreet*, 7 Pet. 634; *Rush* v. *Parker*, 5 Cranch, 287; *Richmond* v. *Milwaukee*, 21 How. 391; *The Grace Girdler*, 6 Wall. 441; *Cook* v. *Moffatt*, 5 How. 295; *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Wood Paper Company* v. *Heft*, 8 Wall. 333; *United States* v. *The Peggy*, 1 Cranch, 103; *Portland Company* v. *United States*, 15 Wall. 1; *Selma, &c., Railroad Company* v. *Bank*, 94 U. S. 253; *United States* v. *Ayres*, 9 Wall. 608; *United States* v. *Crussell*, 12 Wall. 175; *United States* v. *Young*, 94 U. S. 258. IV. They show that the decree appealed from was not final. The pleadings presented two issues, 1st. Whether the railways were

obliged to do the transportation; 2d. What was a reasonable compensation for it. The first only was decided by the decree appealed from. The second was also a question of law. *Union Company* v. *United States*, 104 U. S. 667. What is and what is not a final judgment is discussed in *Young* v. *Grundy*, 6 Cranch, 51; *Houston* v. *Moore*, 3 Wheat. 433; *Gibbons* v. *Ogden*, 6 id. 448; *The Palmyra*, 10 id. 502; *The Santa Maria*, 10 id. 431, 444; *Chace* v. *Vasquez*, 11 id. 429; *Canter* v. *American Insurance Company*, 3 Peters, 307; *Brown* v. *Swan*, 9 id. 1; *Young* v. *Smith*, 15 id. 287; *Forgay* v. *Conrad*, 6 How. 201; *Perkins* v. *Fourniquet*, 6 id. 206; *Pulliam* v. *Christian*, 6 id. 209; *Barnard* v. *Gibson*, 7 id. 650; *United States* v. *Girault*, 11 id. 22, 32; *Fourniquet* v. *Perkins*, 16 id. 82; *Craighead* v. *Wilson*, 18 id. 199; *Beebe* v. *Russell*, 19 id. 283; *Farrelly* v. *Woodfolk*, 19 id. 288; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Thomson* v. *Dear*, 7 id. 342; *Railroad Company* v. *Swasey*, 23 id. 405. These cases show that the policy of the law and the decisions of the court are alike adverse to fragmentary appeals. The practice in patent cases may be referred to. V. The decree appealed from was pronounced at the March term of court in 1882. In June, 1882, at the same term, a further decree was made modifying the decree appealed from. This being done at the same term of court, was done while the court had control of the case, *Railroad Company* v. *Bradleys*, 7 Wall. 575; *Bassett* v. *United States*, 9 Wall. 38; *Ex parte Lange*, 18 Wall. 163; *Bronson* v. *Shulten*, 104 U. S. 410, 415, and operated to reopen the previous decree, and let in proof material to the issues, and requiring further action of the court.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language above cited, he continued:

As we have had occasion to say at the present term, in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and *Grant* v. *Phœnix Insurance Company*, 106 U. S. 429, a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been

determined. Under this rule we think the present decree is final. The suit was brought to compel the railway company to do the express company's business. The controversy was about the right of the express company to require this to be done on the payment of lawful charges. It was no part of the object of the suit to have it definitely settled what these charges should be for all time. The point was to establish the liability of the railway company to carry. The decree requires the carriage, and fixes the compensation to be paid. It adjudges costs against the railway company, and awards execution. Nothing more remains to be done by the court to dispose of the case. Inasmuch as the rates properly chargeable for transportation vary according to circumstances, and what was reasonable when the decree was rendered may not always continue to be so, leave is given the parties to apply for a modification of what has been ordered in that particular if they, or either of them, shall desire to do so. In effect the decree requires the railway company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable.

The controversy which the express company has had referred to the master, about the compensation to be paid for the transportation during the pendency of the suit, does not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order are of the same general character as those of a receiver who holds property awaiting the final disposition of a suit. They are incidents of the main litigation, but not necessarily a part of it. The supplemental order, made after the decree, relates only to the settlement of the accounts which accrued pending the suit.

The motion to dismiss is denied.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* DINSMORE, President.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Decided January 29th, 1883.

Appeal—Certificate of Transcript—Certiorari—Final Decree—Jurisdiction.

1. On the merits of the motion there is no essential difference between this case and the case of the *St. Louis, Iron Mountain and Southern R. R. Co.* v. *The Southern Express Company*, just decided. Reference to the master to take and state an account between the parties as to the compensation during the litigation and up to its final termination relates to matters of administration not involving the merits.
2. A certificate that the transcript is a "true, full and perfect copy from the record of all the proceedings in the suit" is sufficient to give jurisdiction.
3. If the certificate is not correct, the remedy is by certiorari.
4. Where on the face of the decree it appears that a case was disposed of on demurrer to the bill, the evidence on file is not necessary for the hearing of the bill.
5. When a record has not been printed, and parties do not agree as to its contents, certiorari may be granted, reserving all questions till return.

Motion by appellees to dismiss the appeal; and, in case of denial of this motion, for *certiorari* to bring up record and proofs from below.

Mr. Clarence A. Seward, *Mr. C. W. Blair* and *Mr. F. E. Whitfield* for the motion.

Mr. A. T. Britton, *Mr. J. H. McGowan*, *Mr. Thomas J. Portis*, *Mr. A. L. Williams* and *Mr. A. F. Dillon* against it.

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

This motion to dismiss is made because, as is alleged, 1, the decree appealed from is not a final decree, and, 2, the transcript is not properly certified.

1. As to the decree.

The case is in some particulars different from that of the *St. Louis, Iron Mountain & Southern Railway Company* v. *The Southern Express Company*, just decided, but in our opinion the differences do not materially affect the present question.

The decree in this case, as in that, requires the railway company to carry for the express company, and fixes the rate of compensation, "until the further order or decree of this [circuit] court." In this case, the reference to the master "to take and state an account between the parties as to the compensation that should be and has been paid during the litigation, and up to the final termination thereof," was entered before or at the time of the decree from which the appeal was taken. Still, in this, as in that, the reference is in respect to matters affecting the administration of the cause, and does not involve the merits. The reservation of power to change the rates operates only on the future, and was evidently intended for the purpose of enabling the court to act in case a change should be required. As the decree stands, the express company can require the railway company to carry at the rate which has been fixed.

2. As to the certificate.

The clerk certifies the transcript sent up to be "a true, full and perfect copy from the record of all the proceedings in the suit." Certainly this is sufficient for all the purposes of jurisdiction. If, in point of fact, the certificate is not true, the remedy is by *certiorari*, to supply deficiencies, and not by motion to dismiss.

To meet this view of the case the appellee suggests diminution and asks for a *certiorari*, to bring up "the evidence taken before . . . William H. Rossington, as examiner, . . . remaining on file in the office of the clerk, constituting exhibits, depositions, and proofs used on the argument of the cause in the . . . circuit court."

Upon the face of the decree it appears that the case was disposed of on demurrer to the bill. If that be the truth, the evidence on file is not necessary for the hearing of the appeal, but as the record, which is here, has not been printed in full, and the parties do not agree in their statements as to what it contains, we will grant the *certiorari* asked for, reserving all further questions until the return is made.

STEBBINS *v.* DUNCAN and Others.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Deed—Evidence—Record of Deeds.

1. Suggestion of the death of a plaintiff in the record, and an order to make his devisees parties, is *prima facie* evidence of his death for the purposes of the trial.
2. The existence of a deed, and its destruction by fire being proven, it is competent for the party offering it to prove its contents by a witness who knows them.
3. It being shown that a paper produced is a copy of a lost deed (but without the official certificate), the copy is competent evidence.
4. The witnesses to a deed being dead, the execution of the deed is to be proven by proof of the handwriting of the subscribing witnesses.
5. When a deposition has been destroyed by fire, and a copy, admitted to be such, is offered in evidence, it is not sufficient to object that it has not been shown that the witness is dead, or is incompetent to testify, or that the deposition cannot be retaken. It should be also objected that the witness does not live in another State, or more than one hundred miles distant from the place of trial, in order to lay ground for excluding the copy.
6. In error the court can consider only the objections specifically taken at the trial.
7. The execution of the deed being proven according to law, slight proof of the identity of the grantor is sufficient. In tracing titles, identity of names is *prima facie* proof of identity of persons.
8. It is a general rule in the State of Illinois that when a person has executed two deeds for the same land, the first deed recorded will hold the title.
9. The deed under which the plaintiff claimed was not acknowledged and certified as required by the laws of Illinois to admit it to record. It was, however, recorded. A duly certified copy of this record, and a certified copy of the original memorandum of record were offered, and a witness testified that the deed was a copy of the original deed: *Held*, that under the decisions of the courts in Illinois, this was proof that such deed and memorandum were of record, so as to give notice to subsequent purchasers.

This was an action for the possession of real estate in Illinois, involving title. The plaintiffs claimed under a sale on execution in a judgment recovered by the United States against one Duncan. Duncan's title was derived from a deed from one Dunbar to one Prout, dated January 6th, 1818, and

Argument for Plaintiff in Error.

recorded October 29th, 1838. The defendants claimed under a deed from Dunbar to one Frank, also dated January 6th, 1818, and entered for record June 18th, 1870.

The suit was begun in the name of one Morris, who died pending it. His death was suggested on the record, and at the trial proof of the probate of his will was offered as proof of his death. The first question was on the ruling of the sufficiency of the proof of this fact.

The original deed from Dunbar to Prout was witnessed by one Smallwood, who resided in Washington. Smallwood being dead, the execution of the deed was proved by depositions of persons residing in Washington to the genuineness of Smallwood's signature. The next question was as to the sufficiency of that proof without more complete proof than was offered of the identity of Dunbar.

The deposition and the original deed attached to it were destroyed in the great fire of Chicago. The next questions were as to the admissibility of a copy of the deposition, and as to its sufficiency to prove the signature of the witness.

The original deed was defectively acknowledged. It was, however, admitted to record. A certified copy of the record, and a certified copy of the original memorandum of the entry for record were produced, and a witness testified that the copy produced from the record was a copy of the original deed. The next question was as to the sufficiency of this proof to allow the deed to be read in evidence.

The last question discussed was as to the effect of the record of the deed to Prout upon the title derived through Frank.

The further details necessary for understanding the points decided are set forth in the opinion of the court. These are deemed to be sufficient for comprehending the points in the argument.

Mr. John W. Ross and *Mr. Geo. O. Ide* for plaintiff. I. The probate record was not competent evidence of Morris' death. *Life Insurance Company* v. *Tisdale*, 91 U. S. 238; *Carroll* v. *Carroll*, 60 N. Y. 121. The suggestion of the death did not relieve the plaintiffs below from the necessity of proving it. *Milliken* v

Marlin, 66 Ill. 13. II. The certified copy of the deed from Dunbar to Prout was improperly admitted in evidence. No proper foundation was laid for it. The deed was not properly acknowledged, and was not entitled to record. *Carpenter* v. *Dexter*, 8 Wall. 513; *Semple* v. *Miles*, 2 Scammon, 315; *Choteau* v. *Jones*, 11 Illinois, 300, 320; *Buckmaster* v. *Job*, 15 Ill. 328. And the clerk's certificate to the copy, not being authorized by law, was no evidence. III. The copies of the depositions were improperly admitted. No proof was offered showing that the witnesses were dead, nor any reason or excuse given why the witnesses could not be produced, or why their depositions had not been retaken. In the absence of such preliminary proof, it was incompetent to prove what the depositions contained. *Cook* v. *Stout*, 47 Illinois, 530, 532; *Aulger* v. *Smith*, 34 Illinois, 530; *Stout* v. *Cook*, 57 Illinois, 386; *Hutchins* v. *Corgan*, 59 Illinois, 70. IV. The testimony as to the taxes was improperly admitted. Tax receipts are subject to contradiction and explanation. *Elston* v. *Kennicott*, 52 Ill. 272. V. The evidence as to the deed from Dunbar to Prout did not entitle it to be admitted in evidence. Proof of the handwriting of the subscribing witness should have been accompanied by proof of the identity of the grantor. Phillips on Evidence, 490 to 505; 1 Greenleaf on Evidence, § 575; 1 Wharton on Evidence, § 701; *Wiley* v. *Bean*, 1 Gilman, 302; *Mariner* v. *Saunders*, 5 Gilman, 113. VI. The deed was not admissible as an ancient deed. *Jackson* v. *Blanshan*, 3 Johns. 292; *Smith* v. *Rankin*, 20 Ill. 14. No accompanying possession was shown. *Clarke* v. *Courtney*, 5 Peters, 319, 344; *Fell* v. *Young*, 63 Ill. 106. The certificate of the recorder to the copy of the record did not prove the deed and indorsement, or the fact that they were ancient. *Smith* v. *Rankin* (*sup.*); *Younge* v. *Guilbeau*, 3 Wall. 636; see also *Whitman* v. *Heneberry*, 73 Ill. 109. VII. The deed having been improperly acknowledged, the certified copy was incompetent to prove a recording. *Smith* v. *Rankin*, 20 Ill. 14. Frank's deed and Prout's deed bear the same date, and are to be presumed in law, in the absence of rebutting evidence, to have been made and delivered on the same

day. *Deininger* v. *McConnell*, 41 Ill. 227, 232; *Harden* v. *Osborne*, 60 Ill. 93; *Jayne* v. *Gregg*, 42 Ill. 413. The defendant below being in possession, and the Prout deed not having been properly recorded, the burden was on the plaintiffs below to show the priority of the Prout deed. The Frank deed has priority of record. VIII. The Prout deed lacked the indispensable certificate of magistracy. Hence its record was defective, and no constructive notice.

Mr. Thomas Dent for the defendants.

Mr. Justice Woods delivered the opinion of the court.

This was an action of ejectment, originally brought by William B. Morris, in the Circuit Court of the United States for the Northern District of Illinois, against Howard Stebbins, the plaintiff in error, for the recovery of a quarter section of land, originally situated in Madison County, Illinois, but when the suit was begun, situate in Stark County. Before the final trial of the cause, to wit, on January 22d, 1879, the death of the plaintiff was suggested, and the devisees named in the last will were made parties, as appears by the following entry upon the record of the court:

"Now come the parties by their attorneys, and Thomas Dent, Esq., the attorney of the plaintiff, suggests to the court the death of William B. Morris, and that Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge are the devisees of said deceased; and on the motion of the plaintiff's attorney, it is ordered by the court that said devisees, Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge, be made plaintiffs herein."

The defendant pleaded the general issue. The cause was tried by a jury, who returned a verdict for the plaintiffs, upon which judgment was rendered in their favor for the lands in controversy. To reverse that judgment, the defendant in the circuit court has brought the case here upon writ of error.

A bill of exceptions was taken upon the trial, from which the following statement of the case is made:

Disregarding the order in which the testimony was intro-

duced, and arranging it chronologically, the plaintiffs below, to prove title in themselves, offered the following evidence:

1. An exemplification of a patent from the United States to one John J. Dunbar for the lands in controversy.

2. A certified copy of a deed for the same lands from John J. Dunbar to William Prout, dated January 6th, 1818, said copy being certified to have been made February 3d, 1875.

3. A certified copy of a deed for the same lands from William Prout to Joseph Duncan, dated May 2d, 1834, and recorded in said county, October 29th, 1838.

4. Certified copy of a decree in chancery in the United States Circuit Court for the District of Illinois, dated June 9th, 1846, rendered in a cause wherein the United States were complainants, and the widow and heirs of Joseph Duncan defendants, and of the proceedings under said decree by which the premises in controversy in this suit were sold to the United States.

5. Certified copy of the deed to the United States under said decree for the same premises, made by William Thomas, commissioner, dated August 12th, 1846, and recorded January 17th, 1848.

6. Certified copy of a deed for the same premises, dated December 28th, 1847, and recorded June 5th, 1848, to William W. Corcoran, executed by R. H. Gillett, solicitor of the treasury, in behalf of the United States.

7. Certified copy of a deed for the same premises, dated December 20th, 1867, and recorded March 12th, 1868, from William W. Corcoran to William B. Morris.

8. Certified copy of the will of William B. Morris, and of the probate thereof, from which it appeared that Maria L. Duncan, Harriet B. Cooledge, and Helen L. Cooledge, the plaintiffs, were his residuary legatees.

To sustain the title, which the plaintiffs contended that they derived through these documents, they offered other evidence, which will be noticed hereafter, but they offered no evidence of the death of William B. Morris, the original plaintiff, since the certified copy of his will and of the probate thereof and the letters testamentary issued thereon.

Opinion of the Court.

The defendant, Stebbins, to show title in his lessor, offered in evidence the following title papers:

1. An exemplification of a patent by the United States to John J. Dunbar, dated January 6th, 1818, for the lands in controversy.

2. A certified copy from the recorder's office in Stark County, Illinois, in which county the land is situate, of a deed dated January 6th, 1818, from John J. Dunbar to John Frank, conveying said land in fee, and recorded in said county June 18th, 1870.

3. Other title deeds, by which the title passed from the heirs of John Frank to Benson S. Scott.

4. The stipulations of plaintiffs that Stebbins, the defendant, was in possession of the land in controversy at the commencement of the suit under said Benson S. Scott as his tenant only, and at no time under any other claim.

No exceptions were taken by the plaintiffs to the introduction of these title papers by the defendant.

The real contest in the case was between the title of the plaintiffs deduced through the deed of Dunbar to Prout, and their subsequent muniments of title put in evidence, and the title of defendant derived through the deed of Dunbar to Frank, and the subsequent conveyances put in evidence by him.

The defendant was in possession of the premises sued for. His evidence, which was not excepted to, gave him a *prima facie* title, and unless the plaintiffs showed a better title, they should not have recovered the lands in controversy. It is, therefore, only necessary to consider the title which the plaintiffs claim to have shown in themselves. The errors assigned all relate to the admission by the court below of the evidence offered by the plaintiffs to sustain their title, and the charge of the court to the jury upon the effect of that evidence. These assignments of error we shall now proceed to consider.

The court admitted as evidence tending to prove the death of William B. Morris, the original plaintiff, the duly certified copy of his will and of the probate thereof in the Probate Court of the County of Suffolk, in the State of Massachusetts,

and of the letters testamentary issued thereon, and the court charged the jury, in effect, that this evidence, uncontradicted, was sufficient to show the death of Morris. The admission of this evidence and the charge of the court thereon are assigned for error.

Whether the evidence objected to was or was not competent and sufficient to prove the death of Morris, it was clearly competent, the death of Morris being proved, to show title in the plaintiffs. The objection to its admissibility must, therefore, fall if there was other evidence to show *prima facie* the death of Morris. We think that the suggestion in the record of the death of Morris and the order of the court making his devisees parties was sufficient for this purpose.

Section 10 of chapter 1 of the Revised Statutes of Illinois, p. 94, Hurd, 1880, provides that,

> "When there is but one plaintiff, petitioner, or complainant in an action, proceeding, or complaint in law or equity, and he shall die before final judgment or decree, such action, proceeding, or complaint shall not, on that account, abate if the cause of the action survive to the heir, devisee, executor, or administrator of such decedent, but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner, or complainant, and prosecute the same as in other cases."

The suggestion of the death of Morris, the sole plaintiff, was made in this case, as the record shows, by counsel for the devisees, both parties being present, and the court made the order, without objection, that the devisees be made plaintiffs in this case. We think that this suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of this case, the fact of the death of the original plaintiff. The statute provides upon whose suggestion of the death of a sole party plaintiff, the court shall make his heir or devisee, &c., plaintiff in his stead. It certainly cannot be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record and his heir or devisee substituted in his stead, and

upon final trial require further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the parties for that case, unless some motion is made or issue raised on the part of the defendant, by which the fact of the death is controverted. We have been referred to no decision of the Supreme Court of Illinois where a different rule has been announced. In the case of *Milliken* v. *Martin*, 66 Ill. 13, cited by counsel for defendant, the court merely decided that where a party plaintiff had died and his heirs were substituted in his place, they must prove that the person under whom they claimed was seized of the title and they were his heirs. But the report of the case clearly shows that the point now under consideration was neither decided nor touched. We think, therefore, that the ruling and charge of the court below did not prejudice the defendant.

The next assignment of error relates to the admission in evidence by the court of the certified copy of the deed from Dunbar to Prout and the testimony offered by the plaintiff to sustain such copy. The deed purported to be a conveyance, with covenants of general warranty, by Dunbar to Prout, of the land in controversy, for the consideration of $80. It recited that Dunbar was the patentee thereof, and set out the patent in full. The following is a copy of the *in testimonium* clause of the deed, of the signatures of the grantor and witnesses, the acknowledgment, affidavit of the grantor of his identity, his receipt for the purchase money, memorandum of registration, and certificate of the recorder of deeds for Madison County, Illinois:

"In witness of all the foregoing I have hereunto affixed my hand and seal, at Washington City, in the county of Washington and District of Columbia, this 6th day of January, one thousand eight hundred and eighteen.

"JOHN J. DUNBAR. [SEAL.]

"Signed, sealed, and delivered in the presence of—

"SAMUEL N. SMALLWOOD.

"JOSEPH CASSIN.

"DISTRICT OF COLUMBIA, *County of* ———, *ss.*

"Be it remembered that on this 6th day of January, 1818, the above-named John J. Dunbarr, who has signed, sealed, and delivered the above instrument of writing, personally came and appeared before us, the undersigned justices of the peace, and acknowledged, in due form of law, the same to be his free act and deed, for the purposes therein set forth, and also gave his consent that the same should be recorded whenever it might be deemed necessary. In witness of all which the said ——— has hereunto affixed his name and has undersigned the same.

"Acknowledged before—
"SAMUEL N. SMALLWOOD.
"JOSEPH CASSIN.

"JOHN his + mark. J. DUNBARR.

"I, John J. Dunbarr, do declare upon oath that I am the same person intended and named in the above deed, dated the 6th day of January, 1818, and more particularly in the patent therein recited at length, and further, that I was duly placed in possession of the patent for the land conveyed in the above deed, by receiving the same from the General Land Office.

"JOHN his + mark. J. DUNBARR.

"Sworn and subscribed to before me this 7th day of January, 1818.

"SAMUEL N. SMALLWOOD.

"Received, this 6th day of January, 1818, from William Prout, the sum of eighty dollars, being the consideration money expressed in the above deed.

"JOHN his + mark. J. DUNBARR.

"Witness : JOSEPH CASSIN.

"Recorded June 23d, 1818.

"STATE OF ILLINOIS, *Madison County, ss.*

"I, John D. Heisel, clerk of the circuit court, and ex-officio recorder of deeds within and for Madison County, in the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of an instrument of writing or deed of conveyance now appearing of record at my office in book E, pages 154, 155, and 156.

"In witness whereof I have hereunto set my hand and affixed the seal of our said court, at office in the city of Edwardsville,

this 3d day of February, A. D. one thousand eight hundred and seventy-five.

"[SEAL.] "JOHN D. HEISEL, *Clerk.*"

The defendant below objected to the introduction of said certified copy in evidence, because the original deed was not so certified and proven as to make a certified copy from the record competent evidence under the laws of Illinois.

The court, without passing at that time upon the objection, and not then admitting said writing in evidence as a certified copy, permitted the plaintiffs, at their request, to make the follow proofs:

"And thereupon," as the bill of exception states, "the plaintiffs proved, to wit:

"1. By Mr. Dent, one of the plaintiff's counsel, that said counsel had had in their possession, prior to the great fire of October 8th and 9th, 1871, in Chicago, an original deed corresponding substantially in contents to the writing offered in evidence, except that there was not attached to it the official certificate, dated February 3d, 1875; that he had not compared said offered copy with said original, but he believed from recollection that it corresponded with the original, and that he had not made said alleged copy; that said original deed had been sent to said counsel in behalf of Wm. B. Morris, the then plaintiff, for use in this suit, and had been offered in evidence on the first trial; that said original deed had been burned up in the Chicago fire of October 8th and 9th, 1871; further, that said original deed had been sent to Washington and attached as an exhibit to the original depositions of E. J. Middleton and George Collard, hereinafter mentioned, and had subsequently been detached therefrom by leave of the court, and returned to Washington for use in taking the depositions of Henrietta Boone.

"2. The plaintiffs further offered to read in evidence a copy of the original depositions of E. J. Middleton and George Collard, taken *de bene esse* on September 21st, 1870, at Washington, D. C., to which the defendant below objected. It was admitted that the depositions had been correctly copied by an attorney in the cause from the original depositions on file in the case; that the original depositions, with the other files and records of the

court, were burned up in the fire at Chicago of October, 1871; that no order of the court had ever been made authorizing the filing of said copy as a substitute for the original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire the plaintiffs' counsel had procured said copy from the counsel of defendant, and, with his consent, had placed it on file in this cause as a copy of the original depositions.

"The court thereupon overruled each of said objections to the reading of said copy of the depositions, and permitted the contents of said copy to be read in evidence, which was done; to which decision of the court the defendant then and there excepted.

"The contents of said copy so read were as follows:

"That said Middleton and Collard had carefully examined the signatures of Samuel N. Smallwood on said original deed purporting to be his, in three different places, and aver the said signatures to be the genuine handwriting of said Samuel N. Smallwood; and that said original deed is annexed to their depositions as Exhibit A; that they were personally acquainted with Samuel N. Smallwood in his lifetime, and knew his handwriting, having often seen him write, and they have no hesitation in declaring said signatures to be his genuine signatures."

The plaintiffs also offered in evidence the deposition of William W. Corcoran, who testified that in 1847 he purchased the lands in controversy from the United States at public sale and paid the purchase money for them into the treasury of the United States, and that at the time of the purchase he had no notice of any adverse claim.

The plaintiffs further read in evidence a certified copy of a commission from President Monroe, attested by Richard Rush, acting secretary of State, and the seal of the United States, dated April 30th, 1817, appointing Joseph Cassin justice of the peace in the county of Washington, in the District of Columbia, until the end of the next session of the United States Senate, and no longer; also a certified copy of a like commission, dated September 1st, 1817, appointing Samuel N. Smallwood a justice of the peace of said county until the end of said session, and no longer.

The plaintiffs also offered in evidence the deposition of Anthony Hyde, who testified that he was the business agent in Washington city of W. W. Corcoran; that he knew of the purchase of the land in question by said Corcoran in 1847, and of the payment by him of over $22,000 into the treasury of the United States for this and other lands; that from February, 1848, up to the time when his testimony was taken, February 24th, 1875, he had attended to all matters touching the tract of land in suit, such as the payment of taxes and the appointment of agents, up to the time of the conveyance thereof by Corcoran to Wm. B. Morris; that he sent the original deed from Dunbar to Prout, attached to the depositions of E. J. Middleton and George Collard, to the counsel of plaintiffs below in Chicago on October 11th, 1870; that said deed was afterwards returned to obtain a deposition of one Mrs. H. H. Boone as to Joseph Cassin's signature, and was afterwards forwarded, attached to a deposition of Mrs. Boone, to the clerk of the United States Circuit Court at Chicago on or about January 26th, 1871.

Hyde further testifies that he had paid the taxes on said lands for Mr. Corcoran from 1847 to 1864, mainly through agents who lived in Illinois, but that he himself had for a year or two paid the taxes directly to the county officers.

Assuming, for the present, that the evidence offered to support the deed from Dunbar to Prout was competent and properly admitted, the question is presented whether the deed itself, thus supported, was admissible. We are of opinion that it was.

The existence of the original deed and its destruction in the fire at Chicago, in October, 1871, was distinctly proved by the testimony of Dent, counsel for plaintiffs. He testified that it had been sent to the counsel in Chicago of the original plaintiff in the case; that it had been offered in evidence on the first trial of the case, and had been burned with the other papers and records of the court in the fire mentioned. It was therefore competent for the plaintiffs to prove its contents. Thus, in *Riggs* v. *Taylor*, 4 Wheat. 486, this court said:

"The general rule of evidence is, if a party intended to use a

deed or any other instrument in evidence, he ought to produce the original if he has it in his possession, or if the original is lost or destroyed, secondary evidence, which is the best the nature of the case allows, will in that case be admitted. The party, after proving any of these circumstances, to account for the absence of the originals, may read a counterpart, or if there is no counterpart, an examined copy, or if there should not be an examined copy, he may give parol evidence of its contents."

In the present case it does not appear that there was in existence any counterpart or examined copy of the destroyed deed. The only resource left to the plaintiffs was to prove the contents of the original by a witness who knew the contents. This was done by the deposition of Dent. He testified that the original deed corresponded substantially in contents to the certified copy offered in evidence, except there was not attached to it the official certificate of the court, dated February 3d, 1875. This evidence made the copy competent for the purposes of the trial.

Having thus established the fact of the original deed and its contents, the plaintiffs below were in the same position as if the original deed was in their possession and they had offered it in evidence. It remained for them to prove its execution.

It has been held by the Supreme Court of Illinois, that, under the act of February 19th, 1819, for establishing a recorder's office, and which was substantially the same as the act of 1807, which was in force when the deed from Dunbar to Prout was executed, a deed is valid as between the parties to it without being acknowledged. *Semple* v. *Miles*, 2 Scammon, 315. See also *McConnell* v. *Reed*, Ib. 371.

Having established by proof the fact that the deed had existed and had been destroyed, and that the copy offered in evidence was a copy of the original, it only remained to prove the signing and sealing of the deed by the grantor.

As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed. *Clarke* v. *Courtney*, 5 Pet. 319; *Cooke* v. *Woodrow*, 5

Cranch, 13. And when there was more than one witness, proof of the handwriting of one was sufficient. 1 Greenleaf on Evidence, sec. 575; *Adams* v. *Kerr*, 1 B. and P. 360; 3 Preston on Abstracts of Title, pp. 72, 73.

By the depositions of Middleton and Collard, which the court admitted in evidence, the handwriting of Samuel N. Smallwood, one of the subscribing witnesses of the deed, was fully proven. His signature also to the acknowledgment of the deed, as one of the justices of the peace before whom the acknowledgment was taken, and his signature to the jurat of an oath of identity indorsed on the deed, subscribed and sworn to before him by Dunbar, were proven by the same testimony. The genuineness of the handwriting of Smallwood as a witness to the deed was placed beyond all doubt by the depositions of these witnesses.

If, therefore, the evidence by which this proof was made was competent and admissible, the execution of the deed from Dunbar to Prout was established, and the deed itself was properly admitted in evidence.

We are next to consider the question whether the copies of the depositions of Middleton and Collard, by which the handwriting of Smallwood was proven, were properly admitted in evidence. This evidence was objected to by the defendant, and his objection was overruled, to which he excepted.

The admission of the parties, as appears by the bill of exceptions, showed the existence of the original depositions, that they had been destroyed with the other records of the court in the fire of October, 1871, that the copies were correct copies of the original depositions, and had been furnished by counsel for defendant, and with his consent had been placed on file in the cause as correct copies of the original. The objection made to the introduction of the copies was that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, and that their depositions could not be retaken; therefore proof of what they had testified in their depositions was not admissible.

The rule invoked to exclude copies of the depositions is, that in the absence of evidence that the witness who testified in a former trial is dead or incapable of testifying, or that his deposition can-

not be retaken, it is not competent to show what his testimony in the former trial was; and that when the deposition of a witness which was read upon a former trial is lost, its contents cannot be proved except after proof of the death of the witness whose testimony it contained. *Cook* v. *Stout*, 47 Ill. 530; *Aulger* v. *Smith*, 34 Ill. 530.

But if the witnesses had lived in another State and more than a hundred miles distant from the place of trial, proof of the contents of their deposition would have been admissible. *Burton* v. *Driggs*, 20 Wall. 125. Therefore, to have made the objection tenable, it should have also been put upon the ground that the witnesses were not shown to reside in another State and more than a hundred miles from the place of trial. This it did not do. When a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. *Burton* v. *Driggs*, *ubi supra*. The original depositions were taken in the city of Washington. It is therefore probable that the witnesses resided there. If the copy of the depositions had been objected to because it was not shown that the witnesses resided out of the district, and more than a hundred miles from the place where the court was held, the plaintiffs below might have supplied proof of that fact. The objection, as it was made, was not broad enough and specific enough, and was therefore properly overruled and the evidence admitted.

But we think the rule relied on by defendant to exclude copies of the deposition does not apply to the case in hand. The plaintiffs did not offer oral evidence of the contents of the depositions, but offered copies, which were admitted by counsel for defendant to be true copies. It was, therefore, not necessary to retake the depositions, or to prove the death of the witnesses or their incapacity to testify. The copy of the deposition was, by consent, substituted for the original, which was proven to have been destroyed, and being admitted to be a true copy, spoke for itself. It was, therefore, properly received in evidence.

It was further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as

the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor in the deed: that is to say, that the John J. Dunbar by whom the deed purported to be executed was the same John J. Dunbar named in the patent for the lands in controversy.

In any case slight proof of identity is sufficient. *Nelson* v. *Whittall*, 1 B. & Ald. 19; *Warren* v. *Anderson*, 8 Scott, 384; 1 Selwyn's N. P. 538 n. (7), 18th ed. But the proof of identity in this case was ample. In tracing titles identity of names is *prima facie* evidence of identity of persons. *Brown* v. *Metz*, 33 Ill. 339; *Cates* v. *Loftus*, 3 A. K. Marsh, 202; *Gitt* v. *Watson*, 18 Mo. 274; *Balber* v. *Donaldson*, 2 Grant (Penn.), 459; *Bogue* v. *Bigelow*, 29 Vt. 179; *Chamblee* v. *Tarbox*, 27 Texas, 139. See also *Sewell* v. *Evans*, 4 Adol. & E. 626; *Roden* v. *Ryde*, ib. 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthias County Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia, where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed.

But, besides the identity of names there was other evidence showing the identity of persons. The patent and the deed bore date the same day, and the patent was recited *in hæc verba* in the deed. These circumstances tend strongly to show that the party by whom the deed was executed must have had possession of the patent. The deed recites that the patent was delivered to the grantor, John J. Dunbar, and the affidavit of John J. Dunbar, sworn to and subscribed on January 7th, 1818, before Smallwood, a justice of the peace, and one of the subscribing witnesses to the deed, whose signature to the jurat is shown to be genuine, to the effect that he was the same John J. Dunbar to whom the patent was issued, was indorsed upon the deed.

After a lapse of sixty-one years, this evidence is not only admissible to prove the identity of the grantee in the patent with the grantor in the deed, but uncontradicted is conclusive.

We are, therefore, of opinion that the deed from John J.

Dunbar to William Prout, which formed a link in the title of the plaintiffs, was sufficiently proven and was properly admitted in evidence by the circuit court. The other muniments of title put in evidence by the plaintiffs were admitted without objection, and established *prima facie* their title to the lands in controversy.

But it will be remembered that the defendant below had also shown a *prima facie* title to the lands in question; that both parties traced title through the patent of the United States issued to Dunbar and through deeds apparently executed by him on the same day, to wit, January 6th, 1818, one to William Prout, under which the plaintiffs claimed, and the other to John Frank, under which the defendant claimed.

The question, therefore, still remains, which is the superior title? According to the jurisprudence of Illinois, this must be settled by the fact, which of the two deeds apparently executed by Dunbar was first recorded.

Section 15 of the act approved January 31st, 1827, Purple's Real Estate Statutes, 480, provided as follows:

"All grants, bargains, sales, &c., of or concerning any lands, whether executed within or without the State, shall be recorded in the recorder's office in the county where such lands are lying and being, within twelve months after the execution of such writings, and every such writing that shall, at any time after the publication hereof, remain more than twelve months after the making of such writing, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent *bona fide* purchaser or mortgagee for valuable consideration, unless such deed, conveyance, or other writing be recorded as aforesaid before the proving and recording of the deed, mortgage, or other writing under which any subsequent purchaser or mortgagee shall claim."

This act remains substantially in force. Hurd's Revised Statutes, page 271, sec. 30.

By an act approved July 21st, 1837, Purple's Real Estate Statutes, 496, 497, it was provided that the recording of any deed . . . whether executed within or without the State,

by the recorder of the county in which the lands intended to be effected are situated, shall be deemed and taken to be notice to subsequent purchasers and creditors from the date of such recording, whether said writing shall have been acknowledged or proven in conformity with the laws of the State or not, and that the provisions of the act shall apply as well to writings heretofore as those hereafter admitted to record. This law is still in force. See Hurd's Revised Statutes, 1880, page 271, sec. 31.

It was held by the Supreme Court of Illinois, in *Reed* v. *Kemp*, 16 Ill. 445, that an instrument affecting or relating to real estate may be recorded though not proven or acknowledged, and the record will operate as constructive notice to subsequent purchasers and creditors. See also *Choteau* v. *Jones*, 11 Ill. 300; *Martin* v. *Dryden*, 1 Gil. 213.

And in *Cabeen* v. *Breckenridge*, 48 Ill. 91, the court declared that, "as a general rule, when the same person has executed two deeds for the same land, the first deed recorded will hold the title."

The evidence shows that the deed of Dunbar to Frank, under which the defendant claimed title, was not recorded until June 18th, 1870. The plaintiffs contended that the deed from Dunbar to Prout, under which they claimed, was recorded on June 23d, 1818, and it was shown that the deed from Prout to Duncan was recorded October 29th, 1838, and the deed of Gillett to Corcoran, June 5th, 1848, and the deed of Corcoran to Morris, March 12th, 1868.

If, therefore, the contention of the plaintiffs that the deed of Dunbar to Prout was recorded June 23d, 1818, is sustained by competent proof, their title must prevail.

But it is insisted for defendant that there was no competent proof of the registration of the deed of Dunbar to Prout. The proof relied on was the testimony of Dent, that the certified copy from the records of the county of Madison was a copy of the original deed; the certificate of the recorder that the certified copy was a copy of a deed which appeared of record in his office; and the certified copy of a memorandum at the foot of a record of the deed as follows, "Recorded June 23d, 1818."

Conceding that the certified copy of the deed from the records of Madison County would not be proof of the contents of the original deed, because such original deed had not been so acknowledged and certified as to make a certified copy competent evidence, yet the fact that such a record of the deed existed was, by the law of Illinois, as we have seen, notice to subsequent purchasers. A certified copy from the record was therefore proof that such a deed and memorandum was of record in the proper office.

For it is a settled rule of evidence that every document of a public nature which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy. *Saxton* v. *Nimms*, 14 Mass. 320; *Thayer* v. *Stearns*, 1 Pick. 109; *Dunning* v. *Roome*, 6 Wend. 651; *Dudley* v. *Grayson*, 6 Monroe, 259; *Bishop* v. *Cone*, 3 N. H. 513; 1 Greenleaf on Evidence, § 484.

The memorandum at the foot of the record was the usual record evidence, competent and conclusive, that the deed had been recorded at the date mentioned.

It was evidence of the date of the registration of the deed, because it was the duty of the recorder, by the nature of his office and without special statutory direction, to note when the record was made. 1 Greenleaf on Evidence, sec. 483.

But we think it may be fairly inferred from section 10 of the act of September 17th, 1807, which was in force when it is claimed that the deed from Dunbar to Prout was recorded, that it was the duty of the recorder to note the time when deeds left with him for record were recorded. He was specifically required to note the date when the deed was received, and was liable to a penalty of three hundred dollars for recording any deed in writing "before another first brought into his office to be recorded." Adam & Durham's Real Estate Statutes, vol. 1, page 63. The making of a memorandum of the date of the record was, therefore, an official act, which naturally fell within the line of his statutory duties, and a certified copy of it would be competent evidence to prove the memorandum and the date of the registration of the deed.

We are of opinion, therefore, that the fact that the deed of

Dunbar to Prout was recorded on June 23d, 1818, was proved by competent evidence, and that it therefore follows that the title of the plaintiffs was better and superior to that of defendants, who claimed under a deed for the same lands not recorded until June 18th, 1870, more than fifty years after its date, and long after innocent purchasers had bought the lands and paid a valuable consideration for them.

The plaintiff in error contends that the act of 1837, *supra*, cannot apply in this case, because at its date the lands in question were no longer within the limits of Madison County, but in the county of Putnam. But the act expressly declares that it shall apply to writings theretofore as well as those thereafter admitted to record. The deed of Dunbar to Prout was recorded under the act of 1807, *supra*, which required it to be recorded in the county where the lands conveyed were situated. It was so recorded. No law of Illinois since passed has required any other registration of deeds by the parties thereto, or has changed the effect of the original registration. See act of February 27th, 1841; Adams & Durham's Real Estate Statutes, vol. 1, pp. 93, 94.

The view we have taken of the case renders it unnecessary to notice certain questions of local practice argued by counsel.

We find no error in the record of the circuit court.

Judgment affirmed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* CUSHMAN and Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Conflict of Laws—Constitutional Law—Contract—Interest—Mortgage—Redemption—Statutes of Illinois.

The statutes of Illinois relating to the redemption of mortgaged property from sales under decree of the federal courts, examined.

While the local law, giving the right of redemption first to the mortgagor, then to judgment creditors, is a rule of property obligatory upon the federal

Statement of Facts.

court, it is competent for the latter by rules to prescribe the mode in which redemption from sales under its own decrees may be effected.

The rule in the Circuit Court of the United States for the Northern District of Illinois, requiring a judgment creditor to pay the redemption money to the clerk of that court, and not to the officer holding the execution, sustained as being within the domain of practice, and not affecting the substantial right to redeem within the time fixed by the local statute.

The Illinois statute of 1879, entitling the purchaser in case of redemption to receive interest upon his bid at the rate of eight per cent. per annum (the previous law prescribing ten per cent.), is applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute. Such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or affect any remedy which the mortgagee had, by existing law, for the enforcement of his contract.

The purchaser at decretal sale is entitled to interest at the rate prescribed by statute when he purchased. The amendatory statute operated *proprio vigore*, to change the rule of court previously fixing the rate at ten per cent.

The existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted are those only which in their direct or necessary legal operation controlled or affected the obligations of their contract.

Bill for foreclosure of a mortgage: decree of foreclosure: demand to redeem and tender of payment: petition of the plaintiff, purchaser at the foreclosure sale, for a master's deed: denial of that petition; and an appeal from that denial.

The property involved in this suit was certain real estate in the city of Chicago, covered by a mortgage, executed January 29th, 1880, by W. H. W. Cushman and wife to secure the Connecticut Mutual Life Insurance Company in the payment of $75,000, five years thereafter, with interest payable semi-annually, at the rate of nine per cent. per annum. It was thereafter conveyed, subject to that mortgage, to one W. H. Cushman.

The local law, in force when the mortgage was given, provided that upon a sale of lands or tenements under execution, the officer should give to the purchaser a certificate showing the property purchased, the sum paid therefor, or, if the plaintiff was the purchaser, the amount of his bid and the time when the purchaser (unless the property be redeemed as provided in the statute) would be entitled to a deed. A duplicate of such certificate, signed by the officer, was required to be filed by him

in the office of the county recorder within ten days from the sale. Within twelve months from sale, the defendant, his heirs, executors, administrators, or grantees could redeem by paying the purchaser, *or the officer* for his benefit, the sum bid by the former, with interest thereon at the rate of *ten* per cent. per annum from date of sale. Whereupon the sale and certificate became null and void. After the expiration of twelve, and at any time before the expiration of fifteen months from the sale, a judgment creditor (even one who became such after the expiration of twelve months from the sale, could redeem by suing out execution, placing the same in the hands of the proper officer (whose duty was to indorse thereon a levy upon the property to be redeemed), and by paying *to such officer*, for the use of the purchaser, his executors, administrators, or assigns, the amount for which the premises were sold, with interest at the rate of *ten* per cent. per annum from the date of sale. The officer, having filed in the county recorder's office a certificate of the redemption by such judgment creditor, was required to advertise and offer the property for sale under the execution. The judgment creditor, thus redeeming the property, was considered as having bid at the execution sale the amount of the redemption money paid by him with interest from the date of redemption to the day of sale. If no larger bid was offered, the property was to be struck off and sold to such judgment creditor, who became entitled to a deed.

The statute provided that the whole or part of any lands sold under execution could be redeemed by a judgment creditor in the like distinct quantities or parcels in which the same were sold; also, if there be no redemption within the time prescribed, that the purchaser was entitled to a deed; further, that "lands sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands" might be redeemed by the mortgagor, his heirs, executors, administrators, or grantees, and by judgment creditors, in the same manner as was prescribed for the redemption by such parties, respectively, of lands sold under executions at law.

By a subsequent act the foregoing statutes were amended, so as to require the party redeeming to pay the amount going to

the purchaser, with interest at only eight per cent. per annum. This act continued in force till after July 1st, 1879.

After the passage of this act the rules of the circuit court relating to redemption were amended so as to read as follows:

"*Ordered*, That the following rules be entered in regard to the redemption of property from sales under decrees in chancery in this court:

"*First.* That whenever any real estate is sold by a master in chancery, special commissioner, or other officer of this court, by virtue of any decree of foreclosure of mortgage or vendor's lien, or mechanics' lien, or for the payment of money, the master in chancery, or officer making such sale, shall, instead of executing a deed for the property so sold, give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or, if purchased by the complainant, in whose favor the decree is made, the amount of his bid, and that such purchaser will be entitled to a deed of the property so purchased, on the expiration of fifteen months from the date of said sale, unless said property shall have been duly redeemed.

"*Second.* It shall be the duty of the master in chancery, or other officer making such sale, to report the same to the court within ten days from the day of the making thereof, unless time for filing said report shall be extended by the court, which report shall be confirmed as a matter of course, unless objections to said sale are filed within twenty days after said report is required to be filed.

"*Third.* Any defendant in the suit in which such decree is rendered, his heirs, administrators, or assigns, or any person interested through or under the defendant in the premises so sold, may, within twelve months from said sale, redeem the real estate so sold *by paying to the purchaser thereof*, his heirs, executors, or assigns, *or to the clerk of this court* for the benefit of such purchaser, his executors, administrators, or assigns, the sum of money for which said premises were sold or bid off, with interest at the rate of ten per cent. per annum from the date of such sale, and in case such redemption is made by payment of the money to the clerk, the person so redeeming shall also pay an additional sum of one per cent. on the amount so paid in as the clerk's fee for receiving and disbursing said redemption, and the clerk on re-

ceiving said redemption money shall at once deposit the same in the registry of this court, and file a certificate among the papers in the cause in which said decree was entered, stating that said real estate has been redeemed.

"*Fourth.* If property sold under any decree of this court shall not be redeemed by the defendant or defendants in the decree, or some persons claiming by, through or under him or them, within twelve months from the date of said sale, then any creditor of the debtor defendant or defendants in such decree, who holds a decree or judgment in full force, and on which he is entitled to execution against such debtor defendant or defendants, may redeem said property after the expiration of twelve months and before the expiration of fifteen months, in the following manner: Such creditor shall sue out an execution on his decree or judgment, and place the same in the hands of the proper officer to execute, who shall thereupon indorse on such execution a levy on the property which is to be redeemed, and thereupon the person desiring to make such redemption shall pay *to the holder of such certificate*, or *to the clerk of this court*, the amount for which the premises to be redeemed were sold, with interest at the rate of ten per cent. per annum from the date of such sale, and if the redemption is made by the payment of the money to the clerk, there shall also be paid the additional sum of one per cent. on the amount of money so paid to redeem, as the clerk's fee for receiving and disbursing said redemption money. And the clerk shall at once pay said money into the registry of the court for the use of the person entitled thereto, and give a receipt for said sum to the person making such redemption.

"And the clerk of this court shall thereupon make and file in the office of the recorder of the county where said premises are situate, a certificate of such redemption, and the officer in whose hands said execution shall have been placed, and who shall have made said levy, shall proceed in the manner required by the twentieth and twenty-first sections of chapter seventy-seven of the Revised Statutes of Illinois, entitled "Judgments, decrees, and executions." After the first redemption, made as aforesaid, any other judgment or decree creditor who shall have the right under the laws of this State to redeem said premises from the first redeeming judgment or decree creditor, may apply to this court for leave to redeem said premises from the creditor first

redeeming the same, and the court will make such order in regard to further redemption as the rights of the parties under the law shall seem to require.

"*Fifth.* In all cases when the master in chancery or any other special or general officer of this court is required to make sale of real estate under any decree or order of this court in any chancery suit, notice of the time and place of such sale shall be given by publication in some newspaper of general circulation published in the county where said real estate is situated, and in case there is no such newspaper published in such county, then such publication shall be made in one of the newspapers hereafter named, published in the city of Chicago, such publication to be made as often as once each week for three successive weeks, and the first publication shall be at least twenty days before the day fixed for such sale."

On the 12th day of December, 1877, the insurance company instituted a suit for foreclosure, in which a final decree of sale was passed on the 14th day of July, 1879. The sale occurred on the 15th day of August, 1879, when the insurance company became the purchaser of various lots, into which the mortgaged premises had been subdivided, at prices aggregating in amount the principal and interest of its debt—the latter being computed up to the decree at the rate stipulated in the mortgage, and thereafter at the statutory rate of six per cent. per annum. The sale was duly confirmed by an order entered October 10th, 1879.

On the 3d day of November, 1880—these rules being in force and no redemption having been made by the mortgagor or by any one claiming under him—a judgment by confession on a warrant of attorney was entered in the court below for $10,150 in favor of Henry S. Monroe against W. H. Cushman, the grantee of the mortgagor. An execution on that judgment, sued out November 9th, 1880, was placed in the hands of the marshal of the United States for the Northern District of Illinois, who indorsed thereon a levy, as of that date, on a portion of the lots purchased by the insurance company. Monroe, on the succeeding day, deposited with the clerk of the federal court the sum of $12,741.95, which covered as well the aggre-

gate amount of principal and interest, as the commissions and fees allowed to the clerk. R. S. § 828. Thereupon, on the next day, the clerk, under his hand and seal of office, issued a certificate of redemption for the lots so levied on.

On November 15th, 1880—on which day, according to the rule established by the Supreme Court of Illinois, the additional three months given to judgment of creditors expired, Robert D. Fowler, assignee of Monroe's judgment and of his interest in the levy and redemption that had been made, deposited with the clerk of the federal court the further sum of $62,037.01 for the redemption of certain others of the lots purchased by the company. That sum covered the latter's bid for those lots, with interest at eight per cent. A certificate of redemption covering such lots was issued on the day of Fowler's deposit. The marshal, on November 16th, 1880, advertised for sale, on the 8th day of December, 1880, all the lots sought to be redeemed under the Monroe judgment and execution. The record does not show the indorsement of any additional levy beyond that made November 9th, 1880. The sale occurred as advertised, Fowler becoming the purchaser of all the lots embraced in the two certificates of November 10th and November 15th, at a sum equal to the amount of the sums deposited, with interest at the rate of eight per cent. per annum from the date of such deposits. No money was paid to the marshal, and none to any other officer, except that deposited with the clerk, who, as required by the act of Congress and the rules in question, placed it in the registry of the court.

The property so sold was, as was claimed by appellee, lawfully redeemed within the time and in the mode prescribed in the rules established by the court below for the redemption of real estate from sales under decrees.

But the contention of the insurance company was that those rules did not conform to the statutes of Illinois; that the latter, equally, as to the time within which, the persons by whom, and the mode in which, redemption might be effected, constituted a rule of property, obligatory as well upon the federal court as upon the courts of the State; and as the property sold was not redeemed in the particular mode prescribed by the local stat-

utes, there was no effectual redemption, and, consequently, the company became entitled to a deed at the expiration of the period fixed for the exercise of the right of redemption.

The circuit court was of opinion, and so adjudged, that the rights of the parties as to the mode of redemption were to be determined by its rules; and since there had been a substantial compliance with them, the application by the company for a deed was overruled. From the final order denying that application this appeal was prosecuted.

Mr. E. S. Isham and *Mr. C. Beckwith* for appellant. I. The parties to the record are the mortgagee and purchaser at a sale under foreclosure on one side, and on the other a purchaser of a judgment by confession for the purpose of redemption. Such purchaser has no right of redemption except as it is created by statute. *Phillips* v. *Demoss*, 14 Ill. 410. He has no claim to have the statutory terms of redemption enlarged by a court of equity. Apart from statute, no right exists to redeem from a mortgage sale. *Fisher* v. *Eslaman*, 68 Ill. 78. In terms it must be conceded that the federal rule is inconsistent with the statute, and a compliance with its terms is not a compliance with the terms of the statute. It is, therefore, said that the differences are not of substance, but of form, which a court of equity should disregard. We concede that when a general right is given by a special statute of a State, the federal courts will give effect to it, and in matters of mere form pursue their own. *Railway Company* v. *Whitton*, 13 Wall. 270. But this cannot be done where compliance with the statutory preliminary methods is a condition of the enjoyment of the right. And the courts of Illinois have held that such right of redemption is statutory and must be exercised in pursuance of the statute. *Littler* v. *People*, 43 Ill. 188; *Stone* v. *Gardner*, 20 Ill. 304; *Durley* v. *Davis*, 69 Ill. 133; *Clingman* v. *Hopkie*, 78 Ill. 152; *Brine* v. *Insurance Company*, 96 U. S. 627. II. The act reducing the rate of interest to be paid on redemption was passed after this mortgage was made, and after the bill of foreclosure was filed. To apply it in this case is, in fact, to impair the obligation of a contract, and brings this transaction within the line of

cases which decide that laws which subsist at the time of making a contract enter into and form part of it as if they were expressly referred to or incorporated in its terms. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Bronson* v. *Kinzie*, 1 How. 311; *Edwards* v. *Kearzey*, 96 U. S. 595; *McCracken* v. *Hayward*, 2 How. 608; *Planters' Bank* v. *Sharp*, 6 How. 301; *Green* v. *Biddle*, 8 Wheat. 1.

Mr. George F. Edmunds (*Mr. William R. Page* was with him) for Fowler.

I. A. An act of Congress providing for any method of disposing of property drawn into adjudication in the national courts is valid, however different that method may be from the methods provided by State law. *Brine* v. *Insurance Company*, 96 U. S. 627; *Allis* v. *Insurance Company*, 97 U. S. 144. B. The rules adopted by the Circuit Court in the Northern District of Illinois are authorized by and are in conformity with the laws of the United States (Revised Statutes, sections 917 and 918), and they are in perfect harmony with section 995 Revised Statutes, requiring all moneys paid to officers of the court to be placed in some public depository. They, therefore, have the same force and effect as if they had been embodied in an act of Congress. C. The State law speaks only to the officers of the State. It cannot speak to any others. The national law speaks to the courts and officers of the United States, and as to them its voice is sovereign. D. It is admitted that Congress cannot establish a rule for the transfer of property in a State as a rule of private conduct. But it is submitted with entire confidence that Congress has power, in the establishment and regulation of the judiciary of the United States, to provide for the method and fact of the disposition of any kind of property concerning which the United States courts have (as in this case) a controversy and suit properly depending before them. E. In cases like this the court has, pursuant to the law of Congress, prescribed methods of *practice and administration merely*, to effectuate with the greatest possible safety, as between its own suitors, the very substance of the rights that the law of the State gives when cases arise in her courts. It is only a varia-

tion of formal means to the very same end. II. A. At the time the mortgage was given, the law of the State allowed a contract rate of interest up to ten per cent. The contract rate on the debt was nine per cent. The State law allowed six per cent. on judgments and decrees. It provided for sales on foreclosure decrees at public auction to the highest bidder. It provided that redemptions from such sales by the debtor or his execution creditor might be made on paying the sum bid and paid by the purchaser, with ten per cent. interest. *Before the decree of foreclosure and sale* the State changed its law of interest on such redemptions, and required the payment of only eight per cent. interest. B. There is no conceivable legal or equitable privity of contract between the purchaser at such a sale and the payee or holder of the obligation secured by the mortgage. The purchaser *as purchaser* is an entire stranger to the contract of debt, and he would hold the land sold even if the decree should be reversed, and the whole debt claimed be held fraudulent. It follows, therefore, that a change in the law of the interest payable to the purchaser, cannot impair the obligation of the contract of debt between the original parties. And, as it was enacted *before* the purchaser acquired any interest, it cannot impair the obligation of any contract of his. See *Wood* v. *Kennedy*, 19 Ind. 68; *Bank* v. *Dudley*, 2 Pet. 492. III. If it be possible to suppose there is any doubt on the foregoing question, the redeeming creditor paid the purchaser his money with eight per cent. interest, in obedience to the express command of the sovereign power of the State, in good faith, meaning to pay all that was due. He then, if in error, acted under a power apparently valid and under a mistake as to its validity, and while the case and the estate were still in court, he tendered the other two per cent. In such a case, it is confidently insisted that the mistake (if there were one), whether it were of law or fact, or both, may be relieved against in the court of equity having judicial domain of the whole subject.

Mr. Justice Harlan delivered the opinion of the court. After reciting the facts as above set forth, he continued:

In *Brine* v. *Insurance Company*, 96 U. S. 627, it is decided—

reversing the practice which had obtained for many years in the Circuit Court of the United States sitting in equity in Illinois—that the State law giving to a mortgagor of real estate the privilege, within twelve months after a decree of foreclosure, and to his judgment creditors within three months thereafter, of redeeming the premises, is a substantial right, and constitutes a rule of property to which the circuit court must conform.

In anticipation, however, of the difficulties which might attend exact conformity, in every case, to the local statutes, the court, in that case, said:

"It is not necessary, as has been repeatedly said in this court, that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court."

The decision in that case doubtless suggested to the circuit court the necessity of adopting definite rules in relation to redemptions from sales under its own decrees. Hence the rules were established which form part of the statement of facts. It will have been observed that these rules differ from the provisions of the local statutes in this, that by the former the redemption money in all cases is required to be paid to the holder of the certificate, *or to the clerk of the court*, whereas by the latter, in case of redemption by a judgment creditor, the money must be paid *to the officer having the execution.* In no case do the rules of the federal court provide for payment either to the master or other officer who conducted the decretal sale, or to the officer holding the execution of the judgment creditor.

However this difference may be regarded in the courts of Illinois when administering the statutes by which they are created, and their jurisdiction defined and limited—*Littler* v. *The People*, 43 Ill. 188; *Stone* v. *Gardner*, 20 Ib. 304; *Durley* v. *Davis*, 69 Ib. 133—we entertain no doubt of the power of the federal court to adopt its own modes or methods

for the enforcement of the right of redemption given by the local law. The substantial right given, first, to mortgagors, their representatives and grantees, and then to the judgment creditors of such mortgagors or their grantees, was to redeem the property sold within the time specified. Whether the redemption is by the one or the other class, the money is for the benefit of the purchaser at the decretal sale. When the amount going to him is *secured* by payment into the hands of some responsible officer, the object of the law, both as respects the purchaser at the decretal sale and the party redeeming, is fully attained. Redemption is effected when, by payment of the redemption money into proper hands, the purchase at the decretal sale is annulled, and the way opened for another sale. The federal court, as indicated by its rules, preferred that the money, if not paid directly to the purchaser, should, by payment through its clerk, come directly under its control for the benefit of the purchaser. Where the sale of mortgaged premises is under a decree of the federal court, and the execution of the judgment creditor seeking to redeem is from a State court, there is an evident propriety in requiring the money going to the purchaser at the decretal sale to be paid through the clerk of the federal court into its registry. The necessity for such a regulation is not so urgent where the judgment creditor's execution is from the federal court; but we perceive no objection to extending the regulation to that class of cases. Under the operation of the rules in question the records of the federal court will, in all cases, show whether the right of a purchaser to a deed has been defeated by redemption. Can it be said that the mode prescribed by the federal court for securing the money going to the purchaser impairs his substantial rights? Is he less secure than he would be if the money is paid to the officer having the execution? Clearly not. The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption become complete and effectual upon payment by him of the required amount. The particular mode in which the money is paid or

secured by the latter for the benefit of the former is not of the substance of the rights of either. The mode or manner of payment belongs, so far as the federal court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and convenient for the administration of justice, is expressly given by statute to the circuit courts. R. S. § 918.

In the conclusions thus indicated we are only giving effect to former decisions. In *Brine* v. *Insurance Co.*, *supra*, it was, as we have seen, distinctly ruled, touching these local statutes, that the federal court—preserving substantially the right of redemption—could pursue its own forms and modes for securing such right. The same doctrine, in effect, is announced in *Allis* v. *Insurance Co.*, 97 U. S. 144. That case arose under a statute of Minnesota which allowed the defendant in a foreclosure proceeding to redeem within twelve months after the *confirmation* of the sale. The decree ordered the master, on making sale, to deliver to the purchaser a certificate, stating that unless the property be redeemed within twelve months after the *sale* he would be entitled to a deed. This departure from the letter of the statute was held not to be material, since substantial effect was given to the right to redeem within one year. The court said:

"In the State courts, where the practice undoubtedly is to report the sale at once for confirmation, the time begins to run from that confirmation. But if in the federal court the practice is to make the final confirmation and deed at the same time, it is a necessity that the time allowed for redemption shall precede the deed of confirmation. There is here a substantial recognition of the right to redeem within twelve months."

It results that the objection taken to the rules established by the court below must be overruled.

The next question to be examined is whether there could be an effectual redemption except by payment of the amount bid, with interest at ten per cent., the rate prescribed by statute at the date of the mortgage. Redemption was made upon the

basis of the amendatory act of 1879, reducing the rate of interest, in such cases, to eight per cent. The contention of the company's counsel is that that act cannot be applied without impairing the obligation of its contract. What was that contract? In what did its obligation consist? By the contract between the mortgagor and mortgagee, the former became bound to pay, within a certain time, the mortgage debt, with the stipulated interest of nine per cent. up to final decree, if one was obtained, and with six per cent. thereafter as prescribed by statute when the mortgage was given. R. S. Ill. 1874, p. 614. Certainly the obligation of *that* contract was not impaired by the act of 1879, for it did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or interfere with or take away any remedy which the mortgagee had, by existing law, for the enforcement of its contract.

The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the *purchaser* should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the *mortgagor and the mortgagee.* The mortgagor might, perhaps, have claimed that *his* statutory right to redeem could not be burdened by an *increased* rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute in force *when the mortgage was executed*, entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject neces-

sarily to the law then in force defining the rights of purchasers.

But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property was lessened by reducing the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction by a subsequent statute of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security.

In support of this proposition counsel cite several decisions of this court in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it effects; that the laws in existence when a contract is made, including those which affect its validity, construction, discharge, and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and that one of the tests that a contract has been impaired is that its value has been diminished, when the Constitution prohibits any impairment at all of its obligation. *Green* v. *Biddle*, 8 Wheat. 1; *McCracken* v. *Hayward*, 2 How. 608; *Planters' Bank* v. *Sharp*, 6 ib. 301; *Edwards* v. *Kearzey*, 96 U. S. 595.

These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale. And the result of the sale in this case

shows that the company, as mortgagor, has received all that it was entitled to demand. The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and, in no sense, an injury to the mortgagee. When that act was passed there was no person to answer the description or to claim the rights of a purchaser; consequently, no existing rights were thereby impaired. That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser; and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract.

One other point remains to be considered. It is said that the rules of the circuit court requiring payment to the purchaser of interest at the rate of ten per cent., were never modified by any order. The court below, we suppose, proceeded upon the ground that the interest to be paid to the purchaser by the party redeeming was of the substance of the rights of both; consequently that the change, in that respect, made by the State law prior to the decretal sale, *proprio vigore*, effected a modification of the rule without a formal order. In that view we concur.

For the reasons given the decree below should be affirmed, and *It is so ordered.*

MEDSKER and Wife *v.* BONEBRAKE, Assignee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Bankruptcy—Equity—Fraudulent Conveyance—Husband and Wife—Practice.

1. Where a wife lends to her husband money which is her separate property, upon his promise to repay it, it creates an equity in her favor which a court of equity will enforce in the absence of fraud.

Statement of Facts.

2. If the husband, being insolvent, mortgages real estate to secure such a debt to his wife, previously incurred, a court of equity will not set aside the mortgage as fraudulent against the assignee in bankruptcy if the wife was ignorant of the insolvency and if there was no fraud.
3. One of two partners files a voluntary petition in bankruptcy, alleging that the other partner will not join him, and praying to have him declared a bankrupt: *Held*, that this, as to the other partner, is a case of involuntary bankruptcy within the meaning of the act of June 22d, 1874, ch. 130, § 10, 18 Stat. 180.
4. On a reference in equity to a master, the findings of the master are *prima facie* correct. Only such matters are before the court as are excepted to, and the burden of sustaining the exception is on the objecting party.

This was a suit in equity by an assignee in bankruptcy, to set aside a conveyance of real estate made shortly before the bankruptcy, by the bankrupt to his wife, through the intervention of a third party. The following extracts from the report of the master show the facts found by him:

"On the 2d day of August, 1876, John R. Medsker and wife conveyed the land described in the bill to Cyrus J. McCole, who, on the 4th of same month, reconveyed the same to the wife, Elizabeth Medsker, the defendant. At the time of these transfers the land belonged to John R. Medsker in fee simple.

"On the 1st day of December, 1876, one Poe, with whom Medsker was in partnership in the hardware business, filed his petition (voluntary) in bankruptcy, alleging that Medsker would not join him and making him a party, praying that he be adjudged a bankrupt.

"On the 29th of December, 1876, Medsker comes in, confesses bankruptcy, and is adjudged accordingly.

* * * * * * *

"The defendant, the evidence shows, married the bankrupt Medsker some thirteen years ago. During the last ten years her husband came into possession of moneys belonging to her, proceeds mostly of lands, inherited from her father, amounting in the aggregate to $5,600. She expressly testifies that he agreed to return it to her, and she always claimed that he was her debtor to that amount. Under the evidence, I think there is no doubt she was a creditor at the time of the conveyance. I think the evidence shows that he was insolvent also at that time, though not that she knew it. I think the conveyance was made

and accepted to prefer her to other creditors. Under the evidence as to the value of the land, which is conflicting, I cannot find that his indebtedness to her was not a reasonable consideration for the conveyance of the land, or that there is such great disparity between the land and the debt it was conveyed to satisfy as to indicate bad faith and a purpose to defraud other creditors."

The master found as law that the bankruptcy was involuntary on Medsker's part; that the transaction was not void under the statute; and that it was not void for fraud.

The assignee's counsel excepted to this report. 1st. That the evidence showed that Medsker was a voluntary bankrupt. 2d. The wife was not a creditor, and knew of the insolvency when the security was taken. 3d. The conveyance was made with intent to defeat and defraud creditors; and they also excepted to the conclusions of law. The court sustained the exceptions and decreed that the conveyance should be set aside; from which decree the wife appeals.

Mr. S. Shellabarger and *Mr. John A. Finch* for the appellant.

Mr. Addison C. Harris and *Mr. W. H. Calkins* for the assignee, after arguing on the facts that the wife was not a creditor and that the transaction was fraudulent, cited *Seitz* v. *Mitchell*, 94 U. S. 580; *Humes* v. *Scruggs*, 94 U. S. 22; *Wickes* v. *Clarke*, 8 Paige, 161; *Resor* v. *Resor*, 9 Ind. 347; *Johnson* v. *Rockwell*, 12 Ind. 70; *Phillips* v. *Frye*, 14 Allen, 36; *Lyne* v. *Bank of Kentucky*, 5 Marshall, 545; *Wylie* v. *Basil*, 4 Md. Ch. 327; *Nolen's Appeal*, 23 Penn. St. 37; *Besson* v. *Eveland*, 26 N. J. Eq. 468; *Kline* v. *McGuckin*, 25 N. J. Eq. 423; *Dutcher* v. *Wright*, 94 U. S. 553; *Reade* v. *Livingston*, 3 Johns. Ch. 481; *Savage* v. *Murphy*, 34 N. Y. 508; *Case* v. *Phillips*, 93 N. Y. 164; *Fox* v. *Moyer*, 54 N. Y. 125; *Jacobs* v. *Hesler*, 113 Mass. 157; *In re Jones*, 6 Biss. 68; *Moyer* v. *Adams, Assignee*, 9 Biss. 390; *Lyon* v. *Green Bay, &c., Railroad Company*, 42 Wis. 548.

Mr. Justice Miller delivered the opinion of the court.

This is a bill in chancery, brought by Bonebrake, as assignee

in bankruptcy of John R. Medsker, against said Medsker and his wife.

The object of the bill is to subject to administration, as part of the assets of the bankrupt, a farm of 162 acres of land on which Medsker and his wife were living, the legal title of which was in Mrs. Medsker.

It appears that on August 2d, 1876, Medsker and wife conveyed this land to McCole, who, on the 4th day of the same month, conveyed it to Mrs. Medsker, the consideration in each deed being recited as $8,000.

On December 1st, 1876, one Poe, with whom Medsker was in partnership in the hardware business, filed his petition in bankruptcy, alleging that Medsker would not join him and making him a party, and praying that he be adjudged a bankrupt. On the 29th of that month Medsker came in and confessed himself a bankrupt, and was so adjudged.

The charging part of the bill, as regards the invalidity of the title conveyed to Mrs. Medsker by these two deeds, reads as follows:

"On that day, to wit, August 2d, 1876, within four months of the time of filing said petition in bankruptcy, the said John R. Medsker, being the owner, in his own right, of the real estate above described, and being indebted as aforesaid, with the fraudulent intention of defeating the operation and effect of the bankrupt law, and with the fraudulent intention of preventing his property from being distributed and applied in payment of his debts as provided for in the bankrupt law, and with the intention of preferring, in violation of the provisions of the bankrupt law, a pretended claim of the defendant Elizabeth Medsker, which claim your orator says was unjust and incorrect, and not a valid and legal claim against said John R. Medsker, the said John R. Medsker, together with his wife, the defendant Elizabeth Medsker, did execute, without any consideration whatever, to one C. J. McCole, who was a party to such fraudulent purpose, a deed of conveyance of said real estate, and the said grantee, C. J. McCole, in pursuance of the previous understanding and agreement, and for the purpose of carrying out the fraudulent intent before expressed, did convey said real estate to

the defendant Elizabeth Medsker, wholly without any consideration, on the 4th day of August, 1876.

"And your orator states that said Elizabeth Medsker was fully cognizant of the fraudulent and wrongful intention of said John R. Medsker, and participated in the same and joined in the deed to McCole for the purpose of carrying out the same, and accepted said fraudulent conveyance from C. J. McCole with full knowledge of its purpose, and with the intention of carrying out said fraudulent purpose."

To this bill Medsker and his wife filed their answer, under oath, in which they admit the conveyances and the bankruptcy proceedings, but denying all fraud in the transaction, and that Medsker was in failing circumstances when the deeds were made, or that they knew or believed he was unable to pay his debts. They aver that after said conveyances were made a large part of the indebtedness of Poe and Medsker was paid off in the ordinary course of business.

They further allege that the conveyances mentioned were made in order and for the express purpose, and for no other purpose, of paying a debt of $5,700 which Medsker owed his wife, and the interest accumulated thereon, for money loaned by her to him, which he had promised to repay to her on demand.

It is evident that the bill is framed upon the idea that section 5128 of the Revised Statutes was in force, and that the periods within which such conveyances by an insolvent could be assailed as void under the bankrupt law were four and six months, and all its allegations seemed aimed at such acts as would be unassailable after those periods. But the act of 1874 has shortened these periods to four and two months in cases of involuntary bankruptcy. 18 Stat. 180, ch. 390, § 10.

We do not doubt that Medsker's was a case of involuntary or compulsory bankruptcy within the meaning of this amendment. The distinction intended by this language is clearly between the cases in which the bankrupt himself and of his own volition initiates proceedings in bankruptcy, and those in which they are commenced by some one else against him.

In the one case it is voluntary and in the other compulsory.

Opinion of the Court.

It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by any one else; and it is compulsory and involuntary if he refuses to join in such case and is forced into it, as much as in any other enforced bankruptcy.

These deeds cannot be impeached, therefore, on the grounds of preference or payment in violation of the bankrupt law.

But whatever may have been the case in the mind of the pleader who drew the bill, there is language which, if liberally construed, may be held to charge that these conveyances were void or voidable, as being made with the intention of defrauding and cheating creditors generally, and without any valuable consideration.

In this view the bill was very loosely drawn, but as issue was taken on it and testimony produced, we will inquire into its effect as proof of the charge.

When the pleadings were made up an order was entered, without objection, referring the case to a master to take the evidence and report his finding thereon.

He reported that Medsker had received, at various times during the ten years preceding his bankruptcy, moneys belonging to his wife, mostly proceeds of land inherited from her father, amounting in the aggregate to $5,600; and that he had agreed to return it to her, and that she had always claimed that he was her debtor to that amount. He, therefore, finds she was a creditor at the time of the conveyance. He also finds that Medsker was insolvent at that time, and that his wife did not know it; and, on the whole, that the allegations of the bill are not sustained.

Exceptions to this report were filed, which were sustained by the court and a decree rendered for the assignee.

The evidence taken by the master was reported with his findings, and the case seems to have been treated by the court below without much regard to the finding of the facts by the master, or any special regard to the exceptions made to his report. This is not correct practice in chancery cases in the circuit courts of the United States, whatever may be the rule in the State courts.

The findings of the master are *prima facie* correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party.

In the case before us we are inclined, after a careful examination of the testimony, to concur with the master's report.

It is altogether a matter of the weight of evidence.

1. It is denied that the money was received of the wife by the husband, and if received, that it was a loan.

The testimony leaves no doubt that there was received from the estates of the wife's deceased father and brother, at different times, the aggregate sum of $5,700. The wife swears positively that she loaned these sums to her husband, who repeatedly promised to pay her; that at one time, more than a year before the bankruptcy, they had sharp words or ill-feeling about it, and he told her he had nothing but the farm and would convey that to her, and that the conveyances finally made were in pursuance of his repeated promise to do so. All this is wholly uncontradicted.

2. Much testimony is taken to prove that the price was so inadequate as to show fraud, though no such charge is made in the bill.

The fair result of all the testimony on this point is that the land was worth about $8,000, the sum recited in the conveyance; and if interest be computed on the $5,700 from the periods at which the various sums were received, it will amount to the full value of the land, if not more, at the time the deeds were made.

3. There is no reason to disbelieve Mrs. Medsker when she swears positively that she did not know nor suspect her husband's insolvency until bankrupt proceedings were commenced.

Her statement is confirmed by the allegation, undisputed, that between the time of the conveyance and the petition in bankruptcy $4,000 of their debts were paid, and the bill alleges that their debts were only $5,000 in excess of their assets.

4. The master, who was present and heard Mrs. Medsker testify, and could see her manner, and is therefore better able to determine the weight due to her testimony, says he has no

doubt she was a creditor, and was in ignorance of Medsker's insolvency. *Dean* v. *Pearson*, 102 Mass. 101.

5. The conveyance first to McCole, who paid nothing, but took the title in trust for Mrs. Medsker, and from him to her, was to satisfy the common-law inability to make a direct conveyance from husband to wife, and is no evidence of fraud.

In the case of the *Atlantic National Bank* v. *Tavener*, 130 Mass. 407, that court says: "The question whether a loan by the wife to the husband, of money which is her separate property, upon his promise to repay it, creates an equity in her favor, which a court of equity will enforce, has not been decided in this commonwealth. But it has generally, if not uniformly, been decided in the affirmative in other courts," for which numerous cases are cited. It is added: "That the jury in this case having found that the money delivered by the wife to the husband was by way of loan, and not of gift, and that his subsequent conveyance of land through a third person to her in repayment of that loan, was not made with the purpose of hindering, delaying, or defrauding creditors, that conveyance, to satisfy his equitable obligation to his wife, was not a voluntary conveyance, and was valid against his creditors. *Bullard* v. *Briggs*, 7 Pick. 533; *Forbush* v. *Willard*, 16 Pick. 42; *Stetson* v. *O'Sullivan*, 8 Allen, 321; *French* v. *Motley*, 63 Maine, 326; *Grabill* v. *Moyer*, 45 Penn. St. 530; *Babcock* v. *Eckler*, 24 New York, 623; *Steadman* v. *Wilbur*, 7 R. I. 581."

Such is precisely the case here, as reported by the master, and, as we think, supported by the evidence; and

The decree of the circuit court is reversed, and the case remanded, with directions to dismiss the bill.

STUCKY, Assignee of MELTER in Bankruptcy *v.* MASONIC SAVINGS BANK and Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Decided March 5th, 1883.

Bankruptcy—Fraudulent Preference.

A creditor, dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or take security without necessarily violating the bankrupt law. When such creditor is unwilling to trust a debtor further, or feels anxious about his claim, the obtaining additional security, or the receiving payment of the debt is not prohibited, if the belief which the act requires is wanting. *Grant* v. *National Bank*, 97 U. S. 80, approved and followed.

Mr. David W. Armstrong and *Mr. L. N. Dembitz*, for the appellants.

Mr. J. P. Helm and *Mr. W. O. Dodd*, for the appellees.

Mr. Justice Miller delivered the opinion of the court.

This suit originated in a bill in equity brought in the district court by Stucky, as assignee of Melter, a bankrupt, against the bank and against Jacob Krieger, Sr., for the purpose of having two mortgages made by the bankrupt declared void, and the real estate covered by them sold free of the lien of those mortgages. The ground of this relief is the allegation that the mortgages were made by Melter when insolvent, and were preferences in contemplation of bankruptcy, void by the bankrupt law, and that, by virtue of the bankrupt proceedings commenced within two months after they were made, they are void.

The case was decided in favor of the assignee in the district court, but on appeal the circuit court reversed this decree and dismissed the bill.

It is shown that both mortgages were taken to secure renewal notes for pre-existing debts, one note and mortgage being made to the bank directly, and the other to Mr. Krieger, who was president of the bank, the note being indorsed by him to the bank. They were for $6,000 each.

Opinion of the Court.

The whole matter turns upon the question whether Krieger, who acted almost alone for the bank, had reasonable ground to believe that Melter was insolvent at the time the mortgages were made.

The district judge, who decided that he had such reasonable ground, does not seem to have given due weight to the principles of the case of *Grant* v. *The National Bank*, decided by this court, and reported in 97 U. S. 80, a case which was fully considered, and which has since been followed by us as a leading one on the subject.

That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law.

In the case before us the testimony of Krieger himself, as the one who best knows the strength of the suspicion, if any, on which he acted, and what evidence was before him, must chiefly control.

We have examined his deposition very carefully. We think it bears the impress of candor, and it negatives the idea that he had reasonable ground to believe Melter insolvent, or that he actually did believe it.

The evidence, outside of this, as to the various estimates of the value of Melter's property and the amount of his debts, while it shows that Melter was probably insolvent, does not show that this was known to Melter himself or to Kreiger, or that the latter had reasonable grounds to believe him so.

It would serve no useful purpose to give in this opinion a full examination of all the evidence. It is sufficient to say that in looking it all over we concur with the circuit judge, and his decree dismissing the bill is

Affirmed.

NEW HAMPSHIRE *v.* LOUISIANA and Others.

NEW YORK *v.* LOUISIANA and Others.

ORIGINAL.

Decided March 5th, 1883.

Constitutional Law—International Law—Jurisdiction—Sovereign State.

1. The history of article XI. of the amendment to the Constitution which provides that the judicial power of the federal courts shall not extend to suits against a State by a citizen of another State, or by citizens or subjects of a foreign State, and the causes which led to its adoption, reviewed.
2. Unless the State prosecuted consents, that amendment prohibits the court from entertaining jurisdiction of a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own. One State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.
3. The relation of one of the United States to its citizens is not that of an independent sovereign State to its citizens. A sovereign State seeking redress of another sovereign State on behalf of its citizens can resort to war on refusal, which a State cannot do.
4. The qualifications of the duty of a sovereign State to assume the collection of the debts of its citizens from another sovereign State considered and stated.

The case on which the opinion is given is thus stated by the court.

On the 18th of July, 1879, the general court of New Hampshire passed an act, of which the following is a copy:

"AN ACT to protect the rights of citizens of this state, holding claims against other States.

"*Be it enacted by the Senate and House of Representatives in General Court convened.*

SECTION 1. Whenever any citizen of the State shall be the owner of any claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, which obligation shall be past due and unpaid, such citizen holding such claim may assign the same to the State of New Hampshire, and deposit the assignment thereof, duly exe-

cuted and acknowledged in the form and manner provided for the execution and acknowledgment of deeds of real estate by the laws of this State, together with all the evidence necessary to substantiate such claim, with the attorney-general of the State.

"SEC. 2. Upon such deposit being made, it shall be the duty of the attorney-general to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the attorney-general, shall, upon the assignor of such claim depositing with him such sum as he, the said attorney-general, shall deem necessary to cover the expenses and disbursements incident to, or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the State of New Hampshire, in the Supreme Court of the United States, as he, the said attorney-general, shall deem necessary for the recovery of the money due upon such claim ; and it shall be the duty of the said attorney-general to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust, and settle such claim before or after judgment.

"SEC. 3. Nothing in this act shall authorize the expenditure of any money belonging to this State, but the expenses of said proceedings shall be paid by the assignor of such claim ; and the assignor of such claim may associate with the attorney-general in the prosecution thereof, in the name of the State of New Hampshire, such other counsel as the said assignor may deem necessary, but the State shall not be liable for the fees of such counsel, or any part thereof.

"SEC. 4. The attorney-general shall keep all moneys collected upon such claim, or by reason of any compromise of any such claim, separate and apart from any other moneys of this State which may be in his hands, and shall deposit the same to his own credit, as special trustee under this act, in such bank or banks as he shall select ; and the said attorney-general shall pay to the assignor of such claims all such sums of money as may be recovered by him in compromise or settlement of such claims, deducting therefrom all expenses incurred by said attorney not before that time paid by the assignor.

"SEC 5. This act shall take effect on its passage."

Under this act six of the consolidated bonds of the State of Louisiana, particularly described in the cases of *State ex rel. Elliott* v. *Jumel* and *Elliott* v. *Wiltz*, 107 U. S. 711, were assigned to the State of New Hampshire by one of its citizens. This assignment was made for the purposes contemplated in the act, and passed to the State no other or different title than it would acquire in that way. After the assignment was perfected a bill in equity was filed in this court in the name of the State of New Hampshire, as complainant, against the State of Louisiana and the several officers of that State who compose the board of liquidation provided for in the act authorizing the issue of the bonds. The averments in the bill were substantially the same as those in *Elliott* v. *Jumel*, save only that in this case the ownership of the bonds specially involved was stated to be in New Hampshire, while in that it was in Elliott and his associates. The prayer was in substance for a decree that the bonds and the act and constitutional amendment of 1874 constitute a valid contract between Louisiana and the holders of its bonds; that the defendants and each of them might be prohibited from diverting the proceeds of the taxes levied under the act from the payment of the interest, and that the provisions of the debt ordinance of 1879 might be adjudged void and of no effect, because they impaired the obligation of the contract. The bill was signed in the name of New Hampshire by the attorney-general of that State and also by the same counsel who appeared for Elliott, Gwynn & Walker in their suit in equity reported in 107 U. S.

On the 15th of May, 1880, the legislature of New York passed the following act:

"AN ACT to protect the rights of citizens of this State owning and holding claims against other States.

"*The people of the State of New York, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. Any citizen of this State, being the owner and holder of any valid claim against any of the United States of

America, arising upon a written obligation to pay money, made, executed, and delivered by such State, which obligation shall be past due and unpaid, may assign the same to the State of New York, and deliver the assignment thereof to the attorney-general of the State. Such assignment shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such assignment before the delivery thereof. Every such assignment shall contain a guaranty, on the part of the assignor, to be approved by the attorney-general, of the expenses of the collection of such claim, and it shall be the duty of the attorney-general, on receiving such assignment, to require on behalf such assignor, such security for said guaranty as he shall deem adequate.

"SEC. 2. Upon the execution and delivery of such assignment, in the manner provided for in section one of this act, and furnishing the security as in said section provided, and the delivery of such claim to him, the attorney-general shall bring and prosecute such action or proceeding, in the name of the State of New York, as shall be necessary for the recovery of the money due on such claim, and the said attorney-general shall prosecute such action or proceeding to final judgment, and shall take such proceedings after judgment as may be necessary to effectuate the same.

"SEC. 3. The attorney-general shall forthwith deliver to the treasurer of the State, for the use of such assignor, all moneys collected upon such claim, first deducting therefrom all expenses incurred by him in the collection thereof, and said assignor, or his legal representatives, shall be paid said money by said treasurer upon producing the check or draft therefor of the attorney-general to his or their order and proof of his or their identity.

"SEC. 4. This act shall take effect immediately."

On the 20th of April, 1881, E. K. Goodnow and Benj. Graham, being the holders and owners of thirty coupons cut from ten of the consolidated bonds of Louisiana falling due January 1st, 1880, July 1st, 1880, and January 1st, 1881, assigned them to the State of New York by an instrument in writing, of which the following is a copy :

"Know all men by these presents, that we, the undersigned, citizens of the State of New York, being the owners and holders of valid claims against the State of Louisiana, arising upon written obligations to pay money, made, executed, and delivered by the State of Louisiana, and now past due and unpaid, being the coupons hereto annexed, in consideration of one dollar to each of us paid by the State of New York, and for other good and valuable considerations, hereby assign and transfer the said claims and coupons to the State of New York.

"And we do hereby covenant with the said State that if an attempt is made by it to collect the said claim from the State of Louisiana we will pay all the expenses of the collection of the same.

"In witness whereof we have hereunto set our hands and affixed our seals this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

"E. K. GOODNOW. [L. S.]
"BENJ. GRAHAM. [L. S.]

"Sealed and delivered in presence of—
"FRANK M. CARSON."

Thereupon the State of New York, on the 25th of April, filed in this court a bill in equity against the State of Louisiana and the officers of the State composing the board of liquidation, with substantially the same averments and the same prayer as in that of the State of New Hampshire. There was, however, a statement in this bill not in the other, to the effect that many of the consolidated bonds were issued to citizens of the State of New York in exchange for old bonds of Louisiana which they held, and that citizens of New York now hold and own bonds of the same class to a large amount. Testimony has been taken in support of this averment.

Mr. Wheeler H. Peckham for the State of New Hampshire. —I. The controversy is one arising on a contract. This species of controversy is within the jurisdiction of the court.— II. The particular contracts are negotiable instruments of which the State by assignment is legal owner, and in the suit is the real party in interest, whether the transfer was an

actual sale or merely colorable. *Sheridan* v. *The Mayor*, 68 N. Y. 30; *Mercer County* v. *Hackett*, 1 Wall. 83; *Nat. Bank* v. *Texas*, 20 Wall. 72; Edwards on Bills, 130–132; *Hays* v. *Hathorn*, 74 N. Y. 468.—III. The remedy is not sought against the State, but against other defendants to restrain them from diversion of funds. If the State cannot be made a party, a court of equity will proceed without it. *Board of Liquidators* v. *McComb*, 92 U. S. 531. New Hampshire seeks only the relief which would be granted in a suit between individuals in a circuit court. Louisiana had power to issue these bonds; New Hampshire power to acquire them. *United States* v. *Bank*, 15 Pet. 377; *Union Branch Railroad Company* v. *East Tennessee, &c., Railroad Company*, 14 Geo. 327. The creditor State is entitled here to the same remedies against the debtor State, which one individual would have against another in a circuit court.—IV. The fact that the ownership is acquired under a statute does not oust the jurisdiction. No citizen of one country can sue in the courts of his own country any other State or sovereignty, nor can he sue such other State in its own courts. He must resort to his sovereign (*i. e.* New Hampshire), for redress; and under the federative system this court, in a controversy between States, takes the place of the last resort of independent nations. *Rhode Island* v. *Massachusetts*, 12 Peters, 657.—V. This jurisdiction extends even to political questions between States, when a judicial question arises for their settlement. *Rhode Island* v. *Massachusetts*, *ubi sup.*; *Virginia* v. *West Virginia*, 11 Wall. 39. *Mr. Peckham* also discussed some provisions of the Constitution of Louisiana, and the peremptory remedies sought for.

Mr. Leslie W. Russell, Attorney-General of New York, *Mr. David Dudley Field*, and *Mr. William A. Duer*, for the State of New York.—The parties to the controversy, the States of New York and Louisiana; and the officers of the latter charged with the assessment and collection of taxes and payment of the debt; the subject of the controversy—a contract by the State of Louisiana for the payment of money; and the remedies sought for the enforcement of that contract are all

within the jurisdiction of the court when properly brought before it.—I. A State of this Union can implead another State in this court for a money demand. *Van Stophorst* v. *Maryland*, 2 Dallas, 401; *Oswald* v. *New York*, 2 Dallas, 401, 402 and 415; *Chisholm* v. *Georgia*, 2 Dallas, 419; *Grayson* v. *Virginia*, 3 Dallas, 320; *Hollingsworth* v. *Virginia*, 3 Dallas, 378; *Huger* v. *South Carolina*, 3 Dallas, 339; *Cutting* v. *South Carolina*, 2 Dallas, 415, note; *New York* v. *Connecticut*, 4 Dallas, 1.—II. The assignment of the demand for the purpose of suing does not affect this right. The right and duty of every sovereign State, on behalf of its citizens, to call upon any other sovereign State for the fulfilment of its obligations to those citizens, is an established rule of international law. Our own country has acted upon it so often, that with us it is no longer an open question. Our diplomatic correspondence is full of references to it. The argument cites also Stat. 4 Hen. IV. ch. 7; Ordonance de la Marine, 1681; Grotius, B. 3 ch. 2, sec. 5 subdivision 2; Vattel, book 2, ch. 18, page 347, with Ingersoll's notes, 1869; Rives' Life of Madison, vol. 1, 564; vol. 2, 41; Manning's Law of Nations, 150 (Amos edition); 2 Twiss' Law of Nations, sec. 11; 2 Phil. Int. Law, 8; The Federalist. The extent of the jurisdiction over controversies between the States, and the manner of exercising it, have been so often considered by the court, that a reference to the cases is hardly necessary. Thus the suit of New Jersey against New York, begun in 1830, appears three times in the reports, and that of Rhode Island against Massachusetts, begun in 1832, appears five times. *New Jersey* v. *New York*, 3 Pet. 461; 5 Pet. 284, where Chief Justice Marshall goes over the subject, and 6 Pet. 323; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, where the jurisdiction was considered at length by Mr. Justice Baldwin; 13 Pet. 23, 14 Pet. 210, 15 Pet. 233, and 4 How. 591. In *Poole* v. *Fleeger*, 11 Pet. 185, 209, Mr. Justice Story, delivering the opinion of the court, used this language respecting the rights of the States, under the law of nations, independent of the Constitution. . . . "It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their re-

spective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction requiring the consent of Congress. The Constitution declares, that 'No State shall, without the consent of Congress, enter into any agreement or compact with another State;' thus plainly admitting that, with such consent it might be done; and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."—III. Even if a suit cannot be maintained against the State, its officers can be required to apply the money in their hands to the payment of interest. *Kendall's Case*, 12 Pet. 527; the *King* v. *Lord Commissioners*, 5 Nev. and Man. 589; 6 Nev. and Man. 508.—IV. They may, also, in case the amount in their hands is insufficient for that purpose, be required to assess and collect a tax. *Board Comrs. Knox County* v. *Aspinwall and others*, 24 How. 376; *Supervisors* v. *United States*, 4 Wallace, 435; *Von Hoffmann* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Mayor* v. *Lord*, 9 Wall. 409; *United States* v. *Boutwell*, 17 Wall. 604; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Loan Association* v. *Topeka*, 20 Wall. 655; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *United States* v. *Memphis*, 97 U. S. 284; *Memphis* v. *United States*, 97 U. S. 293; *Memphis* v. *Brown*, 97 U. S. 300; *United States* v. *Fort Scott*, 99 U. S. 152; *County of Greene* v. *Daniel*, 102 U. S. 187; *Louisiana* v. *New Orleans*, 102 U. S. 203; *Louisiana* v. *United States*, 103 U. S. 289; *Wolff* v. *New Orleans*, 103 U. S. 358.

Argument for Louisiana.

Mr. J. C. Egan, Attorney-General of Louisiana, and *Mr. John A. Campbell* for the State of Louisiana.—I. The judicial power of the United States does not extend to suits against a State.—II. An agreement by a State with an individual creates no juridical obligation and no juridical relation between the parties. Federalist, No. 81; 6 Webster's Works, 537; 1 Calhoun's Works, 260. The clause in the Constitution forbidding a State to impair the obligation of a contract has no application to such agreements. The term "contract" is narrower than the term "agreement." A contract is an agreement which raises an obligation that can be enforced at law. Anson on Contracts, sec. 9; Pollock on Contracts, 6; Austin on Jurisprudence, 1016, 17. This distinction was known to the framers of the Constitution, and they used language applicable to perfect obligations, which could be enforced at law, and which had no application to those imperfect obligations which men owe to themselves or their families, or their neighbors, but which cannot be enforced at law. This distinction is recognized in the English courts, *Crouch* v. *Credit Foncier*, L. R. 8 Q. B. at page 384; and by French jurists, 42 Dalloz, Jurisp. Gen. Tresor public, No. 1105; and by this court, *Bank of United States* v. *United States*, 5 How. 382. He also cited 15 Laurent, No. 424, p. 477; 1 Picot, Code Civ. p. 162–3; Larombière des Obligations, 360–364; ib. 58–59; 1 Bentham's Works, 148; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 208; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Ogden* v. *Saunders*, 12 Wheat. 213, 332.—III. The United States enjoy immunity from suits as matter of right. *United States* v. *Clarke*, 8 Pet. 436; *Briscoe* v. *Bank*, 11 Pet. 257; *United States* v. *McLemore*, 4 How. 286; *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Thompson*, ib. 486. An obligation to pay the debts contracted before the Constitution was inserted in article VI. It was part of the supreme law. But the creditors had no *vinculum juris*. Theirs were *pacta quæ non habent causam civilem*. This is a case strictly analogous to the case stated in the bill.—IV. This is not a controversy between States. It is a vicarious controversy between individuals. Controversies between States have little resem-

blance to those between individuals. They arise out of public relations and intercourse, and involve political rights.—V. Courts of chancery discourage suits that are artificially produced, and do not arise on the relations of the parties. The merchandise consisting merely of a faculty to come into court, is not allowed.—VI. The rule of chancery is that the immediate parties to a contract, or their successors, are necessary parties to a suit for its enforcement. In this case the State is the only party indebted, or charged to be indebted. The object of the bill is to establish a debt against her, to be paid out of money belonging to her. *Shields* v. *Barrow*, 17 How. 130; *Coiron* v. *Millauden*, 19 How. 113; Pomeroy on Contracts, 546, 484–5, 491.—VII. In the New York case an argument of a wider scope is presented; that the State of New York, having been a sovereign, and with powers to make war, issue letters of marque and reprisal, and otherwise to act in a belligerent way, resigned these powers into the control of the United States, to be held in trust, and therefore this court must make decrees in the cases in favor of the plaintiff, for judgment, making declaration of the default of Louisiana, and to subject her collecting agencies and accounting officers to the demands of the bill, and to compel the collection of taxes, to pay all the holders of coupons and bonds within the State of New York their interest and principal, from year to year, till the debt becomes due in A. D. 1914. No precedent of such a suit has been cited, and it must be admitted the present has the merit of originality and invention. It is opposed to the general practice of nations, and the testimony of the leading bankers of Great Britain and of the leading financiers of Europe is a dissent and contradiction to any policy or right to use governmental power in such cases. Mr. Campbell reviewed the acts of government in such cases, and closed with an argument upon the constitutions of Louisiana.

Mr. Peckham and *Mr. Field* replied.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the case he continued:

The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Art. III., sec. 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and citizens of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789, c. 20, sec. 13, 1 Stat. 80, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of assumpsit in this court against the State of Georgia, and process was served on the governor and attorney-general. *Chisholm* v. *Georgia*, 2 Dall. 419. On the 11th of August, 1792, after the process was thus served on Mr. Randolph, the attorney-general of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said, "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the acts of another State, whose will must always be dear to me, that she too condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All the justices who heard the case filed opinions, some of which were very elaborate, and it is evident the subject re-

ceived the most careful consideration. Mr. Justice Wilson in his opinion uses this language, p. 465 :

"Another declared object (of the Constitution) is, 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, 'that no State shall pass a law impairing the obligation of contracts,' we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision *secure*, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable for such a violation of right, to no controlling judiciary power?"

And Chief Justice Jay, p. 479 :

"The extension of the judiciary power of the United States to such controversies, appears to me to be *wise*, because it is *honest*, and because it is *useful*. It is *honest*, because it provides for doing justice without respect to persons, and by securing individual citizens, as well as States, in their respective rights, performs the promise which every government makes to every free citizen, of equal justice and protection. It is *useful*, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action, and enforces the great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined."

Prior to this decision the public discussions had been confined

to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State; many of the leading members of the convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the governor. This led to the convening of the general court of that commonwealth, which passed resolutions instructing the senators and requesting the members of the House of Representatives from the State "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction, and, soon after the next Congress came together, the eleventh amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798. That amendment is as follows:

"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 and subjects of any foreign State."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another

State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the attorney-general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney-general such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the attorney-general, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney-general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the attorney-general are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of the amendment, the States may prosecute the suits, because, as the "sovereign and trustee of its citizens," a State is

"clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in the *United States* v. *Diekelman*, 92 U. S. 520, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Art. 1, sec. 10, cl. 3.

But it is said that, even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International law, vol. II., 2d ed., page 12:

"As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State."

Whether this be in all respects true or not, it is clear that no nation ought to interfere, except under very extraordinary cir-

cumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and

The bill in each case is dismissed.

Statement of Facts.

THE NUESTRA SEÑORA DE REGLA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appeal—Constitutional Law—Demurrage—Execution—Prize—Probable Cause—Supreme Court.

The *Nuestra Señora de Regla* was seized in November, 1861, by the army. In December, 1861, the master chartered her to the quartermaster's department for two hundred dollars a day. She remained in the service of the quartermaster till January 29th, 1862, when she was delivered to the navy, by whom she was used as a transport till March 1, 1862. She was then sent to New York and libelled as prize. A decree of restitution was made June 20th, 1863. Proceedings to fix the amount of demurrage were stayed to enable the matter to be adjusted diplomatically. In 1870 the Department of State informed the Spanish Minister that it would be more satisfactory to the United States to have the question settled by the court. A reference to a commissioner resulted in a decree for demurrage to the date of the decree for restoration, in all 268 days. On appeal the decree was set aside as excessive, and the case remanded. Under a new reference the same demurrage was allowed, and decree therefor made: *Held* that

1. It having been settled by the former decree in 17 Wall. 29, that the steamer was not lawful prize, and that the capture was without probable cause, these questions were no longer open. *Supervisors* v. *Kennicott*, 94 U. S. 498, followed.
2. The capture being made by the army, the vessel was not subject to condemnation as prize.
3. The executive could, without legislative authority, submit to the determination of a judicial tribunal the question of the amount of damages for the capture.
4. A captor who does not institute judicial proceedings for the condemnation of his prize without unnecessary delay is subject to demurrage in case a decree of restitution is made after proceedings are begun.
5. The United States are liable to demurrage in the present case from the date when the surrender for adjudication might have been made until the date of the surrender, at the rate fixed by the charter party.

The steamer Nuestra Señora de Regla was built in New York for the claimant, a railroad company in Cuba, created by the laws of Spain. She was delivered to an agent of the claimant on the 6th of November, 1861, and sailed for Havana in command of a Spanish master. She was a side-wheel steamer of about three hundred tons burden, built to run on a ferry

between Havana and a terminus of the railroad company's railroad, On her way down the coast she went into Port Royal, and while there the quarter-master of the United States at that post offered to purchase her for the use of the government. The master declined to sell, as he had no authority. She was then, on the 29th of November, seized by order of Gen. Thomas W. Sherman, in command of the United States forces. In communicating the fact of the seizure to the adjutant-general of the army, on the second of December, the general said:

"If this steamer I have seized is confiscated, she should be left here. She is just the thing we want, and admirably adapted for these waters and our purpose. She is new and exactly such a boat as they have at the Jersey City Ferry in N. Y. Will cary 1,000 men, and will draw not over six or seven feet."

No judicial proceedings were instituted for her condemnation, but at some time before December 16th, the following charter-party was entered into:

"Articles of agreement made this day of December, 1861, between , captain of the steam ferry-boat Nuestra Señora de Regla, for and on behalf of the owners of the said ferry-boat, of the first part, and Captain Rufus Saxton, as assistant quarter-master in the United States army, for and on behalf of the United States of America, of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the payment hereinafter promised to be well and truly made by the said party of the second part, hath chartered to the United States the steam ferry-boat Neustra Señora de Regla, with all her tackle, apparel, furniture, and machinery, to be used for transporting troops, stores, or other things, as the said party of the second part may direct.

"And the said party of the second part doth agree, for and in consideration of the faithfnl performance of the above duty, that the said party of the first part shall receive the sum of two hundred dollars for each and every day the said boat may be kept in service, said steam ferry-boat to be kept staunch, sound and strong,

and her machinery in good running order and condition, by the party of the first part.

"It is understood by the parties to this agreement that in case the said steam ferry-boat shall be confiscated to the United States, then this contract shall be void; otherwise to remain in full force and virtue.

"It is furthermore understood by the parties to this agreement that the said steam ferry-boat is not to be run outside of the bar of Port Royal, but at any and all points on the rivers and creeks that connect with Broad River.

"This contract to commence on the 16th day of December, 1861, and continue in force ten days, after which each party has a right to cancel the same.

"In witness whereof the undersigned have hereunto affixed their hands and seals, at Hilton Head, S. C., the day and date first above written.

"(S'd) YGNACIO A. REYNALS. [L. S.]
"(S'd) R. SAXTON, [L. S.]
"*Capt. U. S. Army, Chief Quartermaster, E. C.*"

The testimony showed that two hundred dollars a day was a fair price for the use of the vessel at that place at that time. One witness, competent to judge, testified to that effect, and no attempt was made by the United States to contradict him.

The vessel was kept in the possession or under the control of the quarter-master until the 29th of January, when she was in form delivered to the flag officer of the navy in command at that station. She was, however, kept in constant use by the government as a transport, in the way contemplated by the charter, from the 16th of December until about the 1st of March, when she was sent to New York. No judicial proceedings were begun against her until the 9th of June, when a libel of information in prize was filed in the District Court for the Southern District of New York by the United States, in behalf of themselves "and of the naval captors in interest." She was attached on the same day by the marshal, and the usual monition was issued and served. The owner filed a claim on the 9th of July. No further proceedings were had until the 22d of August, when the following order was entered:

Statement of Facts.

"On reading and filing a notice of motion and a verified copy of a letter from the secretary of the navy, stating that the navy department desires to obtain possession of the steamer Nuestra Señora de Regla; and on hearing Mr. E. Delafield Smith, United States district attorney, in support of the motion, and Mr. W. R. Beebe, proctor for the claimants, in opposition thereto, it is hereby ordered that the said steamer Nuestra Señora de Regla be appraised by Benjamin F. Delano, United States naval constructor, and Benjamin F. Garvin, chief engineer, both now stationed at the navy yard, New York, and John Inglis; that such appraisement be filed with all convenient speed with the clerk of this court; that thereafter said steamer be delivered to the navy department for the use of the government, upon filing in court a certificate of the assistant treasurer of the United States in New York that the amount of the appraisement has been deposited in the United States treasury, subject to the order and disposal of the court on final decree in the case.

"SAMUEL R. BETTS."

The letter of the secretary of the navy referred to in this order was as follows:

"NAVY DEPARTMENT, *August 11th*, 1862.

"SIR: The department will take the steamer Nuestra Señora de Regla at the appraisement of twenty-five thousand dollars.

"It desires early information, if practicable, as to the appraisement in the case of the Annie, the Stettin, and the Memphis.

"I am, resp'y, your ob't s'v't, "GIDEON WELLS."

The vessel was valued by two of the appraisers at $28,000 and by the third at $30,000, and immediately delivered to the navy department, although the certificate of deposit provided for was never filed. The cause was heard on the 20th June, 1863, and a decree entered directing that the vessel be restored to the owner, but reserving all questions of costs, and damages resulting from the capture, for future hearing and determination. On the 15th of October, 1863, the following entry was made in the cause:

"It having been mutually agreed between the counsel for the

respective parties that the said vessel, in the above decision, was immediately taken into the possession and use of the United States under a charter-party, and delivered them thereunder, and so remained without molestation from the claimants. On motion of the counsel for the vessel and with the assent of the United States attorney, it is ordered by the court that further proceedings and litigation be stayed in the above cause, to the end that all questions of damages reserved in the decision of the court in the term of June last, may be considered and adjusted by the government of the United States in the application, and with the concurrence of the government of Spain.

"SAMUEL R. BETTS."

On the 20th of May, 1870, the following letter was addressed to the Spanish minister in Washington by the Acting Secretary of State:

"DEPARTMENT OF STATE, *Washington, May 20th*, 1870.

"SIR: I have the honor to acknowledge the receipt of your note of the 5th instant in relation to the Spanish steamer Nuestra Señora de Regla, and the claim which arose in consequence of her seizure by the United States authorities in 1861.

"The District Court of the United States for the Southern District of New York, after deciding that the claimants were entitled to restitution of the vessel, made an order suspending proceedings, to the end that the question of damages might be considered and adjusted by the government on the application and with the concurrence of that of Spain.

"Without referring to the reasons which have so long delayed any arrangement between the two governments, I have now to say that it will be more satisfactory to the government that the parties interested should apply to the court, which still retains jurisdiction of the case, to obtain such further relief as justice may demand, and in the mode which that tribunal shall deem most proper and convenient.

"I avail myself of this occasion to offer to you assurances of my very high consideration.

"J. C. BANCROFT DAVIS,
Acting Secretary of State."

Statement of Facts.

On the 2d of June following, the cause was referred to one of the commissioners of the court to ascertain the amount of damages the claimant had sustained by the seizure and detention of the vessel. The commissioner made his report on the 20th of May, 1871, fixing the damages for the detention at the rate of $200 a day from November 29th, 1861, to June 20th, 1863, the date of the decree for restoration, with interest at six per cent. per annum, amounting to $167,370.66⅔, and allowing for the expenses and services of an agent remaining with and attending to the vessel, $5,680; for counsel fee in defending the proceedings, $5,000, and for the value of the vessel at the date she should have been restored, with interest added, $36,833.33¼, or a total of $214,884.00. Exceptions were taken to this report by the United States, but they were overruled, and a decree rendered for the full amount allowed by the master, with interest added.

From that decree an appeal was taken to this court, where, at the October term, 1872, it was decided "that the vessel was not lawful prize of war or subject to capture, and the corporation which owned her is doubtless entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel; but it may be well doubted whether it is not more properly a subject of diplomatic adjustment than determination by the courts." It was also said in the opinion, "the decree of the district court included the sum of $5,000 for counsel fees. We think that the amount was greatly excessive, and the allowance for counsel fees wholly unwarranted." For the errors thus indicated the decree was reversed. *The Neustra Señora de Regla*, 17 Wall. 29. The case was then remanded for further proceedings in accordance with the opinion. On the 22d of July, 1873, after the mandate was filed, a second reference was made to the commissioner "to assess the damages of the claimant of the vessel sustained by him in consequence of the seizure and detention of the vessel, and that on such reference all the proofs already taken in the cause or before the referee be used, together with such other proofs as may be put in by either party."

Under this reference the commissioner again reported that the United States continued to use the vessel after she was taken

possession of by the navy department, pursuant to the order of August 22d, 1862, until the 20th of June, 1863, the date of the decree for her restoration, and that she had never been restored to the owners or her value paid. He therefore allowed:

For detention from November 29th, 1861, to June 20th, 1863, 568 days, at $200 per day.....	$113,600 00
Interest at 6 per cent. to date of report...	81,698 00
For value of vessel, ascertained to be.....	30,000 00
Interest from June 20th, 1863.....	21,549 00
For expenses of agent, 568 days at $10.....	5,680 00
	$252,527 00

To this report exceptions were filed on behalf of the United States, but they were overruled by the court, and a decree entered March 8th, 1879, for the amount found due, with interest from the date of the report, or in all, $308,932.38. From that decree this appeal was taken.

Mr. Assistant Attorney-General Maury for the United States:—I. Argued the merits of the seizure on the facts as now presented, and contended, on the authority of *United States* v. *Bank of the United States*, 5 How. 382, that the court was not concluded in the second appeal by an expression of opinion on the first appeal as to a question which was not then presented in the then condition of the record; and further that the government cannot be prejudiced by the laches of its officers in omitting to properly present the question of the validity of the seizure at the former trial.—II. The record shows the seizure was made for probable cause, as defined in *The Thompson*, 3 Wall. 155; *Locke* v. *United States*, 7 Cranch, 339. —III. The proper parties to a judgment are not before the court. The persons who used the authority of the government to seize the vessel should be here in a proceeding in prize. *The Louisa Agnes*, Blatchford Prize Cases, 107; *The Eleanor*, 2 Wheat. 345; *The Magnus*, 1 C. Rob. 31. Especially if a judgment for costs is to be given against them. *The Leucade*,

2 Spinks. 228. The soldiers who made the seizure have no interest in the prize as captors, *The Siren*, 13 Wall. 389; but may nevertheless be subjected in a prize court to damages and costs for the seizure. *Ib.*—IV. The court below was without authority to make a decree against the United States. *Case* v. *Terrell*, 11 Wall. 199.—V. The demurrage was not referrible to the capture as proximate cause, and was therefore not ground for damages in this suit.—VI. The use of the vessel under the charter-party was under a contract, and therefore not a ground for judgment for damages.—VII. No damages should in any event have been allowed after August, 1862.

Mr. William Allen Butler for the appellee. — I. The questions settled at the former hearing are no longer open *Himely* v. *Rose*, 5 Cranch, 313; *Skillern* v. *May*, 6 Cranch, 267; *Ex parte Sibbald* v. *United States*, 12 Pet. 488; *The Santa Maria*, 10 Wheat. 431; *Corning* v. *Troy Iron and Nail Factory*, 15 How. 451; *Supervisors* v. *Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461.—II. The district court had power to make all orders and decrees made in the case. *The Apollon*, 9 Wheat. 362; *The Lively*, 1 Gallison, 314; *The Glen*, Blatchford Prize Cases, 375; *The Sybil*, Blatchford Prize Cases, 615; *The Siren*, 7 Wall. 152; *The Labuan*, Blatchford Prize Cases, 165; *The Jane Campbell*, Blatchford Prize Cases 101.—III. The United States having waived objection to jurisdiction, the adjudication is final. The exercise of a jurisdiction which exists cannot be objected to after voluntary appearance and litigation on the merits. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Bangs* v. *Duckinfield*, 18 N. Y. 592. A State properly brought into the forum of litigation cannot assert rights or immunities as incident to sovereignty. *Davis* v. *Gray*, 16 Wall. 203.—IV. The United States is not sued in these proceedings. It comes into court voluntarily, and forces the vessel here. That has no analogy to a proceeding against the United States as defendants. There are plenty of precedents to support the decree. *The Labuan* and *The Sybil*, *ubi sup.*—V. There was no error in respect to the award of damages. On this point *Mr. Butler* referred to the Treaty of 1795, 8

Stat. 139, as showing the obligation and rights of the parties, and cited Roberts on Admiralty and Prize, 446; Upton on Prize Courts, 246; Phill. Int. Law, § 449; *The Lively*, 1 Gallis. 314; *The Apollon*, 9 Wheat. 377; *The Pizarro*, 2 Wheat. 227; Massé, Droit Commercial, liv. ii., ch. 2 § 2; § xi. tom. 1, p. 310; 3 Phill. Int. Law, 41; Wheat. Int. Law (Lawrence ed.), 512; *Haver* v. *Yaker*, 9 Wall. 32. The rule of damages is to measure the compensation by the freight which the vessel was in the act of earning. *Williamson* v. *Barrett*, 13 How. 101; *The Gazelle*, 2 W. Rob. 279; *The Glaucus*, 1 Lowell, 366; *Vantine* v. *The Lake*, 2 Wall. Jr. 52; *The Narragansett*, Olcott, 388; *The Rhode Island*, Olcott, 505; *The M. M. Caleb*, 10 Blatchford, 467; *The Stromless*, 1 Lowell, 153; *Whitehall Trans. Co.* v. *N. J. Steamboat Co.*, 51 N. Y. 369; *Mailler* v. *Express Propeller Line*, 61 N. Y. 312. Under the circumstances complete indemnity can be given only by compensation for the loss of earnings as well as the loss of the vessel. *Allen* v. *Fox*, 51 N. Y. 562; *Star of India*, 1 Prob. Div. 466; *Dermott* v. *Jones*, 2 Wall. 1; *Sturgis* v. *N. J. Steamboat Co.*, 35 N. Y. Superior Ct. Rep. 251; *S. C.* on appeal, 62 N. Y. 625; *Howland* v. *Coffin*, 47 Barb. 653. For the parallel rule at common law, see *Hadley* v. *Baxendale*, 9 Exch. 341; *Phil., Wilm. & Balt. R. R. Co.* v. *Howard*, 13 How. 307. And the order of the prize court of Aug. 22d, 1862, for the delivery of the vessel to the navy department, does not affect the right of the claimant to the whole award for demurrage up to the time of final decree. *The Memphis*, Blatchford, Prize Cases, 202; *The Ella Warley*, Ib. 207; *Hudson* v. *Guestier*, 4 Cranch, 293; *Home* v. *Camden*, 2 H. Bl. 532, and 4 T. R. 383; *Willis* v. *Commissioners of Prize*, 5 East, 22; *The Noysomhed*, 7 Ves. Jr. 593; *The Brig Louis*, 5 C. Rob. 146; *The Two Friends*, 1 C. Rob. 271; *The Eliza*, 1 Acton, 336; *Smart* v. *Wolffe*, 3 T. R. 323; *The Pomona*, 1 Dodson, 25; *The Peterhoff*, Blatchf. Prize Case, 620; *Le Caux* v. *Eden*, 2 Doug. 594, 610, 616; *Goss* v. *Withers*, 2 Burr. 683, 694; *The Flad Oyem*, 1 C. Rob. 134; *The Santa Cruz*, 1 C. Rob. 49; *The Fanny and Elmira*, 1 Edw. Adm. 117; *The Ceylon*, 1 Dodson, 105.

Opinion of the Court.

Mr. Chief Justice Waite delivered the opinion of the court. After reciting the facts as above stated he continued:

That the steamer was not lawful prize or the subject of capture was expressly decided on the former appeal. It was also impliedly settled that the capture was without probable cause, for it was said that the owner was undoubtedly entitled to a fair indemnity for the losses sustained, the only difficulty being as to the amount. These questions are, therefore, no longer open. *Clark* v. *Keith*, 106 U. S. 464; *Supervisors* v. *Kennicott*, 94 U. S. 499.

The first of the remaining questions to be considered is whether a decree can be entered against the United States for damages. As the capture was made by the army, or by the army and navy operating together, it inured exclusively to the benefit of the United States. There is no distribution of prize money in such a case. *Porter* v. *United States*, 106 U. S. 607; *The Siren*, 13 Wall. 389. The United States were, therefore, in legal effect the captors, and they came voluntarily into court to secure for themselves the benefit of what had been done. They deliberately adopted the acts of the military and naval officers as their own, and came, as captors, to condemn their prize. Offers to purchase the vessel were made and declined before she was seized, and soon after the seizure she was chartered and put into actual use without any attempt at securing an adjudication. It is evident, also, that the capture must have been the subject of diplomatic correspondence between the government of Spain and the United States before the vessel was brought in for adjudication, because on the 6th of May, 1862, after the vessel got to New York, and before the libel was filed, Mr. Seward, the then secretary of State, wrote the district attorney for the Southern District of New York, as follows:

"Sir: Noticing the arrival at New York of the Spanish steamer Nuestra Señora de la Regla, which was seized at Port Royal by General Sherman for an alleged illegal breach of neutrality, I now transmit the papers found on board of her, and an abstract of them which I caused to be prepared and which you may find useful."

Although the libel was filed on the 9th of June, 1862, and the claim was promptly put in, the adjudication was not had until June of the following year, when all further proceedings were stayed with the consent of both parties to await an adjustment of damages by the two governments. Nothing further was done until nearly seven years afterwards, when the secretary of State informed the Spanish government of the wish of the United States that the parties interested should apply to the court, which still retained jurisdiction, for such relief as justice demanded, and in the mode that tribunal should deem most proper and convenient. Thereupon, on motion of the claimant, and with the consent of the United States district attorney, the reference was ordered to ascertain the damages. Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish government, and with the consent of the claimant, for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.

It is objected, however, that the executive department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication. If that had not been done in this instance, the Spanish government would have had just cause of complaint, and could have demanded reparation for the wrongs that had been done one of its subjects. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. Necessarily, therefore, the question of damages to the owner of the captured vessel arose. Since, without the consent of the United States, no judgment for damages could be rendered against them in the pending suit that could be enforced by execution, the Spanish government had the right to assume the prosecution of the claim, and it did. Necessarily the negotiations on the part of the United States under this claim were conducted by the executive. After long delay no agreement was reached, and as a last resort for ending the controversy, it

was determined to refer the whole matter to the court for judicial inquiry and determination. We see no reason why this might not be done in such a case. It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. It is too late now to insist that the case is not one of prize, because in the libel it is expressly alleged that the vessel was captured as lawful prize, and condemnation was asked on that account. When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved.

The next inquiry is as to the amount of damages. The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum* v. *Mayberry*, 2 Wheat. 1; *The Apollon*, 9 Wheat. 362; *The Lively*, 1 Gall. 314; *The Corier Maritimo*, 1 Rob. 287.

Upon the facts in this case there can be no doubt of the propriety of such an allowance for the extraordinary detention of the vessel before she was delivered up for adjudication, especially since she was detained for the express purpose of use by the United States. And as to the amount of the allowance, there is no opportunity for discussion. The United States were willing and actually contracted to pay $200 a day for her use if she was not in fact lawful prize, and that is shown to have been a reasonable price for her charter at the time. She was seized on the 29th of November, and it is fair to assume that if due diligence had been used she might have been surrendered for adjudication by the 16th of December, when her charter began to run. She was not actually surrendered until the 9th of June—a delay of 175 days beyond what was necessary. It

is not disputed that her value at that time was $30,000. She cost when built $50,000, and was new when captured. As she has never been restored under the order to that effect, there can be no doubt of the liability of the United States for her value, when at their request she was delivered into their possession by the court. It is not a matter of any importance that the certificate of deposit in the treasury of the amount of her appraised value was not filed. By taking the vessel on the terms imposed by the court, the United States impliedly agreed to restore her in as good condition as she was when taken, or pay her value in money. By the surrender of the vessel for adjudication, the United States relieved themselves from any further liability for damages in the way of demurrage, and became bound for the vessel instead.

The allowance for demurrage includes reasonable compensation for the pay and expenses of an agent to look after the interests of the owners up to the time of the delivery of the vessel to the navy department by the court. After that no agent was necessary. From that time the case stood as though a sale had been made and the proceeds paid into the registry of the court.

Our conclusion is that damages should be allowed as follows:

For unnecessary and unusual delay in proceeding to adjudication, 175 days at $200	$35,000
For value of vessel	30,000
In all	$65,000

To which add interest, at the rate of six per cent. per annum, from the time of the order of restitution, June 20th, 1863, until the decree.

The decree of the district court is reversed and the cause remanded with instructions to enter another decree in accordance with this opinion.

CROSSLEY & Another *v.* CITY OF NEW ORLEANS & Another.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.—MOTION TO DISMISS.

Decided March 12th, 1883.

Louisiana—Practice.

The record shows that the cause presented two questions in the court below; one not federal, the other federal. The opinion of the court below shows that the cause was decided there on the first point only: *Held*, That in cases coming from the Supreme Court of Louisiana the opinion of the court, as presented by the record, may be examined to determine whether the judgment can be reviewed.

Mr. B. R. Forman for defendants in error, moving to dismiss.

Mr. Henry C. Miller for plaintiffs, resisting.

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

The record shows that the defendants in error sought to enjoin the collection of a judgment against their property to enforce an assessment under the drainage laws of Louisiana: 1, because under the operation of the laws authorizing the judgment nothing more remained to be paid thereon; and, 2, because the judgment had, in terms, been released and discharged by certain acts of the general assembly of the State, passed in 1877 and 1878. If the case was decided below on the first of these grounds, no federal question is involved.

It was settled long ago that, in cases coming to this court from the Supreme Court of Louisiana, the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one we have authority to review. *Armstrong* v. *Treasurer of Athens Co.*, 16 Pet. 281; *Almonester* v. *Kenton*, 9 How. 1; *Grand Gulf R. R. and Banking Co.* v. *Marshall*, 12 How. 165; *Cousin* v. *Labatut*, 19 How. 202; *Murdock* v. *Memphis*, 20 Wall. 590. From the statement of the case and the opinion found in this record, it is manifest the decision was placed entirely on the

Statement of Facts.

ground that the judgment was not collectible under the law as it stood before the acts of 1876 and 1877 were passed. Consequently the case was disposed of before the federal question presented by the pleadings was reached, and that question was not and need not have been decided. Under these circumstances we have no jurisdiction, and the

Motion to dismiss is granted.

MERRITT, Collector, *v.* STEPHANI & Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided March 19th, 1883.

Customs Duties.

Under Schedule B of § 2504 of the Revised Statutes, which imposes a duty of 30 *per cent. ad valorem* on "glass bottles or jars filled with articles not otherwise provided for," such duty is chargeable on bottles filled with natural mineral water, although, by § 2505, mineral water, not artificial, is declared to be exempt from duty.

This was a suit to recover back duties exacted by the plaintiff in error, as collector of the port of New York, on glass bottles imported in June, 1879, from Antwerp. The bottles contained natural mineral water. The collector charged on the bottles a duty of 30 *per cent. ad valorem*, under this provision of Schedule B of section 2504 of the Revised Statutes:

"Glass bottles or jars filled with articles not otherwise provided for: thirty per cent. ad valorem."

The collector charged no duty on the water, as being free under this clause of section 2505:

"The importation of the following articles shall be exempt from duty: . . . Mineral waters, all, not artificial."

At the trial, it was proved on behalf of the plaintiffs that

mineral waters are and have always been generally imported into this country in glass bottles, although sometimes contained in stone bottles or jugs, but that the glass bottle is the usual form and kind of package for natural mineral waters. The circuit court directed a verdict for the plaintiffs, and after a judgment for them the collector sued out this writ of error.

Mr. Solicitor-General Phillips for the collector, cited *Schmidt* v. *Badger*, 107 U. S. 85.

Mr. Edward Hartley and *Mr. Walter H. Coleman* for the appellees.—I. If the act of 1861 embraced mineral water bottles, the act of 1864 repealed it as to them by imposing the duty of three cents per bottle in lieu of former duties. *Gossler* v. *Collector*, 3 Cliff. 71; *Washington Mills* v. *Russell*, 1 Holmes, 245; *Gautier* v. *Arthur*, 104 U. S. 345; *Kohlsaat* v. *Murphy*, 96 U. S. 153; *Murdoch* v. *Memphis*, 20 Wall. 590; *United States* v. *Bowen*, 100 U. S. 508. When Congress substitutes the provisions of one tariff act for another, the terms are used in the same sense as in prior acts. *Roosevelt* v. *Maxwell*, 3 Blatchford, 391; *Reiche* v. *Smythe*, 13 Wall. 162. Counsel also cited to other points *Barnard* v. *Morton*, 1 Curt. 404; *Harrington* v. *Trustees of Rochester*, 10 Wend. 547; *In the matter of John Davis*, 3 Benedict, 482; *Brown* v. *County Commissioners*, 21 Penn. 37; *Powers* v. *Barney*, 5 Blatchford, 202; *King* v. *Middlesex*, 2 B. & A. 818; *Hadden* v. *Collector*, 5 Wall. 107; *Sturges* v. *Collector*, 13 Wall. 19.

Mr. Justice Blatchford delivered the opinion of the court.

In the opinion of this court in *Schmidt* v. *Badger*, 107 U. S. 85, the foregoing provision as to a duty on "glass bottles or jars filled with articles not otherwise provided for," was under consideration. It was held that the duty of 30 *per cent. ad valorem* was not a duty on the articles contained in the bottles and on the bottles also, and was not a duty on the contents of the bottles, but was a duty merely on the bottles, leaving the articles imported in the bottles to be subject to such duty, if any, as was elsewhere imposed on them. If the contents were ale or beer, the duty on the ale or beer was thirty-

five cents per gallon, and the duty on the bottles was 30 *per cent. ad valorem.* If the contents were natural mineral water, or mineral water not artificial, the water was free, and the duty on the bottles was 30 *per cent. ad valorem.* The duty on the bottle was independent of the duty on its contents, and was chargeable even though the contents were free. The statute does not contain any provision that the bottle shall be free when its contents are free, while it does contain a distinct provision that there shall be a duty of 30 *per cent. ad valorem* on bottles, nor otherwise provided for, filled with articles. The mineral water, not artificial, is free. By Schedule M of section 2504, artificial mineral water is made dutiable thus:

"For each bottle or jug containing not more than one quart: three cents, and, in addition thereto, 25 *per cent. ad valorem;* containing more than one quart: three cents for each additional quart, or fractional part thereof, and, in addition thereto, 25 *per cent. ad valorem.*"

Thus, as to artificial mineral water, the water and the bottles containing it are both charged with duty, while as to natural mineral water, it is free, and the bottles containing it are dutiable.

By section 13 of the act of June 30th, 1864, 13 Stat. 214, the provision as to a duty "on mineral or medicinal waters, or waters from springs impregnated with minerals," was as follows:

"For each bottle or jug containing not more than one quart, three cents, and, in addition thereto, 25 *per cent. ad valorem;* containing more than one quart, three cents for each additional quart, or fractional part thereof, and, in addition thereto, 25 *per cent. ad valorem.*"

By section 5 of the act of June 6th, 1872, 17 Stat. 236, mineral waters, not artificial, were made free on and after August 1st, 1872. The act of 1872 (§ 46) repealed all prior inconsistent provisions. From this it is argued that after the act of 1864 was passed, prior provisions, which might have embraced mineral water bottles, were annulled, and that, as the act of 1872

repealed the provisions of the act of 1864 as to such bottles, and made mineral waters, not artificial, free, there was no law in force imposing a duty on the bottles containing such free waters. The answer to this view is, that the duty imposed by the act of 1864 was a duty on the article composed of bottle and water, the specific duty and the *ad valorem* duty being each of them a duty on the bottle and the water considered as one article. When the water was made free, the whole provision as to a duty on the aggregated bottle and water disappeared, leaving existing applicable general provisions to apply to the bottle.

The provisions so existing after the act of 1872 took effect were those found in the acts of 1861 and 1864, and transferred into Schedule B of section 2504 of the Revised Statutes, and applied in this case. They were in force as express enactments when the importation in this case was made. *Schmidt* v. *Badger*, *ubi supra*.

The judgment of the circuit court is reversed, and the case is remanded to that court, with directions to grant a new trial.

MERRITT, Collector, *v.* PARK & Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided March 19th, 1883.

Customs Duties.

The decision of this court, in *Schmidt* v. *Badger*, 107 U. S. 85, that, under the statutory provisions in question in this case, the proper duty on the importation of glass bottles containing beer, was a duty of 30 *per cent. ad valorem* on the bottles, in addition to a specific duty of 35 cents a gallon on the beer, confirmed and applied to this case.

The facts are all in the opinion.

Mr. Solicitor-General Phillips for collector.

Syllabus.

Mr. Edward Hartley and *Mr. Walter H. Coleman* for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit to recover back duties exacted by the plaintiff in error, as collector of the port of New York, on glass bottles imported in March, 1879, from London. The bottles contained beer, and the defendant below exacted a specific duty of 35 cents a gallon on the beer, and also a duty of 30 *per cent. ad valorem* on the bottles. The bottles were the ordinary ale bottles of commerce. The circuit court directed a verdict for the plaintiffs, and they had a judgment, to review which the collector brought this writ of error.

The question involved is the same, and arose under the same statutory provisions, as in the case of *Schmidt* v. *Badger*, 107 U. S. 85. It was there held that such duty on the bottles, in addition to such duty on the beer and ale contained in them, was a lawful duty. That decision governs the present case, and the judgment of the circuit court is reversed and the case is remanded to that court, with directions to grant a new trial.

OTTAWA *v.* CAREY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Decided March 19th, 1883.

Municipal Bonds—Municipal Corporations.

1. Municipal corporations, being created only to aid the State government in the legislation and administration of local affairs, possess only such powers as are expressly granted, or as may be implied because essential to carry into effect those which are expressly granted.
2. Bonds issued by a municipal corporation, but not under either a general authority to borrow for corporate purposes, or a special legislative authority to borrow for purposes within the power of the legislature to confer, are void in the hands of a person who is not an innocent *bona fide* holder without notice.

Statement of Facts.

3. A municipal corporation authorized by its charter "to borrow money on the credit of the city and to issue bonds therefor," and by special act to borrow a named sum "to be expended in developing the natural advantages of the city for manufacturing purposes," is not thereby authorized to issue bonds by way of donation to an individual to aid in developing the water power of the city, and is not liable to an action upon such bonds by one who takes them with notice of the facts.

Suit to recover upon bonds of the city of Ottawa, issued to develop the water power near the city, and given to the owners of the power.

Article IX., section 5, of the Constitution of 1848 of the State of Illinois, which was in force when the rights of the parties to the controversy were fixed, was as follows:

"The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes."

In 1853 the corporation of Ottawa was incorporated as a city with the following among other powers:

"ART. 5, SEC. 1. The city council shall have power and authority to levy and collect taxes upon all property, real and personal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce the payment of the same in any manner to be prescribed by ordinance not repugnant to the Constitution of the United States, and of this State.

"ART. 5. SEC. 3. The city council shall have power . . . to establish, support and regulate common schools, to divide the city into school districts, to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof, provided, that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum.

"ART. 10. SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to, and voted for, by a majority of the voters of said city, attending an election held for that purpose."

In 1851, one Cushman and his associates were empowered by

the legislature of Illinois to organize a corporation to be known as the Ottawa Manufacturing Company, to construct a dam across the Fox River for the purpose of creating a water power; and in 1865 this corporation, having been organized, was further empowered to construct a dam across the Illinois River, and to introduce the waters of that river into the Fox River above their dam on the latter.

In 1867 the legislature empowered the city to subscribe $100,000 to the stock of this company; but the subscription was never made. On the 15th day of June, 1869, the city of Ottawa adopted the following ordinances:

"Sec. 1. Be it ordained by the city council of the city of Ottawa that the mayor of the city be and he is hereby authorized to borrow in the name of the city, at a rate of interest not exceeding ten per cent., the sum of $60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in the sum of $500.00, with interest payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof, provided that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city. Sec. 2. Be it ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose. Sec. 3. This ordinance shall be submitted to the voters of the city to be voted for or against at an election to be held for that purpose on the 20th day of July, 1869. The manner of the determination shall be by depositing ballots upon which shall be written or printed 'For the loan ordinance' or 'Against the loan ordinance.'"

Under the ordinance of June 15th an election was had, at which a majority of the voters of Ottawa voted in favor of issuing the bonds, and on the 30th July, 1869, the corporation

Statement of Facts.

framed a further ordinance, entitled "An Ordinance to carry into effect an ordinance of June 15th, 1869," by which the mayor was authorized to deliver the bonds to Cushman, to be used by him in "developing the natural resources and surroundings of the city."

The bonds were delivered to Cushman, under a contract which it is not necessary to recite. The municipality received no money, stock, or other equivalent for them. Cushman delivered them to the manufacturing corporation, and the manufacturing company sold them to one Eames, who knew of the proceedings of the common council in regard to the issue of the bonds, and that they were to be used as a gift, but had never heard their validity questioned. The city paid interest on them up to August 2d, 1871, but not thereafter. In November, 1879, Eames sold to Carey, the defendant in error, who knew all the foregoing facts.

Carey brought this suit in the court below to recover on the bonds held by him. The court gave judgment for the plaintiff, and the writ of error was sued out to reverse that judgment.

On the 30th of October, 1882, the judgment below was reversed, and MR. JUSTICE HARLAN delivered the opinion of the court, in which, after reciting some of the foregoing facts, he said:

"The court below, by consent of parties, tried the case without the intervention of a jury, and found, among other facts: 'That the city made no subscription of stock in the Ottawa Manufacturing Company, but issued the bonds as a donation for the purposes indicated in the contract with Cushman, the latter being the sole consideration it received for the bonds; that on the 11th day of March, 1871, Cushman delivered the bonds to the Ottawa Manufacturing Company, of which he was one of the corporators, and of which at the time he was a director, to be used by it for the purpose of making the improvement hereinbefore mentioned, without further consideration; that the company at once entered upon the work of reconstructing the dams and races, and *partially* constructed the same under the powers granted to it . . . and completed said work, so that *some* water power was created, *but that said dam was carried away by a freshet in* 1872 or 1873,

and has never been reconstructed; that in June, 1871, the company sold and delivered the bonds in suit to Lester H. Eames, a citizen of Ottawa, for their full value, and part of the interest which had accrued after August, 1870; that, at the time Eames purchased the bonds he read their recitals, and had never heard their validity questioned, although the policy of issuing them, and the legal authority to do so, was the subject of discussion by the press and people of the city at about the time of their being issued; that Eames had knowledge of the proceedings of the council in reference to the issue of the bonds, knew that they were issued for the purpose of being used as a donation to aid in the completion of the contemplated improvement, and knew of the contract between Cushman and the city with reference to the bonds; and that in November, 1879, after the bonds had matured, Eames sold and delivered them to the defendant in error, a citizen of Missouri, for value, the latter knowing when he purchased substantially all that Eames knew touching the history of the bonds, and the purposes for which they had been applied.'

"We have seen that the general object which the city sought to accomplish was the development of its natural resources and advantages for manufacturing purposes. That end it proposed to obtain by the construction of dams and races in such manner as to bring into practical and permanent use, in the city and its immediate vicinity, all the available power of both the Illinois and Fox Rivers. Consequently, the ordinances passed by the city council, and Cushman's contract, alike required the construction of good, substantial, and sufficient dams and races. Now, it is impossible to resist the conclusion that as to the work done, and as to the manner in which it was performed, there was a substantial, if not an entire, failure upon the part of Cushman and those whom he employed to meet the terms of the agreement under which he, Cushman, received the bonds. The dams and races were, according to the facts found, only partially constructed. The work was completed only to the extent that *some* water power was created; and the dam erected, so far from being 'good, substantial, and sufficient,' to secure the practical and permanent use of the water power, was carried away in 1872 or 1873, by a freshet, and has never been reconstructed. Under these circumstances, the city, as between it and Cushman, was entitled to demand a return of all the bonds, or their value, and to be saved harmless on account

of them. If Cushman still held them, and had himself sued the city, the defence of the latter would be complete. Is Carey, the present holder, in any better position, as against the city, than Cushman would be, had he sued? This question must receive a negative answer, because Carey and his immediate vendee, Eames, were well aware at the time of their respective purchases, as well of the terms of the ordinance, in pursuance of which the bonds were issued, as of the contract between the city and Cushman; and also because, as the special finding sufficiently indicates, the same facts were known to the Ottawa Manufacturing Company when it received the bonds from Cushman, one of its corporators and directors. Neither Carey nor Eames nor the company were *bona fide* holders, entitled to the benefit of the rule announced in *Hackett* v. *Ottawa*, 99 U. S. 86, and *Ottawa* v. *First Nat. Bk. of Portsmouth*, 105 U. S. 342. The work done was not of a character, as to extent, sufficiency or permanency, to entitle Cushman, had he sued, as against the city, to the payment of any of the bonds; and consequently, for the reasons given, the city is not liable to Carey.

"This conclusion renders it unnecessary to notice other questions raised by counsel, some of which relate to the authority of the city to issue the bonds under any circumstances, especially by way of donation.

"After this case had been under submission, our attention was called to a recent decision of the Supreme Court of Illinois, in *Wilson et al.* v. *Ottawa Manufacturing Company et al.* That case is relied upon as authority for the proposition that the city had legal power to issue the bonds in question. In view of the ground upon which our conclusion in this case rests, it is needless to discuss that question in the different aspects in which it is presented."

On the 15th January, 1883, the judgment entered on the 30th day of the previous October was rescinded and annulled, and a rehearing ordered.

On the 6th March, 1883, the case was resubmitted.

Mr. C. B. Lawrence for the city of Ottawa.—I. The legislature of Illinois could not, under the Constitution of the State, authorize a town or city to issue its bonds for any but corporate

purposes, and a donation of bonds to a private corporation, established for the purpose of creating a water power to be owned exclusively by such private corporation, was not an issue of bonds for a corporate purpose, and such bonds, in the hands of a purchaser with notice, are void. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *People* v. *Depuyt*, 71 Ill. 651; *Pendleton County* v. *Amy*, 13 Wall. 297; *Kennicott* v. *Supervisors*, 16 Wall. 452; *St. Jo. Township* v. *Rogers*, 16 Wall. 654; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Rogers* v. *Burlington*, 3 Wall. 654; *Supervisors* v. *Weider*, 64 Ill. 427; *Johnson* v. *County of Stark*, 24 Ill. 75; *Bissel* v. *City of Kankakee*, 64 Ill. 249; *English* v. *The People*, 96 Ill. 566; *Loan Association* v. *Topeka*, 20 Wall. 655; *Lowell* v. *Boston*, 111 Mass. 454; *People* v. *Batchellor*, 53 N. Y. 128; Jones on R. R. Securities, sec. 123, *et seq.*; *Ohio Valley Iron Works* v. *Moundsville*, 11 W. Va. 1; *Wilkesbarre City Hospital* v. *County of Luzerne*, 84 Pa. 55.—II. If these bonds had been issued for a corporate purpose, the bonds, in order to be valid, should have been issued by authority of the board of commissioners specially appointed by the legislature to take charge of this whole matter—to subscribe the stock, and to issue and sell at par the bonds of the city to raise the money for its payment. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Township of East Oakland* v. *Skinner*, 94 U. S. 255; *Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562; *Supervisors* v. *People ex rel. R. R. Co.*, 25 Ill. 181; *Gaddis* v. *Richland Co.*, 92 Ill. 119; *Brush* v. *Ware*, 15 Pet. 93; *McClure* v. *Oxford*, 94 U. S. 429.—III. Even if the bonds had been issued for a corporate purpose, and if they had been issued by the proper authorities, viz., the board of commissioners, they would still be uncollectible by the present plaintiff (a purchaser with notice) because they were issued as a *donation* to a private manufacturing company, whereas the commissioners were authorized to issue them *only in payment of a corresponding amount of the stock of said company.*—IV. Even if the bonds had been issued for a corporate purpose, and if they had been issued by the proper authorities, namely, the board of commissioners, they would still be uncollectible by the present plaintiff, because he bought with notice that they were issued to Cush-

man in consideration of his contract to build "a good and substantial dam across the Illinois and Fox rivers sufficient to bring into use all the available water," and to protect the city on these bonds in case he did not create the water power, which contract he wholly failed to perform.—V. The statute authorized the commissioners to subscribe to the stock of the manufacturing company, and required them to "raise the money" for payment of the subscription, by issuing and selling bonds at not less than par. The mayor issued the bonds directly to Cushman for delivery to the manufacturing company. Even if the bonds were otherwise free from exception, this disposition of them was illegal. *Scipio* v. *Wright*, 101 U. S. 665; *Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 563.

Mr. G. S. Eldredge for defendant.—I. The city of Ottawa had undoubted corporate power to issue the bonds in question, in pursuance of its charter, and they were thus issued for legitimate corporate purposes. He cited *Maher* v. *Chicago*, 38 Ill. 266; *Taylor* v. *Thompson*, 42 Ill. 9; *Burr* v. *Carbondale*, 76 Ill. 455; *Briscoe* v. *Allison*, 43 Ill. 291; *Johnson* v. *Campbell*, 49 Ill. 316; *Misner* v. *Bullard*, 43 Ill. 470; *Chicago R. R. Co.* v. *Smith*, 62 Ill. 268; *People* v. *Depuy*, 71 Ill. 651; *People* v. *Trustees of Schools*, 78 Ill. 136; *Quincy R. R. Co.* v. *Morris*, 84 Ill. 410; *Hensley Township* v. *People*, 84 Ill. 544; *Pine Grove* v. *Talcott*, 19 Wall. 666; *Munn* v. *Illinois*, 94 U. S. 113; *People* v. *Kelly*, 76 N. Y. 475; *Weismer* v. *Douglas*, 64 N. Y. 91; *Livingston* v. *Darlington*, 101 U. S. 407; *Hackett* v. *Ottawa*, 99 U. S. 86.—II. The unconstitutionality of the act of February 19th, 1867, providing that commissioners appointed by the legislature in violation of the Constitution of Illinois of 1848 might subscribe for stock in the Ottawa Manufacturing Company on behalf of the city, and thus impose a debt *in invitum* upon the city. Cites *Harward* v. *St. Clair Drain Co.*, 51 Ill. 130; *Livingston* v. *Wider*, 53 Ill. 302; *People* v. *Chicago*, 51 Ill. 17; *People* v. *Salomon*, 51 Ill. 37; *Gage* v. *Graham*, 57 Ill. 144; *Hessler* v. *Drainage Co.*, 53 Ill. 105; *Marshall* v. *Silliman*, 61 Ill. 218; *Middleport* v. *Ins. Co.*, 82 Ill. 562; *Barnes* v. *Lacon*, 84 Ill. 461.—III. The city is

bound by its own construction of its charter power in this instance, and determination as a matter of fact, that the purpose for which the bonds were issued was a municipal purpose, as said by the Supreme Court of Illinois, "to promote the general prosperity and welfare of the municipality." *McClurkan* v. *Alleghany City*, 14 Penn. St. 82; *James* v. *Milwaukee*, 16 Wall. 159; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Meyer* v. *Muscatine*, 1 Wall. 384; *Society for Saving* v. *New London*, 29 Conn. 174; *Keithsbury* v. *Frick*, 34 Ill. 405; *Galena* v. *Corinth*, 48 Ill. 423; *Mayor* v. *Ray*, 19 Wall. 468; *Orleans* v. *Platt*, 99 U. S. 676; *Block* v. *Commissioners*, 99 U. S. 686. —IV. Eames was a *bona fide* purchaser of the bonds. He was not chargeable with constructive notice of anything but the charter power of the city to issue them; not even gross negligence; nothing short of positive fraud and an attempt on his part, in collusion with the officials of the city, to commit a fraud could impair his right as a *bona fide* holder; gross negligence, even, alone, would not affect it. *Murray* v. *Lardner*, 2 Wall. 120–123; *Cromwell* v. *Sac Co.*, 96 U. S. 51, 57 to 60; *Swift* v. *Smith*, Legal News, Jan. 22d, 1881, 151; *National Bank* v. *Crow*, 60 N. Y. 85; *Seybel* v. *National Currency Co.*, 54 N. Y. 288; *Chapman* v. *Rose*, 56 N. Y. 137; *Welsh* v. *Sage*, 47 N. Y. 143; Byles on Bills, 115; *Comstock* v. *Hannah*, 76 Ill. 530–534; *Goodman* v. *Simmons*, 20 How. 343; *Murray* v. *Lardner*, 2 Wall. 110; *R. R. Co.* v. *Cowdry*, 11 Wall. 459.

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

This is a suit to recover upon bonds issued by the city of Ottawa, Illinois, as a donation to aid in the improvement of the water power upon the Fox and Illinois rivers within the city, or in its immediate vicinity. Other bonds of the same issue were involved in *Hackett* v. *Ottawa*, 99 U. S. 86, and *Ottawa* v. *First National Bank of Portsmouth*, 105 U. S. 342, where it was held, in substance, that, as there was legislative authority to issue bonds for municipal purposes, and it was recited in the bonds then sued on that they were issued for such purposes, the city was estopped from proving, as against *bona fide* holders, that the recitals were untrue. Neither Hackett nor the bank

had any knowledge of the precise purposes for which the bonds were issued, and it was adjudged that they had the right to rely on what was recited.

The facts on which this case rests are, in brief, these:

The city of Ottawa was incorporated as a city in Illinois on the 10th of February, 1853, and given the ordinary powers of municipal corporations of that class for local government. It was specially authorized "to provide the city with water, to erect hydrants and pumps in the streets for the convenience of its inhabitants," and, upon a vote of the people, "to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof." Our attention has not been called to any other provision of the charter as having a bearing on the questions to be considered.

In February, 1851, the Ottawa Manufacturing Company was incorporated by the general assembly of Illinois to build a dam across the Fox river for the purpose of creating a water power to be leased and used. On the 16th of February, 1865, the charter of this company was amended so as to authorize the building of a dam across the Illinois river, and a race to bring the water from that river into the pool of the dam across the Fox.

On the 19th of February, 1867, the general assembly passed an act purporting to constitute a board of commissioners to subscribe $100,000 to the capital stock of the manufacturing company for and on behalf of the city, and to pay the subscription by an issue of the bonds of the city. No subscription was ever made under this authority, and we understand the counsel for the defendant in error to concede that the act itself was unconstitutional.

On the 15th of June, 1869, an ordinance was passed by the city, submitting to the voters at an election, to be held on the 20th of the same month, the question whether the council should borrow $60,000 on the bonds of the city to be "expended in developing the natural advantages of the city for manufacuring purposes. This election was held, and resulted in a vote by a majority of the legal voters in favor of the project. Thereupon, the city, on the 30th of July, 1869, passed

another ordinance, directing the mayor to issue the bonds and deliver them to William H. W. Cushman, "to be used by him in developing the natural resources and surroundings of the city," and authorizing and directing him "to expend the same in the improvement of the water power upon the Illinois and Fox rivers, within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said power to the city and its immediate vicinity."

Under this ordinance the bonds were issued and delivered to Cushman on the 2d of August, 1869, as a donation to aid the city in securing the contemplated water power, he agreeing in writing to cause the necessary works to be completed in the two rivers within a reasonable time, and if not, to return the bonds or a part thereof, according to the special provisions of the contract. No arrangements were made or contemplated for providing the city with water.

Cushman was one of the original corporators of the manufacturing company, and a director at the time the bonds were issued to him, and he, on the 11th of March, 1871, delivered them to the company "to be used by said company for the purpose of making the improvement hereinbefore mentioned, without further consideration." During the month of June, 1871, the company sold and delivered the bonds involved in this suit to Lester H. Eames, a citizen of Ottawa, for their face value and part of the interest which had accrued after August, 1870. When Eames made his purchase and paid for the bonds, he knew they had been issued as a donation to aid in the completion of the improvement contemplated in the contract with Cushman, and was cognizant of all the proceedings of the council in reference thereto. He also knew of the contract with Cushman. In November, 1879, after the bonds fell due, Eames sold them to William H. Carey, the plaintiff below, who paid value for them, with full knowledge of all that was known by Eames about their issue.

Upon these facts, found by the court and set forth in the record, judgment was rendered against the city and in favor of Carey for $72,814.76. To reverse that judgment this writ of error has been brought.

This case differs from those of Hackett and the First National Bank of Portsmouth, *supra*, in that Carey cannot claim protection as a *bona fide* holder, while Hackett and the bank could. Neither Carey, nor Eames, nor the manufacturing company, nor Cushman, were purchasers without notice. Carey and Eames both paid value, but Carey bought after maturity, and it is expressly found that both he and Eames had actual knowledge of the purposes for which the bonds were issued, and of the contract with Cushman. Under the circumstances of this case, the manufacturing company is chargeable with knowledge of all the facts known to Cushman, one of its directors and the original contractor with the city. The questions then to be considered are such as may arise between the city and a purchaser for value from Cushman with full knowledge of all the facts affecting the validity of the bonds at their inception.

In Illinois, under the Constitution of the State, the corporate authorities of cities cannot be invested with power to levy and collect taxes except for corporate purposes. This has long been settled. *Weightman* v. *Clark*, 103 U. S. 256, and numerous Illinois cases there cited. What may be made a corporate purpose is not always easy to decide, but it has never been supposed that if legislative authority had not been granted to a municipal corporation to do a particular thing, that thing could be a purpose of that corporation.

Municipal corporations are created to aid the State government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. 1 Dill. on Mun. Corp., § 89, 3d ed., and cases there cited. To the extent of their authority they can bind the people and the property subject to their regulation

and governmental control by what they do, but beyond their corporate powers their acts are of no effect.

It is not claimed that express authority was given the city of Ottawa to develop, or aid in developing, the natural advantages of its rivers for manufacturing purposes, and what we are now called on to decide is not whether, if such a power had been given, it would be within the general scope of the purposes of a city government, and thus a corporate purpose, within the meaning of that term as used in the Constitution, but whether it has been granted by the legislature. Much is said by the Supreme Court of Illinois in *Taylor* v. *Thompson*, 42 Ill. 9; *Chicago, Danville & Vincennes Railroad Co.* v. *Smith*, 62 Ill. 268; *The People* v. *Depuy*, 71 Ill. 651; *Burr* v. *City of Carbondale*, 76 Ill. 455; *People* v. *Trustees of Schools*, 78 Ill. 136; *The Quincy, Missouri & Pacific Railroad Co.* v. *Morris*, 84 Ill. 410; *Hensley* v. *The People*, Ib. 544, and other cases of like character, as to what may be made a corporate purpose; but these were all cases in which the legislative department of the government had undertaken to grant a power, and the question was whether the power was one that could rightfully be made a purpose of a municipal corporation. No matter how much authority there may be in the legislature to grant a particular power, if the grant has not been made the city cannot act under it.

As power in a municipal corporation to borrow money and issue bonds therefor implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears, *Ralls County Court* v. *The United States*, 105 U. S. 733, it follows that the power contained in the charter to borrow money did not authorize the issue of the bonds in this case, unless they were issued for a corporate purpose, there being a constitutional prohibition against taxation by the city, except for corporate purposes. The question then is whether the city has been invested with power to raise money by public taxation to be donated to private persons or private corporations as a bonus for developing the water power in the city or its vicinity for manufacturing purposes.

The charter confers all the powers usually granted to a city

for the purposes of local government, but that has never been supposed of itself to authorize taxes for everything which, in the opinion of the city authorities, would "promote the general prosperity and welfare of the municipality." Undoubtedly the development of the water power in the rivers that traverse the city would add to the commerce and wealth of the citizens, but certainly power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. It is because railroads are supposed to add to the general prosperity that municipalities are given power to aid in their construction by subscriptions to capital stock or donations to the corporations engaged in their construction; but in all the vast number of cases involving such subscriptions and donations that have come before this court for adjudication since *The Commissioners of Knox County* v. *Aspinwall*, decided twenty-five years ago, and reported in the 21st Howard, 539, it has never been supposed that the power to govern of itself implied power to make such subscriptions or such donations. On the contrary, it has been over and over again held, and as often as the question was presented, that unless the specific power was granted, all such subscriptions, and all such donations, as well as the corporate bonds issued for their payment, were absolutely void, even as against *bona fide* holders of the bonds. *Thomson* v. *Lee County*, 3 Wall. 327; *Marsh* v. *Fulton County*, 10 Wall. 676; *St. Joseph's Township* v. *Rogers*, 16 Wall. 644; *McClure* v. *Township of Oxford*, 94 U. S. 429; *Wells* v. *Supervisors*, 102 U. S. 625; *Allen* v. *Louisiana*, 103 U. S. 80.

In the present case there is nothing whatever to indicate any special authority in this city to pay a bonus for the work that was to be done. It did have power to provide the city with water, but there is nowhere anything looking to such a purpose in this transaction. The object here was to bring the water into use as power, to be leased or sold at reasonable rates. An attempt was made by the legislature to authorize a subscription to the stock of the manufacturing company, but that was of no avail, because in the form adopted the legislation was confessedly unconstitutional. The charter therefore stands the same

as though no such attempt had been made, and what was done did not create a corporate purpose to effect an improvement of the power. But even if there had been power to subscribe to the stock, it would not follow there was power to make a donation by way of a bonus to the company to aid in the improvement. In *Chicago, Danville and Vincennes R. R. Co.* v. *Smith*, *supra*, it was indeed said that the distinction between a donation to aid a company and a subscription to its stock "was more apparent than real," but that was said in reference to the question of making subscriptions and donations for corporate purposes, and not with reference to the effect of a power to subscribe as conferring a power to donate. In no case to which our attention has been called has it been held that a power to subscribe for stock would of itself authorize a donation.

The case of *Hickling* v. *Wilson*, decided by the Supreme Court of Illinois in June of last year, and reported in 104 Ill. 54, is relied upon in support of this judgment. That was a suit by a creditor of the manufacturing company against the stockholders to collect his debt. The city was not a party, and its liability was in no way involved. In the opinion, as published in the official report of the case, it was not even assumed that there was corporate power to issue the bonds.

The present case was submitted at the last term, and at a former day in this term a decision was announced reversing the judgment, but in the opinion reasons were assigned for the reversal different from those now given. That judgment was afterwards, upon application for a rehearing, set aside and a reargument ordered. Upon further consideration of the whole case, we prefer to rest the decision on the ground that as between Cushman and the city the bonds in question were illegal and void, and as the present holder occupies no better position than Cushman, he and all those under whom he claims having bought with full knowledge of all the facts, the judgment should have been in favor of the city.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to enter judgment in favor of the city on the facts found.

ARTHUR, Collector, *v.* FOX and Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided March 19th, 1883.

Customs Duties.

1. A non-enumerated article, if found to bear a substantial similitude to an enumerated article, either in material, quality, texture, or use to which it may be applied, is made by section 2499, Rev. Stat., liable to the duty imposed upon the enumerated article.
2. A non-enumerated article composed of cow-hair and cotton, resembling and used for the same purposes as an enumerated article of goats' hair and cotton, is liable to the same duty as the latter.

Action to recover back duties claimed to have been illegally exacted by the collector of New York.

Mr. Solicitor-General for the plaintiff cited *Davies* v. *Arthur*, 96 U. S. 148; *Arthur* v. *Herman*, 96 U. S. 141; *Murphy* v. *Arnson*, 96 U. S. 131.

Mr. Edwin B. Smith and *Stephen S. Clarke* for the defendants cited *Smythe* v. *Fisk*, 23 Wall. 374; *Stuart* v. *Maxwell*, 16 How. 150; *Ross* v. *Peaselye*, 2 Curtis, 499; *Murphy* v. *Arnson*, 96 U. S. 131; *Arthur* v. *Herman*, 96 U. S. 141; *Davies* v. *Arthur*, 96 U. S. 148.

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

David Fox and Rose Fox, the defendants in error, imported from Liverpool certain goods called velours, composed of cow or calf hair, vegetable fibre, and cotton, an imitation of seal skin, and used for manufacturing hats and caps. The goods were not specifically enumerated in the tariff acts, but "in the use to which they were put, and in appearance and material, resembled manufactures of goats' hair and cotton more nearly than any other article of commerce. The goats' hair and cotton goods are also imitations of seal skin, and all these goods of both kinds are frequently commercially called 'seals,' and are made to represent seal skin and are used for the purposes

for which seal skin is used." The component material of chief value in velours is cow and calf hair, and not cotton.

The provisions of the tariff acts involved in the determination of the duties to be paid on the importation are as follows:

REV. STATS., SEC. 2504, SCHED. A.

* * * * * *

"Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum *ad valorem.*

"SCHED. L.

* * * * * *

"Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem.*

"SEC. 2499. There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned;

"And if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty;

"And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

The importers claimed that the goods were dutiable at thirty-five per cent. *ad valorem* as manufactures of cotton, while the collector exacted a duty of fifty cents per pound, and thirty-five per cent. *ad valorem* on account of the similitude they bore to manufactures composed wholly or in part of the hair of the goat without wool. The duties were paid according to the demand of the collector, and this suit was brought to recover back the excess of what was paid over the duty on manufactures of cotton, that is to say, to recover back the charge of fifty cents per pound. On the trial the circuit court instructed the jury to find for the importers, and to reverse a judgment upon a verdict under such an instruction this writ of error was brought.

Section 2499 of the Revised Statutes is a re-enactment of sec. 20 of the act of August 30th, 1842, c. 270, 5 Stat. 565, as to which this court said, in *Stuart* v. *Maxwell*, 16 How. 150, speaking through Mr. Justice Curtis:

"It was designed to afford rules to guide those employed in the collection of revenue in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great, and diversities may be expected to be made in fabrics adapted to the same rules and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress, by legislation, to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted."

And again, p. 162:

"By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designed to serve the uses and take the place of some article described, but some trifling or colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or knows it under

any commercial name. But it is substantially like a known article which is provided for. The law of 1842 [Rev. Stat. sec. 2499], then declares that it is to be deemed the same, and to be charged accordingly; that the act of 1846 (the tariff act then in force) has provided for it under the name it resembles."

These observations may well be applied to the present case. The goods in question are "non-enumerated." But they are substantially like a manufacture of goats' hair and cotton which is enumerated. They are put to the same uses, look the same, and frequently, in commerce, are called by the same name. They are made of cotton and cow hair, and are evidently of equal quality with the manufactures of cotton and goats' hair, because, in this case, they are charged with a duty of fifty cents per pound, thus indicating a value of eighty cents a pound or over, which calls for the highest duty per pound put on the goats' hair goods. It would seem to be difficult to find a closer resemblance between two articles of manufacture which were not identically the same.

But it is contended that if a non-enumerated "article is made of materials, any of which are mentioned in the statute, it is dutiable at the highest rate imposed on either of its constituents; if neither the article nor any of its component materials is designated in the tariff, then (and then only) it is dutiable according to its similitude in material, quality, texture, or use; and if, in these particulars, it equally resembles two or more enumerated articles, it pays the highest duty placed upon any of such like articles." Such, in our opinion, is not the effect of the statute. If an article is found not enumerated in the tariff laws, then the first inquiry is whether it "bears a similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated . . . as chargeable as with duty." If it does, and the similitude is substantial, then, in the language of the court in *Stuart* v. *Maxwell*, *supra*, "it is to be deemed the same, and to be charged accordingly." In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles. If nothing is found to which it bears the requisite similitude, then

an inquiry is to be instituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. Any other construction would leave the law open to evasions, which, as was also said in *Stuart* v. *Maxwell*, it was the object of this statute, enacted more than forty years ago and kept continually in force since, to prevent.

None of the cases in this court governed by the statute in question sustain the position of the importer. In *Stuart* v. *Maxwell* it was not shown that the goods imported bore a similitude to any other article, and so resort was had to their component materials. The same is true of *Arthur* v. *Herman*, 96 U. S. 141, where the importation was of "certain cheap goods, the warp of which was made of cotton and the filling or woof of cattle hair," and the only question was whether they were to be charged at thirty-five per cent. *ad valorem*, under the act of June 30th, 1864, c. 171, or at ninety per cent. of thirty-five per cent., under the act of June 6th, 1872, c. 315. This depended on whether cotton was "the component part of chief value." There was no attempt to show their similitude to any other article, and both parties agreed that they were dutiable as manufactures of cotton. In *Murphy* v. *Arnson*, 96 U. S. 131, the question was whether the article imported resembled essential oil in material, quality, or texture, and the decision was that it did not. Consequently resort was had to the material clause of the similitude act. In *Fisk* v. *Arthur*, 103 U. S. 431, an article composed of cotton and linen, cotton being the material of chief value and largely predominating, was adjudged to be dutiable, under the similitude act, as a manufacture of cotton, notwithstanding it was composed of mixed materials, and this because "in material, quality and texture, as well as the use to which it is to be put, it is precisely like cotton shirtings." To say that goods made of cow or calf hair and cotton, which were in all respects like goods made of goats' hair and cotton, and applied to the same uses, often bearing the same name in commerce, were to be dutiable at one rate as manufactures of cotton, when the goats' hair goods were assessed at a much higher rate, "would be to encourage evasions of the descriptive terms in the tariff laws 'by some

trifling or colorable change in the fabric or some of its incidents.'"

In our opinion, on the case as made by the bill of exceptions, the court erred in instructing the jury to find for the importer.

The judgment reversed, and the cause remanded, with instructions to grant a new trial.

WINCHESTER *v.* LOUD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Decided March 19th, 1883.

Circuit Court—Removal of Causes.

Hyde v. *Ruble*, 104 U. S. 407, that "a suit cannot be removed from a State court to the circuit court unless either all the parties on one side of the controversy are citizens of different States from those on the other side, or there is in such suit a separable controversy wholly between some of the parties, who are citizens of different States which can be fully determined as between them" adhered to.

This was a suit in equity, begun in a State court of Michigan, by Henry M. Loud, the appellee, a citizen of Michigan, against Charles Winchester and Herbert F. Whiting, citizens of Massachusetts, and George E. Wasey, Henry N. Loud, and Aaron F. Gay, citizens of Michigan, and removed to the Circuit Court of the United States for the Eastern District of Michigan at the instance of the defendant Winchester, on the ground, as stated in the petition for removal, "that the principal controversy in said suit is wholly between said plaintiff (Henry M. Loud), and your petitioner (Winchester), who are citizens of different States, and which controversy can be fully determined as between them, and that your petitioner is actually interested in said controversy." When the copy of the record was filed in the circuit court, that court remanded the suit to the State court. From that order this appeal was taken.

Mr. S. M. Cutcheon for the appellant, after explaining at

length in a brief the controversies, and the relations of the parties to it and to each other, and the relief prayed for, continued.—I. Under the act of March 3d, 1875, 18 Stat., part 3, 470, the court will arrange the indispensable parties on opposite sides of the real matter in dispute according to the facts: *Removal Cases*, 100 U. S. 457; *Barney* v. *Latham*, 103 U. S. 205.—II. The plaintiff, in the third paragraph of his bill, alleges "That all of said lands, . . . either legally or equitably, belonged to your orator and said Aaron F. Gay, as partners and partnership property. That also the personal property of every name and kind belonged to your orator and said Gay as partners."—III. The whole aim and object of his suit is summed up in the following prayer for special relief: "That upon the payment to said Winchester of said $275,000 and interest, reconveyance be made to your orator and said Gay."—IV. The mere fact that Aaron F. Gay is placed in the bill as a defendant in this suit does not change his relation to the controversy in the case. *Board of Co. Comrs.* v. *Kansas Pac. R. R. Co. et al.*, 4 Dillon, 277.—V. The plaintiff and Aaron F. Gay are on the plaintiff's side of the first and second controversies. And they are citizens of the State of Michigan. The appellant Winchester is the only indispensable party to the other side of these controversies, and he is a citizen of the State of Massachusetts. Therefore upon the filing of the petition and bond by the appellant Winchester, the entire suit was removed to the Circuit Court of the United States. *Barney* v. *Latham*, 103 U. S. 205.—VI. The order of the Circuit Court of the United States, remanding this suit, should be reversed, with directions to reinstate the cause upon its docket, and proceed therein.

Mr. A. T. Britton and *Mr. J. H. McGowan* for appellee.

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

The petition for removal was filed before answer, and we must look, therefore, to the bill alone to determine what the controversy is. From this it appears that Henry M. Loud claims that the defendants, Wasey, Henry M. Loud, and Whit-

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ing, hold certain real and personal property in trust to secure a debt owing by him and the defendant Gay to the defendant Winchester, and after the debt is paid for the use and benefit of himself and Gay. He asks for an accounting by the trustees, the removal of Wasey and Whiting, and the appointment of others in their places; and after the debt is paid, a conveyance of what remains of the trust property in accordance with the terms of the trust. The case presents but a single controversy, although it involves the determination of several questions. It may be that Winchester is the principal defendant in interest, but full and complete relief cannot be afforded in respect to the single cause of action, to wit, the trust, without the presence of all the parties to the suit. According to the averments in the bill all the defendants, except Henry M. Loud, deny the existence of the trust, and if that should be established, all the defendants are directly interested in the relief that is asked. The case falls clearly within the rule stated in *Hyde* v. *Ruble*, 104 U. S. 407.

The order remanding the suit is affirmed.

ELLIOTT *v.* SACKETT and Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Decided March 26th, 1883.

Contract—Equity—Mistake—Negligence.

By a written agreement between S. and E., S. agreed to convey land to E. "subject to" an incumbrance on it of $9,000, and E. agreed to pay to S. $15,000, by conveying to him land, some of it "subject to" an incumbrance. Without any further bargain, S. delivered to E. a deed, conveying the land "subject to" the incumbrance, and also containing a clause stating that E. assumes and agrees to pay the debt secured by the incumbrance, as a part of the consideration of the conveyance. E., being ill, did not read the clause in the deed respecting the assumption of the debt, but discovered it afterwards, and promptly brought this suit to have the deed reformed. He had made two payments of interest on the incumbrance. In the negotiations prior to the agreement, S., through his agent, had solicited E. to assume and agree to pay the incumbrance, but E. refused. S.

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understood the difference in meaning between the two forms of expression. D., the owner of the incumbrance, was no party to the transaction, and had done nothing in reliance on the deed. He was, on his own application, made a party to the suit, and also filed a cross-bill for a foreclosure of the incumbrance, and the inforcement of a personal liability against S. and E. for the debt. The circuit court made a decree dismissing the bill in the original suit, and adjudging that E. had agreed with S. to pay the amount due on the incumbrance ; that S. and E., or one of them, should pay the debt due to D., and, in default thereof, the land should be sold, and the deficiency reported ; and that, if S. should pay any part of the debt, he might apply for an order requiring E. to repay the amount to him. On an appeal by E. : *Held*,

1. The decree was a final decree, as to E.
2. The amount involved in the original suit was the $9,000.
3. The agreement created no liability on the part of E. to pay the debt to D.
4. There was a departure in the deed, through mutual mistake, from the terms of the actual agreement.
5. Under the special circumstances of the case E. had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches in not observing the provisions of the deed as should preclude him from relief, nor was he guilty of any laches in seeking a remedy.
6. The payment by E. of interest on the incumbrance was not inconsistent with his not having assumed the payment of the debt.
7. E. is entitled to have the deed reformed.

The case of *Snell* v. *Insurance Co.*, 98 U. S. 85, cited and applied.

Bill in equity to reform a contract.

In February, 1876, George A. Sackett and John A. Elliott executed a written agreement under seal, which provided that if Elliott should first make the payments and perform the covenants thereinafter mentioned on his part to be made and performed, Sackett agreed to convey to him "in fee simple, clear of all incumbrances, except as stated, whatever," by a warranty deed, "the house and lot known as No. 166 Calumet avenue, the lot 50 x 127 feet," in Chicago, Illinois, and to assign the insurance policy then "on said improvements," and to pay to Elliott $50; that Elliott agreed to pay to Sackett $15,000, "subject to an incumbrance now on said property" of $9,000, "in the manner following: Lots 8, 9, and 10, block 5, Pittner & Son's addition to So. Evanston, being 150 x 200 feet, subject to an incumbrance of $1,750, and interest at eight per cent. from June, 1873; also, lot one (1), block seven (7), Grant's sub-

division of So. Evanston, and 120 acres of land, Palo Alto Co., Iowa; the two last named pieces of property are clear of incumbrances; and title to pass by good and sufficient warranty deeds; and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said lots, except and after the fourth installment of South Park assessment;" and, in case of the failure of Elliott to make either of the payments, or perform any of the covenants on his part, the contract to be forfeited and determined, at the election of Sackett, and Elliott to fulfil all payments made by him on the contract, and such payments to be retained by Sackett in full satisfaction and liquidation of all damages by him sustained, and he to have the right to re-enter and take possession.

By a warranty deed dated March 8th, 1876, acknowledged the same day, and recorded March 10th, 1876, Sackett and his wife conveyed to Elliott the Calumet avenue property, by a proper description. The deed expressed a consideration of $15,000, and contained this clause:

"This conveyance is made subject to a trust deed executed by the parties of the first part" (Sackett and wife) "to John De Koven, on the (10th) tenth day of May, 1870, securing the notes of said George A. Sackett to Hugh T. Dickey, for nine thousand dollars, due four years from that date, with interest of nine per cent. per annum, interest payable semi-annually; and a further extension of payment commencing on the tenth day of May, 1874, for same amount above mentioned (nine thousand dollars), payable in five years from said date, with interest of nine per cent., the interest notes payable semi-annually, which debt, with its interest, the said party of the second part" (Elliott) "assumes and agrees to pay as part of the consideration of this conveyance, or purchase price above stated. The covenants hereinafter are subject to the above incumbrance."

Then followed covenants of seizin and warranty and against incumbrances.

The controversy in the present case arose out of the difference between the written agreement executed by the parties and the deed to Elliott, there being no question as to the con-

veyances by Elliott of the land which he agreed to convey. By the agreement the Calumet avenue property was to be conveyed subject to the $9,000 incumbrance. By the deed the conveyance was not only made subject to the incumbrance, but Elliott was made to assume and agree to pay the $9,000 debt as part of the consideration of the conveyance, or purchase price of $15,000.

In April, 1877, Elliott filed a bill in a State court in Illinois against Sackett, praying that the deed be reformed by striking therefrom the words stating that Elliott assumed and agreed to pay the $9,000 debt, as part of the consideration. The bill alleged that the consideration for the agreement of Sackett to convey the Calumet avenue property to Elliott was the agreement of Elliott to convey to Sackett the other property named in the written agreement; that one Hill, as agent of Sackett, solicited Elliott to purchase the Calumet avenue property; that during the negotiations, Hill and Sackett solicited Elliott to assume the payment of the incumbrance, but Elliott refused to assume any liability on account of it, and insisted that he would simply purchase the property subject to the incumbrance, and thereupon the written agreement was made; that the statement in the deed that Elliott assumed and agreed to pay the incumbrance as a part of the consideration for the premises was contrary to the mutual understanding between Hill and Sackett and Elliott, and contrary to the written agreement; that Elliott, when he received the deed, was suffering under physical infirmities and mental distress, and did not examine the deed as carefully as he should otherwise have done, but had the deed recorded, believing that Sackett had acted in good faith and had made the deed in conformity with the understanding of the parties and the written agreement; and that Elliott had recently discovered the mistake in the deed.

In June, 1877, Dickey, the owner of the $9,000 note made by Sackett and secured by the deed of trust, was, by an order of the State court, on his petition, made a defendant in the suit and allowed to file an answer and a cross-bill. His answer controverted the material allegations of the bill. A few days later, on the petition of Dickey, the suit was removed into the

Circuit Court of the United States for the Northern District of Illinois, and Dickey filed a cross-bill in the latter court, making as defendants Sackett and his wife, De Koven, the trustee, Mattocks, his successor in the trust, Elliott, and Underwood, the tenant of Elliott. The cross-bill alleged that the whole amount secured by the note and the trust deed was due, and that by the terms of the conveyance to Elliott he became liable to pay the debt to Dickey, and prayed for a sale of the premises to pay the amount due, and a foreclosure of the equity of redemption of the defendants, and the payment of the debt out of the proceeds of sale, and a decree against Sackett and Elliott for any balance due beyond the proceeds of the sale.

Sackett answered the original bill. The answer admitted that Sackett entered into an agreement in writing to convey the premises "in a certain manner and on certain conditions," the exact words and terms of which he did not remember. It admitted that Sackett, at the time of the negotiations with Elliott for the sale of the premises, solicited Elliott to assume and agree to pay the incumbrance of $9,000. It then proceeded:

"And this respondent denies that the said complainant refused the said solicitations and request of this defendant, but this respondent avers and will, at the proper time and place, prove the truth to be, that when the negotiations, conversations, and details preliminary to the final completion of the transactions upon which this suit was brought, were ended, and the parties were ready to close the transaction by the delivery of the deeds, it was fully and fairly understood by the parties to the same that a warranty deed conveying the said premises, 166 Calumet avenue, should and would be accepted by the said Elliott with the condition of conveyance therein provided, viz.: that the said Elliott did assume and agree to pay, as a covenant of said deed, the before mentioned nine thousand dollars, and interest semi-annually, and the warranty deed of this defendant contained that provision accordingly."

The answer also averred that Elliott carefully read over the deed in the office of Hill, at the time of the delivery of the papers in the transaction, in the presence of Sackett, "being fully aware of and noting especially, as this defendant believes,

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from his best recollection, the said clause in said deed which complainant now desires shall be expunged."

In March, 1878, Elliott answered the cross-bill, setting up that the clause in the deed from Sackett and wife as to the agreement by Elliott to pay the incumbrance was inserted by mistake or fraud on the part of Sackett or his agent, and repeating the averments of his original bill.

Replications were filed to the answer of Sackett to the original bill and to the answer of Elliott to the cross-bill, and the cross-bill was taken as confessed as to the other defendants in it, and the cause was referred to a master to take proofs and report the same to the court, with the amount due to Dickey. Proofs were taken and the causes were brought to a hearing thereon. The court made a decree dismissing the original bill for want of equity, and adjudging that all the material allegations in the cross-bill are proved; that the equities were with Dickey; that there was due to him from Sackett $11,399.28, with interest; and that Elliott, for a valuable consideration, assumed and agreed with Sackett to pay the amount due on the mortgage to Dickey. The decree then provided that Sackett and Elliott, or one of them, should pay to Dickey, within one day from the date of the entry of the decree, the amount so due to him, with interest and costs of suit, and that, in case the payment was not made, the premises should be sold by a master, and that he should report any deficiency in the proceeds of sale to pay the amount due. The decree concluded with providing that in case Sackett should pay such indebtedness, or any part thereof, he should have leave to apply to the court, on notice to Elliott, for a further order, at the foot of the decree, requiring Elliott to repay to Sackett the sum so paid on said indebtedness. Elliott appealed to this court.

Mr. William E. Mason for the appellant, cited *Cochran* v. *Chitwood*, 59 Ill. 53; *Snell* v. *Insurance Co.*, 98 U. S. 85; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Davis* v. *Symonds*, 1 Cox, 402; *Seymour* v. *Delancey*, 6 John. Ch. 222; *Miner* v. *Hess*, 47 Ill. 170.

Mr. Edward G. Mason, for the appellees.—I. It must appear

that a contract is different from the intention of *both parties* to justify a court of equity in reforming it. The deed complained of is exactly in accordance with the intention of Sackett, one of the parties to it. Story on Equity Jurisprudence, 11th edition, p. 144, § 138, K. note; *Schettiger* v. *Hopple*, 3 Grant's Cases, 54; *Nevius* v. *Dunlap*, 33 New York, 676; *Coffing* v. *Taylor*, 16 Ill. 457; *Ruffner* v. *McConnell*, 17 Ill. 217; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Snell* v. *Insurance Company*, 98 U. S. 85.—II. A court of equity will only reform a contract *upon the clearest and most convincing proof of mistake.* No such proof is found in this record. Story on Equity Jurisprudence, 11th edition, pp. 157, 161, §§ 152 and 157, and cases cited; *Schettiger* v. *Hopple*, 3 Grant's Cases, 54; *Nevius* v. *Dunlap*, 33 New York, 676; *Edmonds' Appeal*, 59 Penn. St. 220; *Ruffner* v. *McConnell*, 17 Ill. 217; *Hunter* v. *Bilyeu*, 30 Ill. 228; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Ivinson* v. *Hutton*, 98 U. S. 79; *Snell* v. *Insurance Co.*, 98 U. S. 85.—III. The weight of the evidence shows that *no mistake at all was made* in the deed from Sackett to Elliott. The evidence of the deed is not overcome by that of the preliminary contract, even if they differ. Story on Equity Jurisprudence, 11th edition, page 165, § 160, and cases cited. Sackett's testimony as to what the agreement was, is practically uncontradicted, and is confirmed by the other witnesses. Elliott's own conduct shows that he regarded the contract as one of assumption. *Miller* v. *Thompson*, 34 Mich. 10; *Coolidge* v. *Smith*, 129 Mass. 558; *Muhrig* v. *Fisk*, 131 Mass. 110. The proof in favor of mistake is exceedingly weak. The deed properly expresses the legal effect of the contract. A purchaser taking a deed "subject to" an incumbrance, the amount of which is deducted from the purchase price, becomes personally liable for the same. *Comstock* v. *Hitt*, 37 Ill. 542; *James* v. *Day*, 37 Iowa, 164; *Herbert* v. *Doussan*, 8 La. Ann. 267; *Fowler* v. *Fay*, 62 Ill. 377; *Waters* v. *Hubbard*, 44 Conn. 340.—IV. If Elliott made any mistake, it was one of law and not of fact, from which a court of equity will not relieve him. *Hunt* v. *Rousmanier's Administrators*, 1 Pet. 1; *Bank of the United States* v. *Daniel*, 12 Pet. 32; *Sibert* v. *McAvoy*, 15 Ill. 106; *Wood* v. *Price*,

46 Ill. 435; *Snell* v. *Insurance Company*, 98 U. S. 85.—V. Even where the minds of the parties have never met, courts of equity do not interfere where there was gross negligence on the part of the plaintiff. Story on Equity Jurisprudence, 11th edition 143, § 138 *i.*; *Graves* v. *Boston Marine Ins. Co.*, 2 Cranch, 419; *Grymes* v. *Sanders*, 93 U. S. 55; *Snell* v. *Insurance Co.*, 98 U. S. 85.—VI. Nor do courts of equity interfere where intervening rights have accrued, or where the parties cannot be placed *in statu quo ante*. Story on Equity Jurisprudence, 11th edition, p. 143; *Grymes* v. *Sanders*, 93 U. S. 55; *New Orleans Canal and Banking Company* v. *Montgomery*, 95 U. S. 16.

Mr. Justice Blatchford delivered the opinion of the court. After stating the facts as above, he said:

It is objected by the appellee Dickey, that there is nothing in the record to show that the amount in controversy exceeds $5,000; and that the decree, so far as Elliott is concerned, is not a final one. It is urged that the provision of the decree is, that, if the amount specified is not paid to Dickey within one day, the premises shall be sold, and, if the proceeds of sale are insufficient, the master shall report the amount of the deficiency; that this is not a deficiency decree against Elliott; that it does not appear that it will ever be necessary to enter a deficiency decree against any one; that, on the decree, as it stands, no execution can be issued against any one; that all the evidence goes to show that the deficiency decree will not exceed $2,000; and that the decree is merely interlocutory as to Elliott, because, until a sale is made, there can be no cause of complaint on the part of Elliott. The answer to this objection is, that the decree dismisses the original bill, and adjudges that Elliott agreed with Sackett, for a valuable and sufficient consideration, to pay the amount due on the incumbrance. The amount involved in the original suit is the entire amount of the incumbrance, which Elliott is made by the deed to him to agree to pay, and the bill seeks relief from liability for that amount, by striking out the clause from the deed. The decree denies that relief. If that relief was wrongly denied, all relief against Elliott under the

cross-bill necessarily falls, as the only liability from Elliott to Dickey arises from that clause in the deed.

On the merits, we are of the opinion that Elliott is entitled to the relief he asks by his original bill. The terms of the written agreement between Sackett and Elliott are very clear, and show that the parties were merely making an exchange of land. Sackett agrees to convey to Elliott the Calumet avenue property, subject to the $9,000 incumbrance, and to assign an insurance policy, and to pay $50. Elliott agrees to convey to Sackett three lots subject to a specific incumbrance, and two other pieces of property clear of incumbrance. It is true, that Elliott agrees to pay to Sackett $15,000, but the agreement expressly states that that sum is to be paid "in the manner following," which is by conveying the land described. The land to be conveyed to Sackett is apparently valued by the agreement, for the purposes of the transaction, at $15,000. Nothing is said about deducting the $9,000 from the price of the property to be conveyed to Elliott, nor is any sum named as the purchase money of that property. An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt, to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee. Such is the law in Illinois, where this land is situated, *Comstock* v. *Hitt*, 37 Ill. 542; *Fowler* v. *Fay*, 62 id. 375, as well as the law in other States. *Belmont* v. *Coman*, 22 N. Y. 438; *Fiske* v. *Tolman*, 124 Mass. 254.

Under the written agreement, therefore, it is plain that Elliott assumed no personal liability. Both parties executed this agreement and are to be held to have understood it in that sense. Sackett, in his answer, does not deny the allegation of the original bill, that the agreement between the parties was

that neither Sackett nor Elliott should assume or agree to pay outstanding incumbrances on the respective parcels of land, and that that appears by the written agreement. But the answer, while admitting that Sackett entered into an agreement in writing to convey the premises in a certain manner and on certain conditions, and referring to such agreement for certainty, sets up, that, after the written agreement was made, the parties came to an understanding that Elliott would accept a deed whereby he should assume and agree to pay the $9,000 incumbrance, and that the deed given "contained that provision accordingly." There is no evidence to support this allegation. Sackett testifies that he never had any conversation with Elliott in regard to his assuming liability for the mortgage, but that they met together and the deeds to each other were passed. Sackett had employed Hill as his agent to dispose of the Calumet avenue property. Elliott testifies that Hill offered him the property and wanted him to assume the incumbrance, but he refused, and that finally Hill brought in the agreement which was signed by both parties. Hill testifies to the same effect. Elliott says that when Sackett gave him the deed in Hill's office, he was unwell; that he did not read that part of the deed which states that he is to assume and pay the incumbrance, but only read the prior part which states that the conveyance is made subject to the incumbrance; and that he discovered the mistake in the deed a short time before he commenced this suit.

The actual contract of the parties, as understood by both of them, is shown by the written agreement. Nothing was agreed upon to vary that. Sackett, as he shows by his testimony, knew the difference as to liability which the difference in the language would make, and knew what the language of the written agreement was, and must be held to have understood it to mean what it does mean, and to have known that Elliott understood it in the same sense. So, in the departure from it in the deed, there was a mutual mistake, it not being shown, as set up in the answer of Sackett, that there was an intention, fully and fairly understood by both parties, that in the deed Elliott should assume and agree to pay the incumbrance. Under all

the circumstances proved in this case (and every case of the kind must depend very largely on its special circumstances), Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief.

Neither Dickey nor the trustee was a party or a privy to the transaction between Sackett and Elliott, nor was the trust deed taken, or the debt created or extended, or anything else done by Dickey or his trustee, in reliance on any assumption of the debt by Elliott. As respects the trust deed, the parties to it and to the debt it secured occupied the same position when this suit was brought as when the deed to Elliott was delivered, no new rights having been acquired in reliance on that deed, and none which existed when it was delivered being sought to be impaired by the relief asked by Elliott. Elliott does not seek to interfere with the property he conveyed to Sackett. No circumstances exist on which laches can be predicated on the part of Elliott as to seeking a remedy. The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance. As owner of the property subject to the incumbrance, and desirous of retaining it so long as there was any value in the equity of redemption, he would naturally pay the interest to save a foreclosure.

The principles applicable to a case like the present are fully set forth in the opinion of this court delivered by Mr. Justice Harlan, in *Snell* v. *Insurance Co.*, 98 U. S. 85, and the leading authorities on the subject are there collected. Within those principles this is a case where, in the preparation of the deed to Elliott, there was, by mutual mistake, a failure to embody in the deed the actual agreement of the parties as evidenced by the prior written agreement. The meaning of that prior agreement is clear, and nothing occurred between the parties, after it was signed and delivered, to vary its terms, except the mere fact of the delivery of the deed, the terms of which are complained of and sought to be reformed. The deed did not effect what both the parties intended by the actual contract which

Statement of Facts.

they made, and the case is one for the interposition of a court of equity.

The decree of the circuit court is reversed, with costs, so far as it dismisses the original bill, and so far as it adjudges that Dickey has any equities as against Elliott, and so far as it adjudges that Elliott assumed and agreed to pay the amount due on the mortgage to Dickey, and so far as it adjudges that Elliott shall pay to Dickey the amount found due to him and the costs of the suit, and so far as it provides for an application by Sackett for an order that Elliott repay to him any sum which he may pay on the debt due to Dickey; and the cause is remanded to the circuit court, with directions to enter a decree in the original suit granting the prayer of the bill with costs, and for such further proceedings in the original and cross-suits as may not be inconsistent with this opinion.

EWELL *v.* DAGGS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Decided March 26th, 1883.

Interest—Limitation—Mortgages—Usury.

1. If an action on the debt secured by a mortgage of real estate in the State of Texas is not barred by the statute of limitations, a suit on the mortgage itself is not barred, and this, whether the owner of the equity or a third person be the mortgage debtor.
2. A contract of a kind which a statute in Texas makes "void" for usury, is voidable only; and a repeal of the statute declaring such contracts void deprives the debtor of the statutory defence.
3. When the amount of the face of a note represents a principal sum and interest thereon at a rate higher than the legal rate, and nothing is said in the note itself about interest, the note after maturity will bear interest at the legal rate.

On May 27th, 1856, James B. Ewell and his wife, having the legal title in fee to the premises, made and delivered to

Daggs a promissory note of that date, payable three years after date to his order, for $3,556, and to secure the same executed and delivered to Daggs a deed of mortgage upon a tract of land in Guadulupe County, Texas, containing 1,653 acres, which mortgage was duly proved and recorded on June 5th, 1856.

James B. Ewell acquired the legal title to this land on April 13th, 1854; but, in equity, it belonged to his brother, George W. Ewell, the appellant, for whom and with whose money it had been bought. The legal title was conveyed by James B. Ewell to his brother, George W. Ewell, on September 6th, 1856, the latter having no knowledge of the mortgage to Daggs, and Daggs having no notice, actual or constructive, of the equity of George W. Ewell.

On March 9th, 1872, Daggs, being a citizen of Virginia, brought his action at law against James B. Ewell and wife, on the note, in the Circuit Court of the United States for the Western District of Texas, and recovered judgment against James B. Ewell, July 14th, 1873, for $3,530.93.

The defence set up by James B. Ewell in that suit was usury, the actual amount of the loan having been $2,000, the residue of the note being interest on that amount until its maturity, at the rate of 20 per cent. per annum, compounded annually.

A statute of Texas in force at that time on the subject of usury was as follows:

"That all contracts or instruments of writing whatsoever, which may in any way, directly or indirectly, violate the foregoing provisions of this act by stipulating for, allowing, or receiving a greater premium or rate of interest than twelve per cent. per annum for the loan, payment, or delivery of any money, goods, wares, or merchandise, bonds, notes of hand, or any commodity, shall be void and of no effect for the whole premium or rate of interest only; but the principal sum of money or the value of the goods, wares, merchandise, bonds, notes of hand, or commodity, may be received and recovered."

Payments had been made on the note prior to the commence-

ment of the suit to the amount of $1,745, which were allowed; but the usurious interest was not deducted, on the ground that the Constitution of Texas, which went into effect in 1870, and continued in force till after the recovery of the judgment, repealed all usury laws and prevented any defence on that account.

The judgment not being paid, Daggs filed the present bill in equity January 14th, 1875, to foreclose the mortgage and sell the mortgaged premises, to which James B. Ewell and his wife, George W. Ewell, and the heirs of James B. Wilson were made defendants. The heirs of Wilson claimed title to a portion of the land under George W. Ewell, by virtue of a sale and actual possession prior to the date of the mortgage to Daggs. The decree established their title, and from that there was no appeal.

As against George W. Ewell, however, it adjudged a foreclosure of the equity of redemption and sale of the remainder of the premises, in default of payment by him of the amount found due upon the judgment against James B. Ewell, and interest thereon at the rate of twelve per cent. per annum. From this decree George W. Ewell prosecuted this appeal.

Mr. William Reynolds for the appellant.—I. The court erred in overruling the defence of the Statute of Limitations. In Texas, unlike most States, the mortgage is only an incident to the debt, and the mortgagor is the real owner, entitled to possession. *Duty* v. *Graham*, 12 Texas, 427; *Perkins* v. *Sterne*, 23 Texas, 561; *Blackwell* v. *Barnett*, 52 Texas, 326. Under the Texas Statute of Limitations the defence of George W. Ewell must be successful, unless the bringing of a suit against James B. stopped the running of the statute as to George W. That cannot be; because, in order to bind one by judgment in a suit to which he was not party, and by reason merely of priority in estate, he must have acquired his title *post litem motam*. *Doe* v. *Derby*, 1 A. & E. 783; *Hunt* v. *Haven*, 52 N. H. 162; *Winslow* v. *Grindal*, 2 Greenleaf, 64; *Adams* v. *Barnes*, 17 Mass. 365; *Burleson* v. *Burleson*, 28 Tex. 383. See *Lord* v. *Morris*, 18 Cal. 482, which holds that after

the mortgagor disposes of the premises his personal liability becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges on the premises. —II. The Supreme Court of Texas has held that the Constitution repealing usury laws did not legalize usurious contracts of a date prior to its adoption. *Smith* v. *Glanton*, 39 Texas, 365. See also *Norris* v. *Crocker*, 13 How. 429; *Steamship Company* v. *Joliffe*, 2 Wall. 450; *Insurance Company* v. *Ritchie*, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 506; *Harris* v. *Runnels*, 12 How. 79; *National Exchange Bank* v. *Moore*, 2 Bond, 170.—III. There was error in the computation of interest. The contract upon which this judgment was founded, being the mortgage note, did *not* "bear a specified interest greater than 8 per cent. per annum, and not exceeding the highest rate of conventional interest permitted," and therefore the judgment should not bear 12 per cent. interest. See note as set out by appellee in his petition, and also as recited in mortgage.

Mr. J. Randolph Tucker for appellee.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts in the language in which they are set forth above, and continued:

Several defences were made in the court below, the overruling of which are assigned for error, and which we proceed now to state and consider in their order.

1. The first defence is the Statute of Limitations, as contained in article 4604, Paschal's Digest, as follows:

> "All actions of debt grounded upon any contract in writing shall be commenced and sued within four years next after the cause of such action or suit, and not after."

It is admitted that the cause of action upon the note was not barred when the action upon it was commenced, the period of limitation not expiring till July 29th, 1872, excluding from the computation the interval between January 28th, 1861, and March 30th, 1870, as required by article 12, section 43 of the Constitution of Texas of 1870.

But the statute quoted does not apply to suits for the foreclosure of a mortgage and sale of the mortgaged property, such as the present. Such suits are not actions of debt grounded upon a contract in writing. They are suits to enforce the lien of the mortgage for the satisfaction of the debt secured by it. If that debt is barred by the Statute of Limitations, then, according to the law in Texas the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident to the debt. It was so held by the Supreme Court of Texas, in *Eborn* v. *Cannon's Adm'r*, 32 Texas, 231, where it says:

"If the notes were a subsisting debt at the time of the institution of the suit, not barred by the Statute of Limitations, the mortgage executed contemporaneously to secure their payment was still valid as long as the debt remained unsatisfied. No matter at what time the power of the court was invoked for its collection and foreclosure and for a decree to subject the mortgaged property to the satisfaction of the debt, it was opportune if the jurisdiction of the court over the debt itself was not ousted. The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal."

See also *Perkins* v. *Sterne*, 23 Texas, 561; *Duty* v. *Graham*, 12 Texas, 427; *Flanagan* v. *Cushman*, 48 Texas, 241.

There is no force in the suggestion that although the defence of the Statute of Limitations would not avail Jas. B. Ewell, because judgment had been rendered against him before the bar took effect, it nevertheless is a protection to Geo. W. Ewell, because he is a stranger to the judgment and mortgage, and the suit now pending was not brought till after the time limited for an action to recover the debt. For the present suit is not to recover the debt, nor is it a suit against Geo. W. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own, but that of Jas. B. Ewell. If he can show that that

debt no longer exists, because it has been barred by the Statute of Limitations, he is entitled to do so; but he must do it by showing that it is barred as between the parties to it. If not, the land is still subject to the pledge, because the condition has not been performed. It is not to the purpose for the appellant to show that he owes the debt no longer, for in fact he never owed it at all; but his land is subject to its payment as long as it exists as a debt against the mortgagor, for that was its condition when his title accrued.

2. The second defence is that of usury. The statute of Texas on that subject has already been quoted. A contract of loan at a stipulated rate of interest greater than twelve per cent. per annum, is declared to "be void and of no effect for whole premium or rate of interest only;" but the principal sum may be received and recovered. The provision of the Constitution of Texas, sec. 44, art. 12, repealing this and all existing usury laws, is as follows:

"All usury laws are abolished in this State, and the legislature is forbidden from making laws limiting the parties to contracts in the amount of interest they may agree upon for loans of money or other property; *provided*, this section is not intended to change the provisions of law fixing the rate of interest in contracts where the rate is not specified." 2 Paschal's Annotated Digest Laws of Texas, 1132.

It is claimed by the appellant that, notwithstanding this repeal of the usury laws, the rights of the parties are to be determined according to the law in force at the time the transaction took place; that by the terms of that law the contract between Daggs and James B. Ewell was void as to the entire interest reserved and paid; that no subsequent law could make valid a contract originally void; and that the appellant is not bound by the judgment rendered against James B. Ewell in favor of Daggs, and is entitled in the present suit to make the defence.

It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be "void and of no effect." But these words are often used in

statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of lessee's estate for non-payment of rent, or breach of other condition, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by re-entry, at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void.

All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom's Legal Maxims, 732.

And Lord Mansfield, in *Holman* v. *Johnson*, Cowp. 341, stated the ground on which, in such cases, courts proceed. He said:

"The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

And the effect is the same, if the contract is in fact illegal, as made in violation of a statute, whether the statute declares it to be void or not. *Bank of United States* v. *Owens*, 2 Pet. 527. "There can be no civil right," said Mr. Justice Johnson, in that case, "when there can be no legal remedy;

and there can be no legal remedy for that which is itself illegal."

A distinction is made between acts which are *mala in se*, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita*, which are void or voidable, according to the nature and effect of the act prohibited. *Fletcher* v. *Stone*, 3 Pick. 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration, was only voidable, notwithstanding the strong words of the statute. *Green* v. *Kemp*, 13 Mass. 515. And in such cases, the advance of the money, although the contract is illegal for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed. "A man by express promise may render himself liable to pay back money which he had received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt." *Flight* v. *Reed*, 1 H. & C. 703; 32 Law Jour. Rep. N. S. Ex. 265.

The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defence for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases: *Curtis* v. *Leavitt*, 15 N. Y. 9; *Savings Bank* v. *Allen*, 28 Conn. 97; *Welch* v. *Wadsworth*, 30 Conn. 149; *Andrews* v. *Russell*, 7 Blackf. 474; *Wood* v. *Kennedy*, 19 Ind. 68; *Town of Danville* v. *Pace*, 25 Grat. 1; *Parmelee* v. *Lawrence*, 48 Ill. 331; *Woodruff* v. *Scruggs*, 27 Ark. 26.

And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. *Read* v. *Plattsmouth*, 107 U. S. 568; and see *Lewis* v. *McElvain*, 16 Ohio, 347; *Johnson* v. *Bentley*, Ib. 97; *Trustees* v. *McCaughy*, 2 Ohio State, 152; *Satterlee* v. *Mathewson*, 16 S. & R. 169; *S.C.* in error; 2 Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88.

The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited.

The case of *Smith* v. *Glanton*, 39 Texas, 365, cited and relied on by counsel for the appellant, we cannot accept as a settlement of the law of Texas to the contrary. The opinion does not consider the question, but dismisses it, on the assumption that the fact that the action was brought before the adoption of the Constitution which contained the repeal of the usury laws, prevented the application of the rule.

It is our opinion, therefore, that the defence of usury cannot avail the appellant, by reason of the constitutional repeal of the statute, on the continued existence of which alone his defence rested.

3. It is next objected that there is error in the amount of the

decree, in allowing interest at the rate of twelve per cent. per annum on the amount of the judgment against James B. Ewell, instead of finding the amount due, irrespective of the judgment, by calculating interest upon the note itself since its maturity, giving proper credits for payments, at the rate of eight per cent. per annum. The amount of the alleged error is $805.25, being the difference between $5,980.22, which is said to be the amount of the decree, and $5,174.97, which it is claimed is the true amount. The law of Texas provides that "on all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties, interest shall be allowed at the rate of eight per cent. per annum from and after the time when the sum is due and payable." Paschal's Dig. of Laws, art. 3940; Rev. Stat. 1879, art. 2976; and also that "all judgments of the several courts of this State shall bear interest at the rate of eight per cent. per annum from and after the date of the judgment, except when the contract upon which the judgment is founded bears a specified interest greater than eight per cent. per annum, and not exceeding the highest rate of conventional interest permitted by law (twelve per cent.), in which case the judgment shall bear the same rate of interest specified in such contract and after the date of such judgment. Paschal's Dig., art. 3943; Rev. Stat. 1879, art. 2980.

The contract on which the judgment was founded stipulated for no rate of interest, the interest reserved being added to the principal in the note itself, and consequently it is evident that the decree should not have allowed interest on the debt at a rate greater than eight per cent. The amount of the decree should have been the sum actually due upon the mortgage debt at the date of its maturity, May 27th, 1859, with interest thereon at the rate of eight per cent. per annum to the time of the decree, April 25th, 1879, giving proper credit for payments made on account from time to time, which amounts to $5,174.97, and on which interest is to be allowed at the same rate until paid.

In our opinion, the appellant is entitled to have this correction made. He is not bound by the judgment against James

Syllabus.

B. Ewell, to which he is neither party nor privy, and which was rendered after the appellant acquired his title to the land. He is consequently not cut off from his right to set up the matter, on which he now insists. *Lloyd* v. *Scott*, 4 Pet. 205; *Brolasky* v. *Miller*, 1 Stockt. (N. J.) 807; *Berdan* v. *Sedgwick*, 44 N. Y. 626; *Post* v. *Dart*, 8 Paige, 639; *Greene* v. *Tyler*, 39 Penn. St. 361.

The decree is therefore modified in respect to the amount found to be due and the rate of interest to be allowed thereon, as already indicated, and with this modification, affirmed, each party paying his own costs in this court.

THE BELGENLAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Ex parte WARDEN and Others.

ORIGINAL.

Decided March 26th, 1883.

WARDEN and Others, Petitioners.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Decided May 7th, 1883.

Admiralty—Appeal—Mandamus—Practice.

1. A final decree in a collision suit in admiralty where the *res* has been surrendered, on a stipulation under the provisions of § 941, Rev. Stat., may be entered against both principal and sureties at the time of its rendition.
2. If a decree in admiralty is entered against claimant and sureties, and claimant appeal, and sureties sign the *supersedeas* bond also as sureties, an alternative writ of mandamus will not be granted to vacate the decree below as to the sureties.
3. Nor will this court, on the stipulator's motion, order the decree set aside here as to them.

Statement of Facts.

One of these proceedings is at common law, the other in admiralty, but both took place at the same term of court, and each sought to effect the same thing in a pending appeal in admiralty.

Under the provisions of § 941, Rev. Stat., William G. Warden and others, in September, 1879, became stipulators in the District Court for the Eastern District of Pennsylvania, on behalf of the master and claimants of the Belgenland, in a suit brought there in admiralty for collision. The condition of the stipulation was as follows:

"Now, if the said claimant shall and will truly abide by all orders interlocutory or final of the said court and of any appellate court in which the said suit may be hereafter depending, and shall fulfil and perform the judgment or decree which may be rendered in the premises, and also pay all costs, &c., this stipulation shall be void, otherwise in force, and execution may issue by virtue thereof at one and the same time against any or all the parties to this stipulation."

Proceedings were had in the suit, and a decree for the payment of money was entered in favor of the libellant and against the claimants and the stipulators. From that decree an appeal was taken to the circuit court for the district, where, on the 14th of October, 1881, it was decreed "that the libellant recover for himself and the other parties in interest, from the respondent, Samuel Jackson, and his stipulators, Joseph D. Potts, William G. Warden, Edward N. Wright, and James A. Wright, his or their damages for the collision mentioned in the libel, . . . aggregating, in all, the sum of $51,594.14." The decree was also entered as a lien against the real estate of the stipulators.

Upon the rendition of this decree an appeal was taken by the claimant to this court, the petitioners signing a supersedeas bond as sureties. The petitioners being seized of real estate in the district, applied to the circuit court to vacate the decree against them, on the ground that it was inadvertently entered and caused a cloud on the titles to their property. The court declined to make the order, and an application was presented

Argument for the Relators.

for a mandamus requiring it to be done. After reciting the facts, the petition for the mandamus made the following averments:

"Your petitioners show that they are hindered and affected by the cloud on the titles of their respective real estates within the said district by reason of the decrees so rendered against them as stipulators as aforesaid; that titles have been refused by purchasers—and they are advised that such decrees are improvidently entered against them, as an appeal in admiralty operates not only as *supersedeas*, but also vacates any decree of the court from whose decree the appeal is taken, and that no decree can be lawfully entered against stipulators whose obligation is conditional on the performance of the decree which may be finally rendered against the claimant, within the ten days allowed to the claimant, in which he may take an appeal from the decree rendered; and that your petitioners are without remedy in the premises, unless redress is given as herein prayed, as no writ of error or appeal lies to the order of the court refusing to vacate said decree."

Mr. Morton P. Henry for the relators.—The petitioners, being sureties, have no right of appeal or writ of error. *The Wanata*, 95 U. S. 600; *The Ann Caroline*, 2 Wall. 538. Their only remedy is by mandamus. *Bank of Columbia* v. *Sweeney*, 1 Pet. 567. The decree entered below was illegal. *The New Orleans*, 17 Blatchf. 216. It is not a lawful judicial sentence against the relators. The final decree to which the appeal lies condemns the vessel and assesses the damages if found in fault. The execution may proceed against claimant and stipulators at the same time by virtue of the act of 1847, Revised Statutes, section 942. But the engagement of the stipulators is none the less collateral to the proceedings *in rem*. The stipulator is a surety, with all the rights incident to suretyship, and not a principal. He is entitled to subrogation and redress as a surety. Within the ten days allowed the claimant to appeal, Revised Statutes, sections 1007 and 1012, sentence is not pronounced against the stipulator, because an appeal vacates the decree and his obligation does not become fixed, and if the stipulator should within that time satisfy the decree, he would

have no recourse against his principal—and the admiralty procedure does not pronounce a sentence he cannot fulfil without losing recourse against his principal.

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

It is not stated in the petition that the stipulation was executed under the provisions of sec. 941 of the Revised Statutes, but for the purposes of this application we assume it was, there being no representation to the contrary. That section provides in express terms for a return of the stipulation to the court, and that "judgment thereon against both principal and sureties may be recovered at the time of rendering the decree in the original cause." It would seem as though nothing more was needed to show the power of the court to include the stipulators in the original decree. Under section 1007 of the Revised Statutes, no execution can issue until the expiration of ten days after the entry of the decree. In this respect these decrees are like others. An appeal with supersedeas stays execution against the stipulators as well as the principal. Therefore, there is nothing in the decree inconsistent with the provision in the stipulation in respect to the time when execution may issue.

It is no doubt within the power of the court to postpone a decree against the sureties until after the time for appeal by the principal has expired, and then to proceed only on notice. Such is the practice in some of the circuits, but we can find nothing in the statute which makes this imperative. In the case of *The New Orleans*, 17 Blatchf. 216, to which our attention has been directed by the counsel for the petitioners, the proceeding was against the sureties for the claimants, on their appeal from the district court to the circuit court, and the court refused to enter the judgment on such a bond until after the time for perfecting an appeal to this court had expired. That was an entirely different question from the one presented here upon a stipulation entered into under section 941.

It is unnecessary to consider whether in law the decree is a lien on the real estate of the stipulators after the appeal. Our inquiry is not as to the effect of the decree, but as to the jurisdiction of the court to enter it. If there was jurisdiction, any

error that may have been committed cannot be corrected by mandamus.

As, upon the showing made by the petitioners, we are clearly of opinion they are not entitled to the relief they ask.

The alternative writ is denied.

The stipulators then filed their petition in this court setting forth the same facts, and prayed "this court by an order in this cause to grant relief, by setting aside the said decree as a lien on the real estate of the petitioners, on such terms as the court shall be pleased to pronounce just and equitable, to sureties in a cause pending an appeal; or will be pleased by its mandate to direct or authorize the circuit court to proceed in the said matter in such manner as shall be consonant to the rights of your petitioners and of the libellant; your petitioners submitting themselves in all things to the order to be made on the premises."

Mr. Morton P. Henry in support of the motion.
Mr. Henry Flanders against it.

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

The decree appealed from was against the respondent and his stipulators. If the decree operates as a lien on the real estate of the stipulators, notwithstanding the appeal, it is an advantage the law gives the appellee for his security, with which we ought not to interfere in advance of the hearing of the case on its merits. Whether there is such a lien we do not decide. That is a question which is not presented to us for determination by the appeal.

Motion denied.

SHAINWALD, Receiver, and Others *v.* LEWIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Decided March 26th, 1883.

Removal of Causes.

1. When in the settlement of a controversy one of the plaintiffs and one of the defendants, necessary parties for the determination of the issues, are citizens of the same State, the cause cannot be removed from the State court under the first clause of section 2, of the act of March 3d, 1875, ch. 137, 18 Stat. 470.
2. In the present case the issue is not a separable controversy which, under the provisions of the second clause in that section, can be so removed.

Appeal from an order of the court below remanding a suit removed into it from a State court of Nevada.

Mr. T. L. Crittenden and *Mr. Franklin H. Mackey* for appellants.

Mr. Albert Bach for defendant.

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

Isaac J. Lewis, a citizen of Nevada, the appellee, on the 15th of January, 1881, brought suit against Harris Lewis, a citizen of California, for the dissolution of an alleged partnership between them, and a settlement of the partnership affairs. To this suit, he made Abraham Coleman, a creditor of the firm and a citizen of California, J. A. Wright, Hoffman Brothers, Joseph Huber, Charles Sadler, A. & M. Sower, R. Hogan, J. D. Pringle, Charles Polkinghorn, B. C. Thomas, and James Brennan, citizens of Nevada, defendants, jointly with Harris Lewis. According to the averments in the bill, Harris Lewis, one of the partners, had become involved in business complications of his own, and a large judgment had been taken against him in the District Court of the United States for the District of California in favor of Herman Shainwald, assignee in bankruptcy of Schoenfield, Cohn & Co. A suit was begun on this judgment in the District Court of the United States for the District

of Nevada, and Ralph L. Shainwald was, by an *ex parte* order, without notice, appointed receiver of the estate of Harris Lewis in Nevada. The receiver at once took possession of the property of the partnership, whereupon a motion was made to vacate his appointment, which was granted. Notwithstanding this, Shainwald retained possession and was selling the interest of Harris Lewis in the property, and on such sales delivering the possession to the purchasers. All the defendants named, except Harris Lewis and Coleman, are either purchasers of the property, or in possession as the agents of the Shainwalds.

On the filing of this bill a receiver of the property of the firm was appointed and qualified. All the defendants, except Harris Lewis and Coleman, answered the bill on the 17th of January, denying the existence of the partnership, and claiming that the property in dispute was the individual property of Harris Lewis. On the same day Herman Shainwald and Ralph L. Shainwald filed a petition of intervention, in which they asked to be admitted as defendants. In this petition they averred that Ralph L. Shainwald had been appointed receiver of the property of Harris Lewis by the District Court for the District of California, and that he took possession under that appointment. It was also stated that in the suit begun in the District Court for the District of Nevada, an attachment was issued under which the property was seized by B. C. Thomas, the sheriff, who was in possession under that authority. It also appeared that, in obedience to an order of the district judge in California, Harris Lewis had executed a formal assignment of all his property to the receiver appointed there.

On the 26th of January Ralph L. Shainwald was, by order of the court, admitted as a defendant in the suit, and the pleadings amended accordingly. Before this time a petition for the removal of the cause to the Circuit Court of the United States for the District of Nevada had been filed by Herman Shainwald and Ralph L. Shainwald, in which it is stated "that the real parties in interest in this action are I. J. Lewis, of the county of Lander, State of Nevada, as plaintiff, and Ralph L. Shainwald, receiver;" that the defendant Pringle is the agent of Shainwald the receiver, and in possession for him; that Ralph

L. Shainwald and Herman Shainwald are citizens of California; that the defendants Wright, Coleman, Hoffman, Huber, Sadler, Sower, Hogan, Polkinghorn, Thomas, Pringle, and Brennan are nominal defendants, and have no interest in the suit; that the goods for which they were sued were sold to them by Ralph L. Shainwald, as receiver; and "that the controversy in said action between said plaintiff and said B. C. Thomas, holding the possession of said property by virtue of said attachment in favor of said assignee, and the controversy in said action between said plaintiff and said J. D. Pringle, holding the possession of said property as agent of said receiver Ralph L. Shainwald, and by virtue of his appointment as receiver, is wholly between citizens of different States, and which can be fully determined as between them; and that said Ralph L. Shainwald and said assignee Herman Shainwald are actually interested in said controversy." Upon this petition the State court, after admitting Ralph L. Shainwald as a party to the suit, but not Herman Shainwald, ordered a removal, but the Circuit Court of the United States for the District of Nevada, when the record was filed there, remanded the cause. From an order to that effect this appeal was taken.

We entertain no doubt of the propriety of the order remanding the suit, brought, as it was, to close up the affairs of the partnership between Isaac J. Lewis and Harris Lewis. All the defendants, except Harris Lewis and Coleman, who have not answered, deny the existence of the partnership. Upon one side of that issue, as now made up, is Isaac J. Lewis, a citizen of Nevada, and on the other, Ralph L. Shainwald, a citizen of California, and all the other answering defendants citizens of Nevada. If Thomas, the sheriff, and Pringle, the agent, are nominal parties, the other defendants are not. If Shainwald is a necessary party, so are they, because they are interested in the controversy in the same way, if not to the same extent, that he is. They get their title from him, and if he holds the property under the assignment from Harris Lewis, subject to the claims of Isaac J. Lewis as a partner, and the partnership creditors, so do they. It is of no importance that Shainwald has more in amount at stake than they. The

title of all depends on defeating the claim of Isaac J. Lewis as a partner. To that extent their interests are identical with those of Shainwald. If there was no partnership, they all go free and each keeps the property he has got. If there was, the interests of these parties may become antagonistic. Besides, on the question of partnership, Harris Lewis, a citizen of California, is a necessary party. If he insists on the partnership, as he certainly may, then, in arranging the parties on that question, there will be citizens of Nevada and California, on one side, and citizens of the same States on the other. Clearly, under these circumstances, the suit was not removable under the first clause of the second section of the act of March 3d, 1875, c. 137, 18 Stat. 470.

Neither was there any separable controversy in the suit such as would entitle any of the parties to a removal under the second clause. As has already been said, the suit was brought to close up the affairs of an alleged partnership. The main dispute is about the existence of the partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case now which can be separated from that about the partnership, and fully determined by itself.

The order remanding this suit is affirmed.

BARTON *v.* GEILER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Decided March 26th, 1883.

This case involves no law. On the facts the decree of the State court is affirmed.

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

This was a suit in equity brought in a State court of Tennessee by Barton, as assignee in bankruptcy of Kessler & Har-

mon, to set aside a conveyance made by Kessler, one of the bankrupts, to Geiler, and the only question presented by the writ of error is, whether upon the testimony embodied in the record and considered by the Supreme Court of Tennessee in the determination of the cause, it should have been found that the conveyance was in fraud of the bankrupt law. The question is entirely one of fact. There can be no dispute about the law. It is sufficient to say that, after a careful examination of the testimony, we are satisfied with the conclusion finally reached below. It would serve no useful purpose to set forth in an opinion the details of the evidence, or to enter into any discussion as to its effect.

The decree of the Supreme Court of Tennessee is affirmed.

GOLDENBERG and Another *v.* MURPHY, Collector.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided March 26th, 1883.

Customs Duties—Limitations.

When a suit is brought in a State court, the laws of that State will control in interpreting the provision of a federal statute of limitations as to what is the commencement of suit.

Action to recover back duties alleged to have been illegally exacted. The whole question was whether the suit was begun in time, it being conceded that the plaintiffs had a good cause of action if not barred by the statute. The facts appear in the opinion of the court.

Mr. S. G. Clarke for the plaintiffs.
Mr. Assistant Attorney-General Maury for the defendant.

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

This was a suit to recover back duties on imports paid under protest, commenced in the Superior Court of the City of New

York, before the enactment of the Revised Statutes, and the only question presented by the writ of error is, whether the suit was "brought within ninety days after the decision of the Secretary," as required by the act of June 30th, 1864, c. 171, sec. 14, 13 Stat. 215, then in force. The facts are, that the decision was made by the Secretary on the 28th of May, 1872, and it was agreed at the trial that the ninety days expired on the 26th of August. A summons in the case was made out in due form of law, bearing date August 21st, 1872, and efforts were made to serve it on the collector without the intervention of the sheriff, but failing in this, the summons was, on the 26th of August, delivered to and received by the sheriff of the county of New York, where the collector resided, with the intent that it should be actually served. Service was in fact made on the 27th.

The New York Code of Civil Procedure, sec. 99, is as follows:

"An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

"An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided."

A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word "commenced" is sometimes used, and at other times the word "brought." In this connection the two words evidently mean the same thing, and are used interchangeably. As this suit was begun in a State court of New York, the laws of that State must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other States, or the rules of the common law.

As it was conceded that under the decision of this court in *Arthur* v. *Lahey*, 96 U. S. 112, the importers were entitled to

Statement of Facts.

a verdict if the suit was brought in time, it follows that the instruction of the court to find for collector was erroneous.

The judgment is reversed, and the cause remanded for a new trial.

GAGE *v.* PUMPELLY and Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Decided March 26th, 1883.

Appeal—Jurisdiction.

In a suit involving title to real estate the court will not dismiss an appeal for want of jurisdiction solely because, where there are conflicting affidavits respecting the value of the property, it may possibly reach the conclusion that the estimates acted on below were too high.

Motion to dismiss for want of jurisdiction.

This suit was brought to set aside a tax sale. The plaintiff below paid the amount of the taxes, $1,120.79, and costs of suit into court. The court on hearing set aside the tax rule. The defendants below appealed. The plaintiff objected to the allowance of the appeal, but the court allowed it, and filed the following opinion:

Blodgett, J.—The defendant has prayed an appeal in this case, which complainant resists on the ground that the matter in dispute does not exceed $5,000, and affidavits have been filed on behalf of each party touching the value of the lands in controversy. I have considered these proofs, and am much inclined to hold that the fair cash value of this property does not exceed $5,000, although it is true that some of the affidavits on the part of the defendant put the value much higher than that, but the affidavits on the part of the complainant refer to actual sales and transactions, which furnish a much more reliable basis of value than these opinions or speculative conclusions. But I dislike by any ruling of my own as to value to deny an appeal to any party who seeks to review my findings upon the main questions in a case. I shall, therefore, allow the appeal, with leave to the appellee to raise the

question in the supreme court, as to whether the amount in controversy is sufficient to enable the defendant to prosecute an appeal. That is, I do not intend by this order, allowing an appeal, to cut off the right, if I could do so, of complainant to move in the supreme court to dismiss the appeal for want of jurisdiction.

The appellant moved to dismiss the appeal on the grounds: 1. That the affidavits showed that the property was worth less than $5,000; 2. That the amount at issue was only the taxes in arrear.

Mr. Edward G. Mason for appellees.
Mr. Albert G. Riddle and *Mr. August N. Gage* for appellant.

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

Many of the affidavits sent up with the transcript state distinctly that the value of the property, which is the matter in dispute, exceeds $5,000. When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high. There is no such decided preponderance of the evidence in this case against jurisdiction as to make it our duty to dismiss the appeal which has been allowed.

Motion denied.

HILTON *v.* DICKINSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided March 26th, 1883.

Appeal—Jurisdiction.

1. Cross-appeals must be prosecuted like other appeals. When a party making a cross-appeal fails, for a period long after the time allowed by law, to perfect his cross-appeal, the court, of its own motion, will dismiss it for want of prosecution.

Statement of Facts.

2. When it appears on the face of the record that the value of the matter in dispute is not sufficient to give jurisdiction, the court will, of its own motion, dismiss an appeal.
3. The sum demanded governs the question of jurisdiction until it appears that it is not the sum in dispute: but when it appears that the sum demanded is not the real sum in dispute, the sum shown, and not the sum demanded, will govern.
4. On appeal by the plaintiff, or by a defendant in case set-off or counterclaim has been filed or affirmative relief is demanded, the jurisdiction is to be determined by the amount of the relief additional or otherwise sought to be obtained by the appeal, having reference to the judgment below.
5. On appeal by defendant, the sum of the judgment against him governs the jurisdiction when no affirmative relief is asked.
6. The amount stated in the body of the declaration, and not merely the damages alleged on the prayer for judgment at its conclusion, must be considered in determining the question of jurisdiction.
7. The previous cases bearing on this subject considered and reviewed.

Bill of interpleader filed by Charles D. Gilmore against Benjamin S. Hilton, William H. Dickinson, John Devlin, and others, to determine the ownership of $2,500, which Gilmore held as trustee. The fund was paid into court, and when the decree below was rendered had increased by investment to more than $3,000. Hilton, Dickinson, and Devlin each claimed the whole. The court, at special term, decreed the whole to Hilton. From this decree both Dickinson and Devlin appealed to the general term. There the decree at special term was modified so as to direct the payment of the fund to Hilton and Dickinson in equal moieties, and to adjudge the costs against Devlin alone. Hilton took an appeal to this court from this decree, "in so far as it modifies the decree of the court below, to wit, the special term in equity," and citation was issued to Dickinson alone. This appeal was docketed here in due time.

An appeal was also allowed Devlin at the time the decree was rendered, but that appeal was not entered in this court. There was no appearance of counsel or security for costs within the time required by law.

Dickinson moved to dismiss the appeal of Hilton, on the ground that the value of the matter in dispute did not exceed $2,500, and to docket and dismiss under the 9th Rule the appeal of Devlin.

Arguments for Parties.

Devlin also appeared by counsel, and presented an assignment to him from Dickinson of all interest in the litigation, which was executed before the decree was modified at general term. He, therefore, insisted that Dickinson had no right to move in the premises, and asked that the appearance of his own counsel be entered.

Mr. F. W. Hackett for Dickinson.—I. A party appealing from part of a decree admits the remainder to be correct. 2 Davies' Chancery Practice, *1467 (5th ed.); *Kelsey* v. *Weston*, 2 N. Y. 500; *Norbury* v. *Meade*, 3 Bligh, 261; *Sands* v. *Codwise*, 4 Johns. 536.—II. The court will ascertain just what amount is involved between appellant and appellee. In *Terry* v. *Hatch*, 93 U. S. 44, several decrees had been passed; a master's report allowed Terry's claim of $23,000, also Hatch's claim of $75,000. It was a suit by creditors against an insolvent bank. Terry excepted to the master's report allowing the above sums; and the court overruling his exceptions, he appealed without joining any other party to the record with him as appellant. As it appeared that the distributive share coming to him was but little more than $500, the court dismissed the appeal. In the case at bar, value of the matter in dispute plainly appears from the pleadings to be less than the jurisdictional amount. This is a fact easily ascertained, and no review of the merits of the case can alter it. The appeal ought to be dismissed without compelling the appellee to go to a final hearing.

Mr. M. F. Morris for Devlin.—Dickinson recovered judgment for the same cause of action against Devlin, and Devlin paid the judgment and took an assignment of it and of all his rights in these suits. His interference in these suits is therefore unwarrantable and extraordinary. As to the motion to dismiss Devlin's appeal, because of his failure to docket it and secure the clerk, the failure seems to have been caused by inadvertence and the supposition that the docketing of one appeal would do for both. Since his attention has been called to the matter, he has caused his appearance to be entered, and has given security to the clerk, and only awaits the permission of

the court to docket his appeal now. As both appeals can and should be heard together, and no injury has been, or can be, done to any one by his failure to docket, and he has now secured the clerk and entered his appearance, it is respectfully submitted that he should be allowed *nunc pro tunc* to docket his appeal, and that the motion to dismiss should be denied.

Mr. F. P. B. Sands for Hilton.

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

At the last term, in the case of *The S. S. Osborne*, 105 U. S. 447, it was decided that "Cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered, and giving the security required by the rules." In that case the appeal had been docketed, but long after the time when by law it should have been done, and, following the rule announced in *Grigsby* v. *Purcell*, 99 U. S. 505, it was dismissed for want of prosecution. Inasmuch, therefore, as we would not hear the cross-appeal if it should be entered at this time, we deny the motion of Devlin to have the appearance of counsel entered on that appeal, and of our own motion dismiss it for want of prosecution.

It is a matter of no importance that the motion to dismiss the appeal of Hilton is made by Dickinson after he has parted with his interest in the decree, for, if on looking into a record we find we have no jurisdiction, it is our duty to dismiss on our own motion without waiting the action of the parties. The question is then presented whether upon the face of this record it appears that the value of the matter in dispute, for the purpose of our jurisdiction, exceeds $2,500, and that depends on whether the "matter in dispute" is the whole amount claimed by Hilton below, or only the difference between what he has recovered and what he sued for. So far as we have been able to discover, this precise point has never before been passed upon in any reported case. There are expressions in the opinions of the court in some cases which may

be, and probably are, broad enough to sustain the jurisdiction, but these expressions are found where the facts did not require a decision of the question now formally presented.

In *Wilson* v. *Daniel*, decided in 1798, and reported in 3 Dallas, 401, upon a writ of error brought by a defendant below from a judgment against him for less than $2,000, it was held that the jurisdiction of this court depended not on the amount of the judgment, but "on the matter in dispute when the action was instituted." Chief Justice Ellsworth, in his opinion, said:

"If the sum or value found by a verdict was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than $2,000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right of removal and revision of the cause, his demand (which is alone to govern him), being for more than $2,000. It is not be presumed that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced."

Mr. Justice Iredell, in a dissenting opinion, thus states the argument on the other side:

"The true motive for introducing the provision which is under consideration, into the judicial act, is evident. When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided, that unless the matter in dispute exceeded the sum or value of $2,000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error."

In *Cooke* v. *Woodrow*, 5 Cranch, 13, decided in 1809, trover had been brought in the Circuit Court of the District of Columbia for sundry household goods, and the judgment was in favor of the defendants. Upon a writ of error by the plaintiff below,

a question arose as to the way in which the value of the matter in dispute should be ascertained, and Chief Justice Marshall, in announcing the decision, said:

"If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but when the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value."

Three years afterwards the case of *Wise & Lynn* v. *The Columbian Turnpike Company* was before the court, which is very imperfectly reported in 7 Cranch, 276. On referring to the original record we find that under a provision of the charter of the turnpike company, 2 Stat. 572, ch. 26, sec. 6, commissioners were to be appointed by the Circuit Court of the District of Columbia to decide upon the compensation to be paid the owners of land for damages growing out of the appropriation of their property to the use of the company. All awards of the commissioners were to be filed in the Circuit Court, and unless set aside by the court were to be final and conclusive between the parties, and recorded by the clerk. Wise & Lynn presented a claim to the commissioners and were awarded $45. On the return of the award to the court they filed exceptions, and, among other things, claimed that they should have been allowed at least $300, but the court confirmed the award. They then brought the case to this court by writ of error, and the turnpike company moved to dismiss because the value of the matter in dispute did not exceed $100, that being then the jurisdictional limit on appeals and writs of error from the Circuit Court of the District of Columbia. The decision of the case is reported as follows:

"It appearing that the sum awarded was only forty-five dollars, the court, all the judges being present, decided that they had no jurisdiction, although the sum claimed by Wise & Lynn, before the commissioners of the road, was more than one hundred dollars."

Opinion of the Court.

In *Peyton* v. *Robertson*, 9 Wheat. 527, replevin had been brought for the recovery of personal property distrained for rent. The defendant in the action acknowledged the taking of the goods as charged in the declaration, but justified it as a distress for the sum of $591 due for rent in arrear, and recovered a judgment against the plaintiff for that amount. The plaintiff then brought the case to this court by writ of error, and insisted that as the damages laid in the declaration exceeded the jurisdictional limit his writ ought not to be dismissed; but the court said, through Chief Justice Marshall:

"If the replevin be, as in this case, of property distrained for rent, the amount for which the avowry is made is the real matter in dispute. The damages are merely nominal. If the writ be issued as a means of trying the title to property, it is in the nature of detinue, and the value of the article replevied is the matter in dispute."

The writ of error was accordingly dismissed.

The case of *Gordon* v. *Ogden*, 3 Pet. 33, was decided in 1830. There the action was instituted for the violation of a patent, and the amount of the recovery in damages was $400, by the verdict of a jury. The damages laid in the declaration were $2,600. The defendant brought the writ of error, and on a motion to dismiss because the value of the matter in dispute was not enough to give jurisdiction, Chief Justice Marshall, speaking for the court, said:

"The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of the judgment. Nothing but that judgment is in dispute between the parties."

Then referring to *Wilson* v. *Daniel*, *supra*, he said:

"Although that case was decided by a divided court, and although we think that, upon the true construction of the twenty-second section of the judicial act, the jurisdiction depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in *Wilson* v. *Daniel*, had not a contrary practice since prevailed. . . . The case of *Wise & Lynn* v. *The Columbian Turnpike Company*, 7 Cranch, 276, was dismissed because the sum for which judgment was rendered in the circuit court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the circuit court, was sufficient. . . . Since this decision we do not recollect that the question has ever been made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court."

The writ of error was consequently dismissed, all the judges agreeing that there was no jurisdiction. This case was followed at the same term in *Smith* v. *Honey*, 3 Pet. 469.

Nothing further of importance connected with the particular question we are now considering appears in the reported cases until 1844, when, in *Knapp* v. *Banks*, 2 How. 73, which was a writ of error brought by a defendant against whom a judgment had been rendered for less than $2,000, Mr. Justice Story said for the court:

"The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding $2,000, and the *ad damnum* exceeds $2,000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than $2,000, there the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than $2,000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum

for which the judgment is given ; and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The rule, as thus stated by Mr. Justice Story, was cited in *Walker* v. *The United States*, 4 Wall. 163, and in *Merrill* v. *Petty*, 16 Wall. 338. But these were cases in which the question was as to the right of a defendant to bring up for review a judgment against himself for less than $2,000.

In *Ryan* v. *Bindley*, 1 Wall. 66, the plaintiff below sued for $2,000, and the defendant pleaded set-off to the amount of $4,000. Under such a plea, if the set-off had been sustained, the defendant would have been entitled to a judgment for the difference between the amount of his claim and that established by the plaintiff. The plaintiff recovered a judgment for $575.85, and the defendant brought a writ of error, upon which jurisdiction was sustained because the defendant sought to defeat the judgment against him altogether, and to recover a judgment in his own favor and against the plaintiff for at least $2,000, and possibly $4,000. Thus the matter in dispute in this court exceeded $2,000.

In *Pierce* v. *Wade*, 100 U. S. 444, the action was replevin for cattle. A judgment was rendered in favor of the plaintiffs for the most of the cattle taken on the writ, but against them for $1,400, the value of some that were taken which did not belong to them. They brought the case here by writ of error, but the writ was dismissed on the ground that the matter in dispute was only the part of the cattle for which judgment had been rendered against the plaintiffs, the court remarking that "the plaintiffs recovered everything else which they claimed, and the judgment against them is less than $5,000."

In *Lamar* v. *Micou*, 104 U. S. 465, where the appeal was taken by a defendant from a decree against him for less than $5,000, it was held that if the set-off or counterclaim relied on would only have the effect of reducing the amount of the re-

covery, without entitling the defendant to a decree in his own favor, there was no jurisdiction.

We understand that *Wilson* v. *Daniel* is overruled by *Gordon* v. *Ogden*, in which Chief Justice Marshall states the opinion of the court to be that "the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error," and that *Wilson* v. *Daniel* was not followed because "a contrary practice had since prevailed." It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. *Lee* v. *Watson*, 1 Wall. 337; *Schacker* v. *Hartford Fire Insurance Company*, 93 U. S. 241; *Gray* v. *Blanchard*, 97 U. S. 564; *Tintsman* v. *National Bank*, 100 U. S. 6; *Banking Association* v. *Insurance Association*, 102 U. S. 121. Under this rule it has always been assumed, since *Cooke* v. *Woodrow*, *supra*, that when a defendant brought a case here, the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied; and this because as to him jurisdiction depended on the matter in dispute here. If the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record would show that he had been successful below as to a part of his claim, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case.

We are unable to see any difference in principle between the position of a plaintiff and that of a defendant as to such a case. The plaintiff sues for as much as, or more than, the sum required to give us jurisdiction, and recovers less. He does not, any more than a defendant, bring a case here to secure what he has already got, but to get more. If we take a case for him when the additional amount he asks to recover is less than we can consider, he has "an advantage over his antagonist,"

such as, in the language of Chief Justice Ellsworth, *supra*, "it is not to be presumed it was the intention of the legislature to give." Such a result ought to be avoided, and it may be by holding, as we do, that, as to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute "between the parties as the case stands upon the writ of error" or appeal, that is to say, as it stands in this court. That was the question in *Wilson* v. *Daniel*, where it was held that, to avoid giving one party an advantage over another, it was necessary to make jurisdiction depend "on the matter in dispute when the action was instituted." When, therefore, that case was overruled in *Gordon* v. *Ogden*, and it was held, as to a defendant, that his rights depended on the matter in dispute in this court, we entertain no doubt it was the intention of the court to adopt as an entirety the position of Mr. Justice Iredell in his dissenting opinion, and to put both sides upon an equal footing. Certainly it could not have been intended to give a plaintiff any advantage over a defendant, when there is nothing in the law to show any such superiority in position.

Under this rule we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. In this connection, it is to be remarked that the "amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction." *Lee* v. *Watson*, and the other cases cited in connection therewith, *supra*. The same is true of

the counterclaim or set-off. It is the actual matter in dispute as shown by the record, and not the *ad damnum* alone, which must be looked to.

Applying this rule to the present case, it is apparent we have no jurisdiction. The original matter in dispute was $3,000. On appeals from the Supreme Court of the District of Columbia we have jurisdiction only when the matter in dispute exceeds $2,500. Hilton recovered below one-half of the $3,000. It follows that as to him the matter in dispute in this court is only $1,500.

The appeal of Hilton is dismissed for want of jurisdiction, and that of Devlin for want of prosecution.

LUDLOFF and Others *v.* UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Decided April 2d, 1883.

Internal Revenue.

A manufacturer of cigars, in his statement furnished in May, 1878, under § 3387 of the Revised Statutes, according to Form 36½, set forth "the room adjoining the store in the rear, on the first floor" of certain premises, as the place where his manufacture was to be carried on. Circular No. 181, issued in March, 1878, by the commissioner of internal revenue, required that a cigar factory should be at least an entire room, "separated by walls and partitions from all other parts of the building," and that the factory designated in Form 36½ should not any part of it be used, "even though marked off or separated from the remainder by a railing, counter, bench, screen or curtain, as a store where the manufacturer can sell his cigars otherwise than in legal boxes, properly branded, labelled, and stamped." This circular went into effect May 1st, 1878. The manufacturer was engaged at the same time and place in doing business as a dealer in tobacco, having paid the special tax as such, and also the special tax as a manufacturer of cigars. He did not comply with the said circular, and had no division between the factory in the rear part of the room and the front part of the room, where he sold articles as a dealer in tobacco, except a wooden counter extending part of the way across the room, and some three feet high. He sold out of a show case in the front part, in quantities

less than 25, from stamped boxes, which were duly branded, marked and stamped, cigars which he had made in the rear part, on which cigars the tax had been paid. For doing so, as a violation of § 3400, in removing cigars made by him without the proper stamps denoting the tax thereon, a quantity of cigars, the property of the manufacturer, found in the rear part of the room, in boxes not stamped, were seized as forfeited to the United States, under § 3400 : *Held*,

1. The requirements of the circular were within the power of the commissioner to prescribe, under § 3396 ;
2. The sales at retail were in violation of law ;
3. The forfeiture claimed was incurred.

The provisions of § 3236, and subdivisions 8 and 10 of § 3244, and §§ 3387, 3388, 3390 and 3392, considered and held not to authorize such sales, they constituting, under §§ 3392, 3397 and 3400, removals of cigars from the place where they were manufactured, without the proper stamp denoting the tax thereon, because the sales were sales of cigars by their manufacturer, at retail, at the place of manufacture, not in stamped boxes, the cigars being in his hands as a manufacturer and not as a retail dealer.

Information against a quantity of cigars of domestic manufacture for violation of the internal revenue laws, and the regulations of the treasury founded thereon. All the material facts appear in the opinion of the court.

Mr. John V. L. Findlay for plaintiffs in error.
Mr. Solicitor General Phillips for the United States.

Mr. Justice Blatchford delivered the opinion of the court.

This is an information filed by the United States in the District Court for the District of Maryland, against a quantity of domestic cigars, to obtain their condemnation, as forfeited to the United States. The information alleges, as a cause of forfeiture, that the cigars were found in the possession of two persons by the name of Ludloff, doing business as Ludloff Brothers, who had manufactured them, and who had unlawfully removed certain cigars, by them manufactured at their manufactory in the city of Baltimore, without the proper stamps denoting the tax thereon, contrary to section 3400 of the Revised Statutes. Ludloff Brothers put in a claim and plea, denying forfeiture, and the issue was tried before a jury, who found a verdict for the United States. Thereupon a judgment of condemnation of the cigars seized was rendered, which

was affirmed by the circuit court, and is now brought here for review by a writ of error taken by the claimants.

The material facts of the case, as they appear by the bill of exceptions, are these: Prior to the seizure of the cigars, and before May 1st, 1878, the claimants carried on the manufacture of cigars in the rear part of a small room on the first floor of the building known as No. 60 West Fayette street, in the city of Baltimore, and at the same time and place were also engaged in doing the business of dealers in tobacco, that is to say, selling imported and domestic cigars, partly manufactured by themselves, and partly purchased from others, and also selling pipes, smoking material, chewing tobacco, snuff, &c., &c., they having first paid to the United States the special tax as dealers in tobacco, and also the special tax as manufacturers of cigars. In the course of said business they sold to their customers cigars so manufactured by them in the rear part of said room, in quantities less than 25, but out of stamped boxes, which boxes were duly branded, marked and stamped, and then deposited in a show-case before said sale was made. No cigars were sold by them upon which the tax had not been paid.

On the 21st of March, 1870, the commissioner of internal revenue had issued a circular (No. 181) in the following terms:

"The portions of the law regulating the manufacture and sale of cigars, without declaring in specific language that the two kinds of business, to wit, manufacturing cigars and selling manufactured tobacco and cigars at retail, shall not be carried on in the same place at the same time, impose such restrictions, make such requirements, and declare such forfeitures and penalties, as render it impracticable for these two kinds of business to be carried on together, as above stated. (See sections 3387, 3392 and 3397 of the Revised Statutes of the United States; also, Special 85, revised, and Form 36½.) Under as lenient a construction of these several sections of the law as their language and the purpose for which they were enacted, to wit, the protection of the revenue, will admit, it is held that a cigar factory, or the place where cigars can be made for sale, must be at least an entire room, separated by walls and partitions from all other parts of

the building, and that the factory or place of manufacture designated and described in Form 36½ cannot be used, nor any portion thereof, even though marked off or separated from the remainder by a railing, counter, bench, screen, or curtain, be used as a store where the manufacturer can sell his cigars otherwise than in legal boxes, properly branded, labelled and stamped. When a cigar manufacturer has a store in a room adjoining his factory, a door and windows may be allowed between the factory and store; and, if necessary for light or ventilation, the upper portion of the partition between the factory and store may be of glass or wire-cloth. Collectors and all other revenue officers are enjoined to see that these instructions are strictly enforced on and after May 1st, 1878."

This order was disregarded by the claimants, because in June, 1878, the said district court had decided that the business of manufacturing and selling cigars at retail, by the same person, at the place of manufacture, as well as selling at said place manufactured tobacco, pipes and other smoking material, was not prohibited by law. Thereupon in August, 1878, the cigars in suit were seized as forfeited, and were found, when seized, in boxes not stamped, in the rear part of the room before described. Such rear part had been designated as the factory or place of manufacture where the claimants proposed to carry on their business, in manner and form as prescribed by the commissioner of internal revenue, as follows:

"(36½.)

"UNITED STATES INTERNAL REVENUE.

"Cigar manufacturers' statement.

"To be rendered to the collector or deputy collector in duplicate, without previous demand therefor, by every manufacturer of cigars before commencing or continuing business. Act of July 20th, 1868, section 82, as modified by section 1, act of December 24th, 1872; section 3387, R. S.

"Ludloff Bros., of Baltimore, in the 6th division of the 3d district of the State of Maryland, at No. 60 W. Fayette street, propose to manufacture cigars; and so much of the building or parts

of the building, stories, apartments, room or rooms, as is hereinafter described, is to be used exclusively and solely for manufacturing cigars, and is to be known as my manufactory, or place where cigars are made, to wit, in the room adjoining the store in the rear, on the first floor of premises No. 60 W. Fayette street.

"There are employed in the premises above described, or I propose to employ, five persons in making cigars; which cigars are manufactured for or to be sold and delivered to , residing at No. in the , and by occupation a .

"(Signed) "LUDLOFF BROS.

"I, William Ludloff, do swear that the above is, to the best of my knowledge and belief, a true and correct statement of the place, street, number, and the exact premises where the business of manufacturing cigars is, or is to be carried on by Ludloff Bros., and all the other matter stated herein is true and correct.

"(Signed) "WILLIAM LUDLOFF.

"Sworn before me this 25th day of May, 1878.

"(Signed) "R. G. KING, *Dep'ty Collector.*

"NOTE.—The blank space in this form after the words 'to wit' is to be filled with a precise and accurate description of the premises. If the manufactory comprises anything less than the entire building, then the description must specify what portion of the building, whether the first, second, or third story of the same, and what room or rooms therein. The same premises or room cannot be used for carrying on the business of a cigar manufacturer and a dealer in cigars. In any building, room, or apartment of any building designated in this statement as the manufactory or place of manufacture, no cigars can be sold except such as are there manufactured, and are in original and full packages."

At the time of said seizure, the wire partition having been previously removed by the claimants, there was no division or separation between the said rear part of the room, designated as the factory as aforesaid, and the front part of the room, where the business of selling cigars, &c., was carried on by the claimants, except a wooden counter extending part of the way across the room, and from three to three and a half feet high, upon which said wire part of the partition had rested.

Opinion of the Court.

The court instructed a jury that if at the time of the seizure the cigars were found in the possession of the claimants, and they were carrying on the business of manufacturing cigars and selling the same by retail, such retail sales being in quantity less than 25 and not sold in stamped boxes, and that said manufacture and said retail sales were carried on in a room in which there was no separation except a wooden bar about three feet high, extending partly across the said room, the jury should find for the United States, although they might find that the claimants made cigars only behind said wooden bar and sold at retail out of stamped boxes. The court also instructed the jury that such retail selling, under such circumstances, to persons who took the cigars away, constituted a removal by the claimants of cigars from their manufactory, without the proper stamps on the boxes denoting the tax thereon. The court refused to instruct the jury that the business of manufacturing cigars and selling the same in less quantities than by the box, at the place of manufacture, is not prohibited by law, provided the manufacturer has a license as a dealer in tobacco, when he sells products other than his own manufacture. These instructions and refusal were excepted to by the claimants.

The substance of the instruction of the court was, that if the claimants had sold cigars manufactured by themselves in quantities less than 25, and not in boxes duly stamped, from the show-case in the part of the room in front of the bar, they had incurred the forfeiture in question, although the cigars were made by them in the rear part of the same room behind the bar, and were sold at retail out of stamped boxes. It is to be understood, from the bill of exceptions, in connection with the instructions and the verdict, that the claimants, after having had the rear part of the room, namely, the part designated in their "statement" as their manufactory, separated from the front part or store part of the same room by a wire partition, so as to substantially make two rooms, and to make the factory an entire room and a separate room, in accordance with the instructions of said circular, had, at the time of the sales at retail complained of as a ground of forfeiture, removed the wire partition, so that the factory was not then a separate

room in the sense of said circular, but the manufacturing was carried on in the same room in which the show-case was and in which the sales at retail took place. This being so, we are of opinion that the instructions were correct; that the requirements of the circular were within the power of the commissioner to prescribe, and not repugnant to any statutory provisions; that the retail sales in question were in violation of law; and that the forfeiture enforced was incurred.

The claimants contend that section 3236 of the Revised Statutes provides that whenever more than one of the pursuits or occupations thereinafter described, are carried on in the same place by the same person at same time, except as thereinafter provided, the tax shall be paid for each according to the rates severally prescribed; that, by subdivision 8 of section 3244, a dealer in tobacco pays a special tax of $5, and can sell manufactured tobacco, snuff and cigars, and by subdivision 10 of the same section, a manufacturer of cigars pays a special tax of $10; that the claimants had paid both of these special taxes; that subdivision 8 of section 3244 provides that no manufacturer of tobacco, snuff or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture; that section 3392, forbidding the sale of cigars in any other form than in new boxes containing at least 25 cigars, provides that nothing in that section shall be construed as preventing the sale of cigars at retail by retail dealers who have paid the special tax as such, from boxes packed, stamped and branded in the manner prescribed by law; and that, under these enactments, no cause of forfeiture existed.

But we are of opinion that there is nothing in these provisions which authorizes the manufacturer of cigars to sell at the place of manufacture, from and out of boxes, cigars there made by him, even though he has paid a special tax as a dealer in tobacco. The provision in section 3236 refers only to pursuits or occupations which can be carried on in the same place by the same person at the same time consistently with other requirements of law on the subject of the special pursuit or occupation. It has no reference to the grant of any

authority to carry on two occupations at the same time and place by the same person, but concerns only the obtaining of a tax for each of two occupations when they are lawfully carried on.

The provision in section 3244 has no other effect than not to require that a manufacturer of tobacco, snuff, or cigars, who sells his own products at the place of manufacture in such manner as is consistent with other provisions of law as to the manner of the sale of such products, shall pay a special tax as a dealer in manufactured tobacco and cigars. It has relation solely to the exaction of a tax, and not to the conferring of authority to sell.

The provision cited from section 3392 has no relation to cigars sold as those in the present case were sold, by the manufacturers, at the place of manufacture. The cigars sold were not in their hands as retail dealers, but as manufacturers, because the requirements of law as to the removal of the cigars from the manufactory had not been observed, and the cigars were still in the manufactory.

We perceive nothing in sections 3387, 3888, or 3390 which affects the foregoing views.

Section 3392 requires that all cigars shall be packed and sold in new boxes containing at least 25. Section 3397 forbids the removal of cigars from any manufactory or place where cigars are made, without being packed in boxes as required, or without the proper stamp thereon denoting the tax. Section 3400 provides that if a manufacturer of cigars removes or sells any cigars without the proper stamps denoting the tax thereon, he shall forfeit to the United States all cigars found in his possession or in his manufactory. Under these provisions the removal of the cigars in this case from the place where they were manufactured, by selling them at retail not in stamped boxes, was ground for the forfeiture of the cigars seized.

The regulations prescribed by the commissioner by the circular referred to were within his authority, under section 3396, to prescribe such regulations for the inspection of cigars and the collection of the tax thereon as he may deem most effective for the prevention of frauds in the payment of such tax. *Thacher's Distilled Spirits*, 103 U. S. 679.

Syllabus.

The proposition asserted in the instruction asked for by the claimants, and which the court refused to give, is understood to be, that, as the claimants sold at their shop, as dealers in tobacco who had paid the special tax, articles not of their own manufacture, in addition to cigars which they made in the same room, the sale of the last named cigars was not prohibited by law. If this proposition has any other meaning than the propositions before considered, it must be held to be entirely without support in law or in reason.

Although the record shows that the claimants were, as dealers in tobacco, engaged at their shop in the business of selling cigars which they purchased, as well as cigars which they made, there is nothing in the case which raises any other questions than those above considered.

The judgment of the circuit court is affirmed.

CITY OF SAVANNAH *v.* KELLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Decided April 2d, 1883.

Municipal Corporations—Statutes, Construction of—Repeal of.

1. A statute which authorized a municipal corporation "to obtain money on loan on the faith and credit of said city for the purpose of contributing to works of internal improvement," is not repealed by implication by a subsequent statute which, reciting that doubts had arisen respecting bonds theretofore issued, enacted that "all bonds heretofore issued by the constituted authorities of the city are valid, and from and after the passage of this act, the mayor and aldermen of the city, upon a recommendation of a public meeting of the citizens called for that purpose, shall have power and authority to cause bonds to be issued and disposed of in such manner as they may direct, for purposes of internal improvement."
2. A statute authorizing a municipal corporation to obtain money on loan on the faith and credit of the city, for the purpose of contributing to works of internal improvement, authorizes the municipality to guarantee the payment of the bonds of a railway company.

Argument for Plaintiff in Error.

Action against the municipality of Savannah to recover on a guaranty of the payment of the principal and interest of the bonds of the Savannah, Albany & Gulf Railroad Company.

In an act relating to the city of Savannah, passed on the 27th of December, 1838, the legislature of Georgia enacted that the mayor and aldermen of said city be and they are hereby authorized and empowered to obtain money on loan on the faith and credit of said city, for the purpose of contributing to works of internal improvement.

Under this authority bonds were issued, whose validity was questioned after issue, and thereupon the legislature on the 4th March, 1856, enacted as follows :

"And whereas, doubts have been entertained whether certain bonds issued and disposed of by the city of Savannah for internal improvements, were legal and valid, therefore, be it further enacted, that all bonds heretofore issued by the constituted authorities of the city of Savannah, are hereby declared legal and valid, and from and after the passage of this act, the mayor and aldermen of the city of Savannah, and the hamlets thereof, upon the recommendation of a public meeting of the citizens of Savannah, called for the purpose, shall have power and authority to cause bonds to be issued and disposed of in such manner as they may direct, for purposes of internal improvement, which bonds so issued shall be legal and valid."

The contentions in this suit were upon the proper construction of these statutes: 1st, whether the act of 1838 empowered the municipality to guarantee the bonds of a railroad corporation; and 2d, whether, conceding that it did confer that power, it was repealed by the act of 1856. The transactions out of which the issues in controversy arose took place in 1858, and are set forth in the opinion of the court.

Mr. Walter S. Chisholm and *Mr. A. R. Lawton* for the plaintiff in error.—I. As to the construction of the act of 1838: The authority to *issue* railroad aid bonds is not one of the ordinary powers of a municipality. Express authority for it is required, and this authority must be exercised in conformity with

prescribed forms. Jones on Railroad Securities, § 296; *Rogers* v. *Burlington*, 3 Wall. 654; *Head* v. *Providence Insurance Company*, 2 Cranch, 127; *Scipio* v. *Wright*, 101 U. S. 665, Burroughs' Public Sec. pp. 206–211. In *Head* v. *Providence Insurance Company*, Marshall, C. J., delivering the opinion of the court, said: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it presents to them a mode of contracting they must observe that mode or the instrument no more creates a contract than if the body had never been incorporated." The supposed obligation of the city is a technical *guaranty*. It is a promise to pay the debt to another. It is a contract to *insure* the solvency of the Albany & Gulf Railroad to the amount of $300,000, bearing semi-annual interest at seven per cent. per annum for twenty years. 2 Daniel on Negotiable Instruments, §§ 1752, 1753. A greater power may include the lesser when they are of the same nature or kind. But "the note and the guaranty are not one and the same thing. The note is the debt of the maker, the guaranty is the engagement of the defendant that the maker shall pay the note when it becomes due. A joint action will not lie against them both. They are not the same, but different and distinct contracts." *Brewster* v. *Silence*, 8 N. Y. 207; *Hall* v. *Farmer*, 5 Denio, 484; *Oxford Bank* v. *Haynes*, 8 Pick. 427; *Floyd Acceptances*, 7 Wall. 666. "Although a municipal corporation may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet this does not give or include the power to lend its credit to another who may be empowered to effect the same object. Expending money by a city council as agents or administrators of their constituents is a very different thing from binding their constituents by a contract or suretyship—'a contract which carries with it a lesion by its very nature.'" 1 Dillon Municipal Corporations, § 471 (393); *Blake et al.* v. *The Mayor of Macon*, 36 Ga. 172. See also *Marsh* v. *Fulton County*, 10 Wall. 676; *Thomas* v. *Railroad Company*, 101 U. S. 71; *Police Jury* v. *Britton*, 15 Wall. 566; *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *East Oakland* v. *Skinner*, 94 U. S. 255; *Colomo* v.

Eaves, 92 U. S. 484; *Marcy* v. *Oswego*, 92 U. S. 637; *Humboldt* v. *Long*, 92 U. S. 642.—II. As to the repeal of the act of 1838, by the act of 1856, the counsel contended that it was the manifest intent of the legislature to substitute the new provision for the old one. "If a subsequent statute be not repugnant in all of its provisions to a prior one, yet, if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one." *Daviess et al.* v. *Fairborn*, 3 How. pp. 636, 645.

Mr. George A. Mercer for the defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The Savannah, Albany & Gulf Railroad Company was a corporation of Georgia, authorized to construct and operate a railroad, the principal and beginning point of which was the city of Savannah. That city was, in fact, owner of more than one-half of its capital stock, which it had subscribed in pursuance of law to aid in its construction. For purposes of construction, that is, partly to pay debts incurred for construction then made, and partly to pay for future improvements, the railroad company in 1859 made an issue of its bonds in the usual form, payable to bearer, twenty years after date, amounting in the aggregate to $300,000, bearing interest at the rate of seven per cent. per annum. On each of this series of bonds there was indorsed the following:

"State of Georgia. For value received, the Mayor and Aldermen of the City of Savannah and hamlets thereof, hereby, as authorized by a public meeting of the citizens thereof, held on the 14th day of May, 1859, guarantee the payment of the within bond, principal and interest, as the same may become due, according to the tenor thereof. Witness the hand of the mayor, with the seal of said corporation affixed. [Seal of city.] Thomas M. Turner, mayor. Attest: Edward G. Wilson, clerk of council."

The bonds were issued with this guaranty indorsed, and were purchased in open market for value. The present action was brought by the defendant in error to enforce the liability of the city of Savannah upon this guaranty. And it is not denied

that the city is liable upon it, if at the time it was made there was authority of law for the city to bind itself in that form for such purposes. The judgment of the circuit court affirms this liability, and is sought to be reversed, upon this writ of error, for that cause.

The fifth section of an act which took effect December 27th, 1838, entitled "An Act to extend the limits of the city of Savannah, and to authorize the corporate authorities of said city to borrow money for works of internal improvement," authorizes the mayor and aldermen "to obtain money on loan, on the faith and credit of said city, for the purposes of contributing to works of internal improvements." This provision is relied on as conferring authority for the guaranty in question.

It is claimed, however, on behalf of the plaintiff in error, that this provision of the act of 1838 was not in force at the date of the guaranty, having been repealed by an act of March 4th, 1856. Wilson's Dig. 526. This act expressly repeals only such acts as conflict with it, and the repeal, if effected, must be, therefore, by implication. The 8th section of the act of 1856 is supposed to have wrought this result. It is as follows:

"And whereas, doubts have been entertained whether certain bonds issued and disposed of by the city of Savannah for internal improvements were legal and valid, therefore, be it further enacted, that all bonds heretofore issued by the constituted authorities of the city of Savannah are hereby declared legal and valid, and from and after the passage of this act the mayor and aldermen of the city of Savannah, and the hamlets thereof, upon the recommendation of a public meeting of the citizens of Savannah, called for that purpose, shall have power and authority to cause bonds to be issued and disposed of in such manner as they may direct, for purposes of internal improvement, which bonds, so issued, shall be legal and valid."

Whether the latter repeals the former law depends on whether the two are inconsistent; and in the present instance, that depends on whether it is manifest from the words of the enactments, that both cover the same ground, and that the

latter was intended to be a substitute for the former. The act of 1856 relates entirely to the issue of bonds by the city of Savannah; the act of 1838 does not specify bonds at all as a mode of obtaining money on loan, on the faith and credit of the city. If it be assumed that the only mode by which that could be done under the act of 1838 was by issuing bonds, it might then be argued that the two acts covered the same subject, and the latter was designed to supersede the former. But to assume that construction of the act of 1838 to be correct, is to beg the question at issue, which is, whether that act requires the issue of bonds as the exclusive mode of obtaining money on loan on the faith and credit of the city. For if it does not, there is no inconsistency between the two statutes, and the act of 1838 is not repealed. Whether it be repealed, then, depends on what it means; and if it authorizes a guaranty such as that sued on, then it is not repealed; unless it might be supposed that the term "bonds," used in the act of 1856, was generic and not technical, and was designed to embrace every form of obligation, whereby the city might extend the aid of its credit to purposes of internal improvement. In that event, the repeal of the act of 1838 might be effected, by conceding that the act of 1856 was large enough to embrace every case, even that of a guaranty, which might have been included in the act of 1838.

But conceding, as we are disposed to do, for the purposes of this case, that the term "bond," as used in the act of 1856, is to be taken in a strict sense, as confined to direct municipal obligations in the usual form of securities known as such, then we are clear that the act of 1838 is not repealed by any necessary implication; because it is not confined to the case of bonds of that description; and the question remains whether it fairly includes that of an obligation such as the guaranty sued on. The argument for the plaintiff in error moves in a circle. It is, that the act of 1838 does not confer authority to make the guaranty, because it is repealed; and that it is repealed, because it does not confer authority to make a guaranty.

The language of the act of 1838 is broad and unqualified. It confers upon the mayor and aldermen plenary power "to obtain money on loan, on the faith and credit of said city for the

purposes of contributing to works of internal improvement." The money paid for the guaranteed bonds was obtained on loan and upon the faith and credit of the city, and it was for the purpose of contributing to works of internal improvement. The fact that it was not advanced directly to the city, but, upon its assurance of repayment, to the railroad company, is not a departure even from the letter of the law, much less its meaning; nor does the fact that the money was advanced partly on the credit of the railroad company diminish the presumed reliance of the purchaser upon that of the city, with which it was joined. It is difficult to conceive of language more comprehensive than that employed, to embrace every form of security in which the faith and credit of the city might be embodied; and that in such cases it is not important to the character of the transaction that the money is obtained in the first instance by the railroad company, upon the credit of the city, was directly ruled in *Rogers* v. *Burlington*, 3 Wall. 654, and affirmed in *Town of Venice* v. *Murdock*, 92 U. S. 494. If the city of Savannah had, by virtue of an arrangement with the railroad company, received from the latter its bonds, and had itself, having indorsed the guaranty in suit, delivered them after sales to purchasers, and, receiving the money, had paid it over to the railroad company as a contribution to purposes of internal improvement, the transaction could not have been made the subject of a cavil, as unauthorized by the act of 1838; and yet this is the precise legal equivalent of the transaction as made. We have no hesitation in saying that it is equally embraced within the meaning of that statute, and that the act in question was in force at the date of the guaranty, and accordingly governs it. The substance of the transaction was, that, in consideration of the money advanced to the railroad company as a loan on the faith and credit of the city, the latter required the railroad company to indemnify it against loss on that account, a precaution which no implication in the statute forbids, and that result was accomplished by the form of the obligation, by which the railroad company became the principal debtor, and the city of Savannah guarantor merely of its bonds.

Opinion of the Court.

It does not detract from the force of this conclusion that the guaranty recites that it was authorized by a public meeting of the citizens thereof, as if it were the case of bonds issued under the act of 1856, which required the recommendation of such a meeting. But if the fact is immaterial, the recital is not injurious. And the official record of the transaction shows that such a meeting was held for the purpose of quieting doubts, and not to raise them. The authorities of the city at that time were only anxious to omit nothing which the most critical might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now, after the lapse of twenty years, in which no such question has been raised, it would, in the language of Mr. Justice Grier, in *Mercer County* v. *Hacket*, 1 Wall. 83, "be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power." *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Meyer* v. *City of Muscatine*, 1 Wall. 384; *James* v. *Milwaukee*, 16 Wall. 159.

In our opinion the act of 1838 authorized the guaranty made by the city of Savannah upon the bonds of the railroad company, and it constitutes a valid and subsisting liability. This disposes of the only question in the case deserving serious consideration; and the judgment of the circuit court is therefore

Affirmed.

CITY OF SAVANNAH *v.* MARTIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Decided April 2d, 1883.

Mr. Justice Matthews delivered the opinion of the court.

This case is identical in its circumstances with that of the mayor and aldermen of the city of Savannah, plaintiffs in error, against Eugene Kelly.

Judgment affirmed.

UNITED STATES *v.* BRITTON & Another.

ON CERTIFICATE OF DIVISION IN OPINION, FROM THE EASTERN DISTRICT OF MISSOURI.

Decided April 2d, 1883.

Indictment—National Bank.

It is no violation of the provisions of § 5440 Rev. Stat., subjecting to penalties persons conspiring to commit an offence against the United States, and persons doing acts to effect the object of the conspiracy; and no violation of § 5209 Rev. Stat., subjecting to punishment a president or a director of a national banking association who wilfully misapplies the money, funds or credits of the association, if the president and such a director conjointly cause shares in the capital stock of such association to be purchased with the money of the association, and held on trust for its benefit.

Indictment for conspiracy by Britton as president and Bates as director of a national banking association, to injure and defraud the association by wilful misapplication of its money. Rev. Stat. §§ 5209, 5440. The acts which formed the subject of the alleged conspiracy are the same which are set forth in the counts in the indictment from 77 forward in *United States* v. *Britton*, 107 U. S. 655, and which were there held, when not charged as a conspiracy, not to be violations of the statutes.

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

Mr. Geo. H. Shields and *Mr. Chester A. Krum* for defendants.

Mr. Justice Woods delivered the opinion of the court.

In this case the indictment contained two counts. They charged a conspiracy between James H. Britton and Barton Bates, the first being president and a director and the latter a director of the same banking association, to misapply its funds by the purchase therewith of the shares of the association. The first count described the offence which defendants conspired to commit substantially as it is set forth in count seventy-seven, and the second count described the offence as the same

Statement of Facts.

is set forth in count ninety-seven in *United States* v. *Britton*, 107 U. S. 655.

The judges of the circuit court were divided in opinion upon the question whether the counts sufficiently stated an offence under sections 5209 and 5440 of the Revised Statutes, and the same has been duly certified to us for our opinion. What we have said in *United States* v. *Britton* cited above, disposes of this question.

We answer in the negative.

UNITED STATES *v.* BRITTON.

ON CERTIFICATE OF DIVISION IN OPINION, FROM THE EASTERN DISTRICT OF MISSOURI.

Opinion, April 2d, 1883.

Indictment—National Bank—Revised Statutes.

1. It is not an offence under § 5209, Rev. Stat., which forbids the wilful misapplication of the moneys of a national banking association by a president of the bank, for such officer to procure the discount by the bank of a note which is not well secured, and of which both maker and indorser are, to the knowledge of the president, insolvent when the note is discounted; and to apply the proceeds of the discount to his own use.
2. Assuming that it was the duty of a president of a national banking association to prevent the withdrawal of deposits while the depositor is indebted to the association, he is, nevertheless, not liable for a criminal violation of § 5209 Rev. Stat., forbidding the wilful misappropriation of the funds of the bank, solely by reason of permitting a depositor who was largely indebted to the bank, to withdraw his deposits without first paying his indebtedness to the bank.

Indictment against the president of a national banking association. The indictment contained three counts. It was found by the same grand jury as the indictment in case No. 406, just decided, and was remitted and transferred to the circuit court in like manner.

The first count charged that the defendant, James H. Britton, on March 24th, 1877, within the Eastern District of

Missouri, being the president and a director of the National Bank of the State of Missouri, the same being a national banking association organized under the act of Congress, "did cause and procure to be then and there received and discounted by said association a promissory note, which said note was then and there in the words and figures following:

"$20,835.] ST. LOUIS, *March* 24th, 1877.

"Four months after date I promise to pay to the order of Geo. F. Britton, negotiable and payable at the National Bank of the State of Missouri, in St. Louis, twenty thousand eight hundred thirty-five dollars, for value received, without defalcation or discount, with interest, after maturity, at the rate of ten per cent. per annum.

"J. H. BRITTON."

That the note was indorsed as follows: "Geo. F. Britton." That the defendant converted to his own use the proceeds of the discount of said note, to wit, the sum of $20,251.63; that said note, when so discounted, was not well secured; that "said James H. Britton, and the said payee and indorser of said note, to wit, one George F. Britton, were then and there insolvent, as he, the said James H. Britton, as president and director as aforesaid then and there well knew;" and that said James H. Britton, by procuring said note to be discounted, and by applying the proceeds of said discount to his own use, wilfully misapplied the said sum of $20,251.63 of the money and funds of said association, with intent then and there to defraud said association and certain persons to the grand jurors unknown.

The second count charged that on June 2d, 1877, within the Eastern District of Missouri, one George F. Britton was indebted to said association in the sum of $79,480.23, as the maker of five promissory notes then unpaid. That said indebtedness of George F. Britton was known to James H. Britton, president and director of said association; that on said June 2d, 1877, said notes were not well secured and said George F. Britton was insolvent, both of which facts said James H. Britton then well knew. Nevertheless, said James H. Britton,

as president and director of said association, did then and there receive and discount a note for $800, dated June 2d, 1877, due and payable on August 5th, 1877, signed by the said George F. Britton as maker, and indorsed by him, the said James H. Britton, he then being insolvent, as he then well knew; that said James H. Britton did then and there pay out of the moneys and funds of said association, as the proceeds of said discount, to the said George F. Britton, the sum of $780.45, contrary to the form of the statute, etc.

The third count charged that on May 18th, 1877, within the Eastern District of Missouri, said James H. Britton was president and a director of said banking association; that from April 12th, 1873, to May 18th, 1877, one Alfred M. Britton had been continuously indebted to said association in the sum of $37,122.67, as maker of a certain promissory note during the same period, owned and held by said association, and was then indebted to said association for interest past due on said note in the further sum of $4,529.01; that said Alfred M. Britton was on said May 18th, 1877, insolvent; that on the day and year last named there was in the moneys and funds of said association to the credit of said Alfred M. Britton the sum of $36,860.45; that said James H. Britton, well knowing the said indebtedness of Alfred M. Britton to said association and his said insolvency, failed and neglected to cause to be applied to the said indebtedness of said Alfred M. Britton the said sum of $36,860.45, so as aforesaid in the moneys and the funds of said association to the credit of said Alfred M. Britton, and did then and there wilfully permit said Alfred M. Britton, while so indebted, to transfer and assign said sum of $36,860.45 to the credit of the City National Bank of Fort Worth, Texas. "And so the said James H. Britton did wilfully misapply the said sum of $36,860.45 of the moneys of said association, with intent to injure and defraud said association and certain persons to the grand jurors unknown, contrary," &c.

Upon demurrer to the indictment the judges of the circuit court were divided in opinion upon the question whether the several counts charged with sufficient certainty an offence

under section 5209 of the Revised Statutes. The case comes to this court upon this certificate of division.

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

Mr. J. B. Henderson, *Mr. Geo. H. Shields*, and *Mr. Chester H. Krum* for defendants.

Mr. Justice Woods delivered the opinion of the court.

It is not alleged in the first count that the J. H. Britton, maker of the note discounted, was the James H. Britton who was president and a director of the association and the defendant in the indictment, and consequently there is no averment that the maker of the note was insolvent. Passing by this defect, and assuming that the maker of the note being the defendant in this case, the gravamen of the charge is that defendant, being president and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question is, therefore, presented whether the procuring of the discount of such a note by an officer of the association is a wilful misapplication of its moneys within the meaning of the law. We are clearly of opinion that it is not. It is not even necessarily a fraud on the association.

One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly authorized officers or agents. Sec. 5136 Rev. Stat. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association. This count does not charge that the

note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount.

But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a wilful misapplication of the funds of the bank, and subject him to a criminal prosecution. The count under consideration charges nothing more than this against the defendant. We are of opinion, therefore, that it does not charge an offence under section 5209 of the Revised Statutes.

What we have said in reference to the first count of this indictment also applies in all respects to the second. We are, therefore, of opinion that it also does not charge an offence under section 5209.

In respect to the third count, we observe that the statute, section 5130, clause seven, places the conduct of the business of banking associations with its board of directors or its duly authorized officers or agents. Section 5145 provides that the affairs of each banking association shall be managed by not less than five directors to be chosen by the shareholders. It is alleged in this count that the defendant was the president and one of the directors of the association. But he was only one

of at least five directors. The only duties imposed on him as president were to certify payments on the capital stock of the association, sec. 5140, to cause to be kept in the office where the business of the association was transacted a list of the shareholders, sec. 5210, and to verify by his oath the general reports made by the association to the comptroller of the currency, sec. 5211, and the reports of dividends declared, sec. 2212. It is nowhere averred in this count that the defendant was the duly authorized officer or agent of the association, whose duty it was to look after the accounts of depositors, to apply the sums standing to their credit to the payment of their obligations to the association, or to prevent the withdrawal or transfer of their deposits while they continued indebted to the association, or that he was even charged with a general superintendence of the affairs of the association. Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the business of the association, the presumption is that it was the duty of the board of directors, and if such was the fact, the defendant was powerless to prevent the transfer of the deposits of Alfred M. Britton to the credit of the City National Bank of Fort Worth. At all events, it is not charged that it was his duty to prevent such transfer, and this constitutes a fatal defect in the indictment.

But even if the defendant had been charged with the duty of looking after the deposits of debtors of the association and of applying their deposits to the payment of their debts, we do not think that the fact that he permitted Alfred M. Britton, while indebted to the association, to withdraw and assign to the City National Bank of Fort Worth his deposit, would constitute a criminal misapplication by the defendant of the funds of the association.

The count charges neither application nor misapplication by the defendant of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of Alfred M. Britton to the payment of Britton's debt. It charges that he permitted Alfred M. Britton to do a perfectly lawful act, namely, to withdraw his own funds from the association and transfer them to another bank.

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This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly penal statute beyond all reasonable limits.

In our judgment the count under consideration, as well as the first and second, is bad.

We, therefore, answer the first, third, and fourth questions submitted to us by the judges of the circuit court in the negative.

UNITED STATES *v.* BRITTON.

ON CERTIFICATE OF DIVISION OF OPINION FROM THE EASTERN DISTRICT OF MISSOURI.

Decided April 2d, 1883.

Fraud—Indictment—National Banks.

1. In an indictment for a conspiracy under § 5440 Rev. Stat., the conspiracy must be sufficiently charged: it cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.
2. The procuring by two or more directors of a national banking association of a declaration of a dividend by the bank at a time when there are no net profits to pay it, is not a wilful misappropriation of the money of the association within the provisions of § 5204 Rev. Stat.; and an allegation of a conspiracy to do that act is not an allegation of a conspiracy to commit an offence against the United States.

Indictment against two directors of a national bank for conspiracy to defraud the bank.

Section 5440 of the Revised Statutes declares:

"If two or more persons conspire . . . to commit any offence against the United States, . . . and one or more of such parties do any act to effect the object of the conspiracy, all

the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars, and to imprisonment not more than two years."

Section 5209 of the Revised Statutes provides as follows:

"Every president, director, cashier, teller, clerk or agent of any" banking "association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association, . . . or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association, or any company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association, . . . shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.".

The defendants were indicted under section 5440 of the Revised Statutes. The indictment contained two counts. The first count charged, in substance, as follows: That Britton was the president and a director of the National Bank of the State of Missouri, in St. Louis, a national banking association organized under the act of Congress, and that Bates was vice-president and a director of the same association; that Britton and Bates, while president and vice-president respectively, and directors of said association, did conspire with each other to wilfully misapply a large sum of money belonging to and the property of said association, to wit, the sum of $87,500, by means of procuring to be made, on June 30th, 1876, by the said association, a dividend of three and one-half per centum on the capital stock of the association, which said dividend was to be greater, in the sum of $87,500, than the net profits of said association on hand after deducting from said net profits the amount of the losses and bad debts of the association existing on said 30th day of June.

The acts done to effect the object of the conspiracy were, in substance, alleged as follows: That Britton falsely represented to one Walsh, who, on June 30th, 1876, was also a director of the association, that the net profits of the association were on

that day sufficient in amount to warrant and permit the declaration of said dividend, and did thereby induce the said Walsh to assent to the declaration of said dividend, and to join, on said June 30th, as such director, with Britton and Bates, directors as aforesaid, in the declaration of said dividend, they, the said Britton, Bates and Walsh, constituting a majority in number of the directors of said association; that, to effect the object of said conspiracy, Britton did further, upon the said June 30th, cause and procure to be made by one Edward P. Curtis, in the record of the proceedings of the board of directors of said association, the following entry: "St. Louis, June 30th, 1876. Present, Messrs. Britton and Walsh, Mr. Bates assenting on the 29th. Ordered that a dividend of 3½ per cent. be declared payable on the 10th proximo, and that the transfer books be closed till that date. Attest, Edward P. Curtis, cashier;" that afterwards, on July 8th, 1876, in further pursuance of and to effect the object of said conspiracy, the said Britton and Bates did each receive from said association, and convert to his own use, a large sum of money, the said Britton the sum of $5,397, and the said Bates the sum of $4,112.

The second count was similar to the first, except that after averring that said dividend so to be declared on said June 30th, 1876, was to be false and fraudulent, it was added that there was on said June 30th, 1876, due and owing to said association certain debts, specifying them, amounting in the aggregate to the sum of $797,214.29; that upon such debts there was owing to the association, then past due and unpaid, interest for a period of six months; that said debts were "not well secured and in process of collection," and their aggregate amount was largely in excess of the net profits and purported net profits of said association then on hand, as said Britton and Bates then well knew, and that said debts were bad debts within the meaning of section 5204 of the Revised Statutes, as said Britton and Bates then well knew.

The defendants demurred to the indictment. Upon the hearing of the demurrer, the judges of the circuit court were divided in opinion upon the following questions:

Argument for United States.

1. Whether, under section 5209 of the Revised Statutes of the United States it was necessary to aver that the alleged conspiracy was entered into with intent to injure and defraud; and whether the several counts in this indictment not containing the said allegations are good and sufficient in law.

2. Whether it was necessary in this indictment, in addition to the allegations charging the conspiracy to wilfully misapply certain funds and property of the association, by means of procuring to be made by the board of directors a dividend, as alleged in the indictment, to further allege that said dividend was in pursuance of said conspiracy declared and made; and, if so, whether the same is sufficiently charged therein, and whether it was also necessary to allege that said dividend was fraudulent when declared, and also when paid.

3. Whether, under § 5209 of the Revised Statutes of the United States, it was necessary in this indictment to charge that the funds alleged to have been misapplied had been previously intrusted to the possession of the defendants.

4. Whether the indictment in this case alleges with sufficient certainty that the bank had no net profits out of which to declare and pay the dividend alleged to have been fraudulent.

5. Whether the said defendants, as directors of the said banking association, are liable to the penalties provided by the said § 5209 upon proof, that they, as such directors, wilfully voted for the declaration of a dividend, knowing that there were no net profits out of which to pay the same; and if liable, must the indictment charge that such dividend was ordered or voted for with intent thereby to defraud the association or other persons.

Mr. Assistant Attorney-General Maury for the United States. —I. It is asked substantially, whether the absence from any count of the averment that the conspiracy was entered into with intent to injure and defraud is fatal to the indictment. There are only two counts in the indictment, and each of them avers that the defendants, as directors of the bank, did "conspire, combine, confederate, and agree together to wilfully misapply, *with intent then and there to injure and defraud the said asso-*

ciation and certain persons to the jurors aforesaid unknown, a large sum," &c. Seeing, then, that each count *does* contain this averment, *quæstio cadit.*—II. It is next asked whether the dividend, which was the object of the conspiracy, should be alleged to have been made, and if so, whether the same is sufficiently charged, and whether it was also necessary to allege that the dividend was fraudulent when declared. It is submitted that it was not necessary to make any averment in the indictment of the consummation of the object of the conspiracy. The offence charged is a *conspiracy to do an unlawful act.* Whether the act was done or not is quite immaterial, under this indictment, there being no handle to say that the conspiracy was merged in the offence resulting from the success of the conspiracy. Whart. Cr. L. section 1346 (8th ed.); *People* v. *Richards*, 1 Manning (Mich.), 216; *People* v. *Mather*, 4 Wend. 229. But if it was necessary, the averment made in that behalf is entirely sufficient. The indictment also alleges with certainty that the dividend was fraudulent when declared and when paid, all which, however, is, we submit, surplusage, because the offence charged is a conspiracy to declare and afterwards to pay a fraudulent dividend. It is the spirit that animated the conspirators, and not the consequences of the conspiracy, that constitutes the offence. Neither is it at all material, under this indictment, whether the dividend declared was or not paid out of net earnings, for this, if so, was entirely compatible with a conspiracy to pay an illegal dividend. How can this court say, looking at the indictment, and it can look no further, that in the state of things mentioned the conspiracy could not have existed?—III. Was it necessary under section 5209 to charge that the funds alleged to have been misapplied had been previously intrusted to the possession of the defendants? It is submitted that inasmuch as the offence charged is a combination or conspiracy to misapply the bank's funds by declaring and paying a fraudulent dividend, the consummation of those objects of conspiracy is not an element of the offence, and therefore it was not necessary to allege that the defendants had been previously intrusted with the funds misapplied. The actual misapplication of funds was one offence and the conspiracy to

misapply them quite another. The first is an offence under § 5440, and the second under § 5209.—IV. The indictment alleges with sufficient certainty that the bank had no net profits, out of which to declare a dividend. As no dividend could be declared in such a state of things, it is not easy to see why a conspiracy to declare one is not indictable.—V. Whether it is enough to subject the defendants to the penalty of section 5209 to prove that they wilfully voted for the dividend, knowing there were no net profits, and if so, whether the indictment must charge that the dividend was ordered or voted for with intent to defraud the association or other persons. It is, perhaps, enough to say that no question as to the sufficiency of evidence can arise under the demurrer. The question here is as to the sufficiency of the indictment, and not as to the measure of proof necessary to sustain the indictment. The charge is that the defendants conspired to bring about the declaration and payment of a fraudulent dividend; that the dividend, the object of conspiracy, was in fact declared, and that the defendants took from the assets of the bank their shares and proportions of said fraudulent dividend—allegations which are of themselves sufficiently evincive of fraud upon the bank, its innocent shareholders and creditors, without any additional averment. But the indictment is not under section 5209, but under section 5440, which makes it penal to conspire to commit any offence against the United States. The offence charged is the unlawful combination to effect an illegal and fraudulent object, and the sufficiency of an indictment under section 5440 is not to be determined by the requirements for an indictment under section 5209.

Mr. J. B. Henderson, *Mr. Geo. H. Shields* and *Mr. Chester H. Krum* for the defendants.

Mr. Justice Woods delivered the opinion of the court.

The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there

must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King*, 7 Q. B. 782; *Commonwealth* v. *Shedd*, 7 Cush. 514.

The charge against the defendants is a conspiracy to wilfully misapply the funds of the association. It is alleged in the counts of this indictment that they, being directors, with intent to defraud the association, did conspire to wilfully misapply its moneys and funds by procuring to be declared by the association a dividend of its net profits, when there were no net profits sufficient in amount to pay it.

Such a dividend is forbidden by section 5204 of the Revised Statutes, which declares as follows:

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section."

We are, therefore, to inquire whether the conspiracy entered into by and between the defendants to misapply the moneys of the association by procuring the declaration by the association of a dividend greater than the net profits of the association is a criminal offence against the United States.

There are no common-law offences against the United States, *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415, and section 5204 does not of itself create any offence against the United States.

But it is contended on behalf of the United States that the procuring of a dividend to be declared by the association when there are no net profits to pay it is a wilful misapplication of the moneys and funds of the association, which is made an offence by section 5209 of the Revised Statutes, and that a conspiracy to commit this offence is made punishable by section 5440.

We think this construction of the statute is unwarranted, and that the indictment is based on a misconception of its provisions.

The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely, by procuring to be declared by the association a dividend when there were no nets profits to pay it. If procuring the declaring of such a dividend by the association is not a wilful misapplication of its funds by these defendants, then the indictment charges no offence. The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. The act belongs to the same class as the purchase by a banking association of its own shares when not necessary to prevent a loss on a debt due it, which, in *United States* v. *Britton*, 107 U.S. 655, we held not to be a criminal misapplication of the funds of the association. If, therefore, the indictment had charged that the defendants had misapplied the funds of the association by themselves declaring a dividend, when there were no net profits to pay it, it would not

have charged a criminal act, much less when it merely charges that they conspired to procure the association to declare a dividend under like circumstances. So that it appears on the face of the indictment that the conspiracy charged was not a conspiracy to commit an offence against the United States.

We therefore answer the first branch of the fifth question propounded to us by the judges of the circuit court in the negative.

Our opinion is that under this indictment the defendants are not "liable to the penalties provided by section 5209, upon proof that they, as such directors, wilfully voted for the declaration of a dividend, knowing there were no net profits out of which to pay the same," because this is not the offence with which they are charged in the indictment. And as they are charged with a conspiracy to do an act which is not an offence, we are of opinion that no penalties could be inflicted on them under the indictment.

As the answer we have given to this question is fatal to the indictment, it is not necessary for us to answer the other questions sent to us by the judges of the circuit court.

Answer accordingly.

In case No. 410, *The United States* v. *James H. Britton* and *Barton Bates*, on certificate of division in opinion from the same court, the indictment contained five counts, all substantially similar to the counts in case 409, just disposed of. What we have said in reference to the indictment in case 409 applies to the indictment in this case. As the indictment is bad, and no good indictment can be framed upon the facts as they appear therein, it is unnecessary and we decline to answer the specific questions submitted to us by the judges of the circuit court. *United States* v. *Buzzo*, 18 Wall. 125.

Statement of Facts.

KIRKBRIDE *v.* LAFAYETTE COUNTY, Missouri.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Decided April 2d, 1883.

Municipal Corporations.

Under an act of the legislature of Missouri, county courts of counties were authorized to subscribe, in behalf of townships in their respective counties, to the capital stock of any railroad company within that State "building or promising to build a railroad into, through, or near such township, and to issue bonds in the name of the county in payment of such subscription. There was a vote of a township in favor of issuing bonds in aid of a particular railroad company. The subscription was made and the bonds issued, reciting that they were authorized by a vote of the people, and were issued under and pursuant to an order of the county court by authority of the act. When the vote was taken and the bonds issued, the company did not propose to build a road into or through the township, but it was proposing to build one from a point nine miles distant from the township to a farther distance. Interest on the bonds was paid for three years. In a suit on coupons of the bonds by a *bona fide* holder for value: *Held*, That the courts should acquiesce in the determination by the qualified voters and the local authorities that the proposed road was near the township, and hold that there was legislative authority for issuing the bonds.

Suit to recover on interest coupons of bonds issued by the county in payment of a subscription to the capital stock of the St. Louis & St. Joseph Railroad Company. The answer denied the authority of the county to make the subscription. The court, a jury being waived, made the following special findings:

I. The plaintiff's action is on coupons of bonds amounting to five thousand seven hundred dollars. These bonds were issued and delivered by the county court of the defendant to the St. Louis & St. Joseph Railroad Company, in the month of November, 1868; said bonds are dated November 2d, 1868, and were delivered about that date, and are of the following tenor, to wit: [The finding then recited the bond.]—II. On the 5th of May, 1868, a petition of 25 tax-payers of Lexington township, in said county, was filed in said county court, praying said court to order

an election of the qualified voters of said township for the purpose of taking the sense of the qualified voters on subscribing by said township $75,000.00 to the capital stock of the St. Louis & St. Joseph Railroad Company, and that such election was ordered and held, and resulted by the proper vote in favor of such subscription.—III. That on 7th July, 1868, said county court, in pursuance of such election, did subscribe the sum of $75,000.00 for and on behalf of the township of Lexington to the capital stock of said St. Louis & St. Joseph Railroad Company.—IV. That said bonds purport on their face to have been issued by authority of an act entitled "An Act to facilitate the construction of railroads in the State of Missouri," approved March 23d, 1868. —V. That plaintiff is a citizen of the State of Pennsylvania, and a purchaser for value before maturity of the bonds and coupons in question, without notice or knowledge of any irregularity in the subscription or issue of said bonds, except as may appear upon their face, and such as he was bound in law to take notice of, and is now the owner and bearer of the same, and that the defendant for three years paid the interest on these bonds as it fell due.—VI. The said St. Louis & St. Joseph Railroad Company was organized and incorporated on the 8th day of January, 1868, by filing articles of association on that date with the secretary of State, in pursuance of the general statutes of Missouri, title 24, of private corporations, chap. 63, of railroad companies, 1865, whereby they were authorized to construct and operate a railroad from Richmond, in Ray county, by the way of Plattsburg, to St. Joseph, in Buchanan county, the length of the road limited to 64 miles, with a capital stock of $2,000,000, each share $100, 13 directors.—VII. That the St. Louis & St. Joseph Railroad Company, southern division, was organized and incorporated on the 10th day of August, 1868, by articles of association filed with the secretary of state on that date, in pursuance of the general statutes of Missouri last aforesaid, whereby it was authorized to construct and operate a railroad "from Richmond, in Ray county, to a point on the bank of the Missouri river, opposite to the city of Lexington;" that the length of this road is intended to be about nine miles, and that said St. Louis & St. Joseph Railroad Company, southern division, did construct its said road to within 500 yards of the north bank of the Missouri river, in Ray county, opposite to said city of Lexington. The company constructing

said road had a capital stock of 200,000 dollars.—VIII. That the Missouri river is a navigable stream, and at that point is 1,500 yards in width, dividing said county of Ray from Lexington township, in Lafayette county.—IX. That said railroad companies, or either of them, have never established a depot, either freight or passenger, within the corporate limits of said city of Lexington nor within said Lexington township, but that passengers and freight are deposited on the north side of said river, in Ray county, at the depot.—X. That Lafayette county and Lexington township and the city of Lexington are located on the south side of the Missouri river.—XI. That Richmond, in Ray county, is nine miles from said Lexington township, in Lafayette county; that there is a ferry operated by a company in the city of Lexington, separate and apart from the railroad, for the purpose of accommodating the public travel and freight going north and south, crossing the river at that point, and also an omnibus company, separate and apart from the railroad or ferry company, to transport passengers to and from the said railroad depot across said ferry, and for all other purposes of general travel; and that tickets for passengers on said railroad company are sold at an office in said city of Lexington.

Mr. J. B. Henderson for plaintiff in error.

Mr. Alexander Graves and *Mr. William Young* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action upon sundry coupons of bonds issued in November, 1868, and March, 1869, by the County Court of Lafayette County, Missouri, in the name of that county, and in payment of a subscription by it made, in behalf of Lexington township, in that county, to the capital stock of the St. Louis and St. Joseph Railroad Company, a corporation created under the laws of that State. The bonds recite that they were authorized by a vote of the people, and also that they were issued "under and pursuant to an order of the County Court of Lafayette County, by authority of an act of the general assembly of the State of Missouri, approved March 23d, 1868,

entitled 'An Act to facilitate the construction of railroads in the State of Missouri.'"

The special finding of facts presents a single question, viz., whether there was legislative authority for this issue of bonds. Its decision depends upon the construction to be given to that part of the before-mentioned act which invests county courts in Missouri with power to subscribe, in behalf of townships in their respective counties, to the capital stock of any railroad company within the State, "building or proposing to build a railroad into, through, or near such townships," &c.

When these bonds were voted by the township, as well as when they were issued, the St. Louis & St. Joseph Railroad Company did not propose to build a road into or through Lexington township, but it was proposing to build a road which its charter authorized it to construct and operate, to wit, from Richmond, in Ray county, by the way of Plattsburg, to St. Joseph, in Buchanan county. Richmond is nine miles distant from Lexington township. The contention of the defendant in error is that a road so far away was not, within the provisions of the statute, near to the township.

The word "near" is relative in its signification. What would be near in one locality would not be in another. Each case must be governed by its special circumstances. The main inquiry is whether a railroad, when constructed, would be near enough to contribute to the convenience or advance the business interests of the particular township involved. It cannot be said, as matter of law, that this road was not near enough to Lexington township to bring about such results. That was a question which the people of that township and the county court of the county were qualified and, within reasonable limits, authorized to settle for themselves. Their action in favor of a subscription was supplemented by payment of interest for three years. Under these circumstances, as between the township and a *bona fide* holder for value, as the plaintiff is conceded to be, the courts should acquiesce in the determination by the qualified voters and the local authorities, that the road in question was near to Lexington township. If there was error in this determination, it is not so plain as to

Statement of Facts.

justify the courts in disturbing the practical construction put upon the statute, at the time the bonds were voted and issued, by those immediately interested in executing its provisions. *Van Hostrup* v. *Madison*, 1 Wall. 291; *Meyer* v. *Muscatine*, 1 Wall. 384.

The judgment is reversed, with directions to enter judgment for plaintiff.

ST. PAUL & CHICAGO RAILWAY COMPANY *v.* McLEAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided April 2d, 1883.

Removal of Causes.

Where, upon the removal of a cause from a State court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

If, upon the first removal, the federal court declines to proceed and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the State court a second petition for removal upon the same ground.

This action was brought in the Court of Common Pleas for the city and county of New York by Samuel McLean, a citizen of that State, against the St. Paul and Chicago Railway Company, a corporation of the State of Minnesota. After answer, the action, upon the petition of the defendant, accompanied by a proper bond, was removed for trial into the Circuit Court of the United States for the Southern District of New York. The sole ground of removal was that the case presented a controversy between citizens of different States. The removal was had before the term at which the cause could have been first tried in the State court. The first day of the next session of the federal court succeeding the removal

was the 7th day of April, 1879. But the copy of the record from the State court was not filed in that court until April 10th, 1879, on which day, upon motion of the attorney for the company, an *ex parte* order was made, showing the filing of such copy, the appearance of defendant, and directing the action to proceed in that court as if originally commenced therein. Subsequently, April 14th, 1879, the plaintiff, upon notice to defendant, moved the court to remand the cause for failure of the defendant to file a copy of the record and enter its appearance within the time prescribed by statute. This motion was resisted upon the ground, supported by affidavit, that it was by inadvertence that the record was not filed in the federal court in proper time, and that counsel did not discover that fact until April 10th, 1879, when it was filed and notice thereof, on the same day, given to plaintiff's attorney. This motion to remand was granted by an order entered May 24th, 1879.

On the 28th of May, 1879, the company filed in the State court a second petition, accompanied by the required bond, for the removal of the action into the federal court upon the same grounds as those specified in its first petition. A copy of the record was promptly filed in the federal court, but the cause, upon motion of plaintiff, was again remanded by an order entered December 27th, 1879.

The present writ of error brought before this court both orders of the circuit court remanding the cause to the State court.

Mr. C. W. Bangs for the plaintiff in error.—I. The plaintiff in error assumes that only such parts of the decision of the circuit court are open to review upon the writ of error, in this court, as are adverse to the contention of the plaintiff in error (defendant below), and as are assigned as error, as hereinbefore stated in the foregoing assignments of error. Rule No. 21 U. S. Supreme Court, sec. 8; *Clark* v. *Killian*, 103 U. S. 766; *The Enterprise*, 2 Curtis, 317. The plaintiff below has sued out no writ of error, and cannot here be heard to say that those portions of the decision of the court below which were contrary to the points taken by him as grounds for re-

manding the cause to the State court were, or are, erroneous. —II. The writ of error brings up for review the first order of the circuit court—that of May 24th, 1879—remanding the cause to the State court, as well as the order of December 27th, 1879; and the court will examine that as well as the other. A writ of error brings up the whole record, which is open to review in all its parts. *Bank of U. S.* v. *Smith*, 11 Wheat. 171; *Dred Scott* v. *Sanford*, 19 Howard, 393. Upon a writ of error to a State court, upon a final judgment there, entered upon a trial, after the refusal of the court to allow the removal of the cause to the United States court, such refusal of the State court may be reviewed, and the judgment vacated if the removal was improperly allowed. *The Removal Cases*, 100 U. S. 457; *Railroad Company* v. *Koontz*, 104 U. S. 5. The writ of error expressly includes the first order of May 23d, as well as the second, and was sued out in time as to the first order as well as the second. § 1008 Rev. Stat. It was duly allowed by the circuit judge, and is a matter of right when sued out in time. *United States* v. *Pacheco*, 20 How. 261; *Steamer Virginia* v. *West*, 19 id. 182. Such writs of error are expressly authorized by section 5 of the act of 1875. *Babbitt* v. *Clark*, 103 U. S. 606; *Railroad Company* v. *Koontz*, 104 U. S. 5.—III. The first remand was improperly ordered. The proceedings for removal were properly completed by the filing of the record as and when it was filed, and the case was thereby removed. The record being in fact filed within a reasonable time thereafter, the circuit court acquired jurisdiction of the cause and could have proceeded with it. This has been expressly held by this court in *Meyer* v. *Construction Company*, 100 U. S. 457, where the court says that "it nowhere appears that the circuit court is to be deprived of its jurisdiction, if by accident the party is delayed until a later day in the term," in filing the record. And also in *Railroad Company* v. *Koontz*, 104 U. S. 5. It has been repeatedly held that when a sufficient case for removal is made in the State court, its jurisdiction ends, and no order of the State court for the removal is necessary. *Hatch* v. *Chicago, Rock Island, &c., Railroad Company*, 6 Blatch. 105; *Fisk* v. *Union Pacific Railroad Company*,

8 Blatch. 243, 247; *Removal Cases*, 100 U. S. 457; *Kern* v. *Huidekoper*, 103 U. S. 485; *Railroad Company* v. *Koontz*, 104 U. S. 5.—IV. The first order of the circuit court remanding the cause to the State court for the reason stated, was not such an exercise of mere judicial discretion, or so entirely a matter of practice as to prevent the review of it by this court.—V. The failure to file the record in the circuit court on the first day of the term, was sufficiently excused. There was no intention not to file the record, or to waive the right of removal, or not to perfect it. The fact, to which the court below refers that the record had been certified ready to be filed, shows that the intention was that it should be filed when the proper time came. The failure to file it was an unintentional oversight, which was rectified as soon as discovered. It was within the cases of *Kidder* v. *Featteau*, 2 Federal Reporter, 616; *Meyer* v. *Construction Company*, 100 U. S. 457; and *Railroad Company* v. *Koontz*, 104 U. S. 5.—VI. The proceedings upon the removal taken in June, 1879, were in all respects regular, were taken in due time, and were fully completed by the filing of the record at exactly the proper time. The learned circuit judge held that "so far as the question of time is concerned, the new petition was filed in time under the act of 1875." That decision in that respect is not open to review here.

Mr. D. M. Porter for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated and said:

In *Removal Cases*, 100 U. S. 457, the court had occasion to construe the act of March 3d, 1875, determining the jurisdiction of circuit courts of the United States and regulating the removal of causes from State courts. We there said, speaking by the Chief Justice:

"While the act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the circuit court is to be deprived of its jurisdiction, if by accident the party is delayed until a later day of the term. If the circuit court, for good cause shown, accepts the transfer after the day and during

the term, its jurisdiction will, as a general rule, be complete and the removal properly effected."

In reference to this language, it was said in *Railroad Company* v. *Koontz*, 104 U. S. 5:

"This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the act of 1875, it was deemed advisable to confine our decision to the facts we then had before us."

In the latter case, it was determined that "if the petitioning party is kept by his adversary, and against his will, in the State court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter the cause in the circuit court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered."

In *National Steamship Co.* v. *Tugman*, 106 U. S. 118, it was ruled that upon the filing of the petition for removal, accompanied by a proper bond—the suit being removable under the statute—the jurisdiction of the federal court immediately attached in advance of the filing of a copy of the record; and whether that court should retain jurisdiction, or dismiss or remand the action because of the failure to file such a copy, was for it, not for the State court, to determine.

These cases abundantly sustain the proposition that the failure to file a copy of the record on or before the first day of the succeeding session of the federal court does not deprive that court of jurisdiction to proceed in the action, and that whether it should do so or not upon the filing of such copy is for it to determine. In this case it was undoubtedly within the sound legal discretion of the circuit court to proceed as if the copy had been filed within the time prescribed by statute. But clearly it had a like discretion to determine whether the reasons given for the failure to comply in that respect with the law were sufficient. We do not say that in the exercise of its discretion the court may not commit an error that would bring

its action under the reviewing power of this court. But since the question whether the cause should be remanded for failure to file the necessary copy in due time is one of law and fact, its determination to remand, for such a reason, should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

We perceive no ground to question the correctness of the order of May 28th, 1879, or to conclude that there was any abuse by the court of its discretion. The only reason given for the failure to file the transcript within proper time was inadvertence upon the part of counsel; in other words, the filing was overlooked. It is scarcely necessary to say that this did not constitute a sufficient legal reason for not complying with the statute. At any rate, the refusal of the court to accept it as satisfactory cannot be deemed erroneous.

But it is contended that the order of December 27th, 1879, remanding the cause, was erroneous, because the copy, upon the second petition for removal, was filed in the federal court within due time after that petition, with the accompanying bond, was presented in the State court. Assuming that the second petition for removal was filed before or at the term at which the cause could have been tried in the State court, we are of opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the federal court declined to proceed and remanded the suit, because of his failure to file the required copy within the time fixed by the statute. When the circuit court first remanded the cause—the order to that effect not being superseded—the State court was reinvested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, as may be readily seen, might work injurious delays in the preparation and trial of causes.

Judgment affirmed.

Statement of Facts.

MANHATTAN MEDICINE COMPANY *v.* WOOD & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

Decided April 2d, 1883.

Equity—Trade-Mark.

A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both being originally circumstances to guide the purchaser of the medicine.

When it is the object of a trade-mark to indicate the origin of manufactured goods, and a person affixes to goods of his own manufacture a trade-mark which declares that they are goods of the manufacture of some other person, it is a fraud upon the public which no court of equity will countenance.

The plaintiff claimed to be the owner of a patent medicine and of a trade-mark to distinguish it. The medicine was manufactured by the plaintiff in New York; the trade-mark declared that it was manufactured by another party in Massachusetts: *Held,* That he was entitled to no relief against a person using the same trade-mark in Maine.

Bill in equity to restrain the defendants from using an alleged trade-mark of the complainant, upon certain medicines prepared by them, and to compel an accounting for the profits made from its use in their sale of the medicines; also, the payment of damages for their infringement of the complainant's rights.

The complainant, a corporation formed under the laws of New York, manufactured in that State medicines designated as "Atwood's Vegetable Physical Jaundice Bitters;" and claimed as its trade-mark this designation, with the accompanying labels. Whatever right it possessed it derived by various mesne assignments from one Moses Atwood, of Georgetown, Massachusetts. The bill alleged that the complainant was, and for a long time previous to the grievances complained of had been the manufacturer and vender of the medicine mentioned; that it was put up and sold in glass bottles with twelve panel-shaped sides, on five of which in raised words and letters

Statement of Facts.

"Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass." were blown in the glass, each bottle containing about a pint, with a light yellow printed label pasted on the outside designating the many virtues of the medicine, and the manner in which it was to be taken; and stating that it was manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States.

The bill also alleged that the bottles thus filled and labelled were put up in half-dozen packages with the same label on each package; that the medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom and his assigns and successors, it had been ever since sold "by the name, and in the manner, and with the trade-marks, label, and description substantially the same as aforesaid;" that the complainant was the exclusive owner of the formula and recipe for making the medicine, and of the right of using the said name or designation, together with the trade-marks, labels, and good will of the business of making and selling the same; that large sales of the medicine under that name and designation were made, amounting annually to twelve thousand bottles; that the defendants were manufacturing and selling at Portland, Me., and at other places within the United States unknown to the complainant, an imitation of the medicine, with the same designation and labels, and put up in similar bottles, with the same, or nearly the same, words raised on their sides, in fraud of the rights of the complainant and to its serious injury; that this imitation article was calculated and was intended to deceive purchasers, and to mislead them to use it instead of the genuine article manufactured by the complainant, and had had, and continued to have, that effect. The bill, therefore, prayed for an injunction to restrain the defendants from affixing or applying the words "Atwood's Vegetable Physical Jaundice Bitters," or either of them, or any imitation thereof, to any medicine sold by them, or to place them on any bottles in which it was put up, and also, from using any labels in imitation of those of the complainant. It also prayed for an accounting of profits and for damages.

Argument for Appellant.

Among the defences interposed were these: that Moses Atwood never claimed any trade-mark of the words used in connection with the medicine manufactured and sold by him; and assuming that he had claimed the words used as a trade-mark, and that the right to use them had been transferred to the assignors of the complainant, it was forfeited by the misrepresentation as to the manufacture of the medicine on the labels accompanying it, a misrepresentation continued by the complainant.

The cause was heard before Clifford, J., and the bill was dismissed with costs. From this decree the plaintiffs appealed.

Mr. Philo Chase for appellant.—The main part of this brief was occupied with a discussion of the facts. The following points of law were taken. The name adopted was a good trade-mark, assignable, and entitled to protection in the hands of the assignee. *McLean* v. *Fleming*, 96 U. S. 245; *Kidd* v. *Johnson*, 100 U. S. 617; *Hall* v. *Barrows*, 4 DeG. J. & S. 150; 33 L. J. (N. S.) 204; 10 Jurist (N. S.), 55; *Fulton* v. *Sellers*, Penn. Sup. Ct. 4 Brewster, 42; *Field* v. *Lewis*, Seten, 4th ed. 237. The law will not allow one man to sell his goods as those of another by the use of similar labels. *Perry* v. *Truefitt*, 6 Beavan, 66; *Croft* v. *Day*, 7 id. 84; *Taylor* v. *Carpenter*, 11 Paige, 292; *Coffeen* v. *Brinton*, 5 McLean, 256; *Taylor* v. *Taylor*, 2 Eq. Rep. 290; *Farina* v. *Silverlock*, 2 Jurist (N. S.), 1008; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; *Edelston* v. *Edelston*, 9 Jurist (N. S.), 479; *Boardman* v. *The Meriden Britannia Co.*, 35 Conn. 402; *Colman* v. *Crump*, 70 N. Y. 573. A transfer and succession of business of an article carries with it its trade-marks by implication. *Shipwright* v. *Clements*, 19 W. R. 599; *The Congress and Empire Spring Co.* v. *The High Rock Spring Co.*, 45 N. Y. 291. The law presumes when one intentionally uses or closely imitates another's trade-marks, merchandise, or manufactures, that he does it for the fraudulent purpose of inducing the public or those dealing in the article to believe that the goods are those made or sold by the latter, and of supplanting him in the good will of his trade or business. *Taylor* v. *Carpenter*, 11 Paige, 292. The rule is that the court will enjoin any imitation calculated to deceive ordinary pur-

chasers. *Crawshay* v. *Thompson*, 4 Man. & G. 385; *Davis* v. *Kendall*, 2 R. I. 556; *Holmes* v. *Holmes, &c., Company*, 37 Conn. 278; *Wotherspoon* v. *Currie*, 22 L. T. R. (N. S.), 260; *Hookman* v. *Pottage*, 26 L. T. R. (N. S.), 755. To be enjoinable it is not necessary that the imitation should be complete; the imitation may be limited and partial, and still be enjoinable. *Lockwood* v. *Boswick*, 2 Daly (N. Y.), 521; *Franks* v. *Weaver*, 10 Beavan, 297; *Coffeen* v. *Brinton*, 4 McLean, 516; *Shrimpton* v. *Laight*, 18 Beavan, 164; *Walton* v. *Crowley*, *supra*; *Clark* v. *Clark*, 25 Barbour (N. Y.), 76; *Brooklyn White Lead Company*, v. *Masury*, id. 416; *Hostetter* v. *Bowinkle*, 1 Dillon, 329. To be enjoinable it is not requisite that the imitation should be intentionally deceptive. *Millington* v. *Fox*, 3 Mylne & Cr. 338; *Dale* v. *Smithson*, 12 Abb. Pr. R. (N. Y.). It is no defence that the imitator informs purchasers of the imitation. It is no answer for the defendants to say that they sold the bitters as theirs. *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; *Chappel* v. *Davidson*, 2 Kay & J. 123. It is sufficient to establish a case for relief to show that the imitation has led or is likely to lead to mistakes. *Clement* v. *Maddick*, 5 Jurist (N. S.), 592. The plaintiff, in trade-mark cases, is entitled to relief, though the respondent did not know that the mark used was a trade-mark. *Kinahan* v. *Bolton*, 15 Irish Ch. 75; *Harrison* v. *Taylor*, 11 Jurist (N. S.), 408; *Hall* v. *Barrows*, 10 id. (N. S.), 55; *Ainsworth* v. *Walmsley*, 12 id. 205. The fact that the trade-marks were used in common by the several owners thereof, did not make them common property as to the world. *Condy* v. *Mitchell*, 26 W. R. 269; *Motley* v. *Dowman*, 3 My. & Cr. 1; *Robinson* v. *Finlay*, 27 W. R. 294; *Weston* v. *Ketcham*, 39 N. Y. Superior Court, 54; *Rogers* v. *Taintor*, 97 Mass. 291; *Sohl* v. *Geisendorf*, 1 Wilson (Ind.), 60. No statute of limitations bars the plaintiff of protection of its trade-marks. *Taylor* v. *Carpenter*, 3 Story, 458; *Taylor* v. *Carpenter*, 2 Wood & M. 1.

Mr. Thorndike Saunders also for appellant.
Mr. William Henry Clifford, for appellees.

Mr. Justice Field delivered the opinion of the court. After reciting the facts as stated above, he said:

In the view we take of the case, it will not be necessary to consider the first defence mentioned, nor the second, so far as to determine whether the right to use the words mentioned as a trade-mark was forfeited absolutely by the assignor's misrepresentations as to the manufacture of the article. It is sufficient for the disposition of the case, that the misrepresentation has been continued by the complainant. A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.

It is admitted that whatever value the medicine possesses was given to it by its original manufacturer, Moses Atwood. He lived in Georgetown, Massachusetts. He manufactured the medicine there. He sold it with the designation that it was his preparation, "Atwood's Vegetable Physical Jaundice Bitters," and was manufactured there by him. As the medicine was tried and proved to be useful, it was sought for under that designation, and that purchasers might not be misled, it was always accompanied with a label, showing by whom and at what place it was prepared. These statements were deemed important in promoting the use of the article and its sale, or they would not have been continued by the assignees of the original inventor. And yet they could not be used with any honest purpose when both statements had ceased to be true. It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company in the city of New York.

Any one has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assur-

ance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. *Manufacturing Co.* v. *Trainer*, 101 U. S. 51.

The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practised upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

This doctrine is illustrated and asserted in the case of *The Leather Cloth Company* (*limited*) v. *The American Leather Cloth Company* (*limited*), which was elaborately considered by Lord Chancellor Westbury, and afterwards in the House of Lords on appeal from his decree. 4 DeG. J. & S. 137, and 11 House of Lords' Cases, 523.

In that case, an injunction was asked to restrain the defendant from using a trade-mark to designate leather cloth manufactured by it, which trade-mark the complainant claimed to own. The article known as leather cloth was an American invention, and was originally manufactured by J. R. & C. P.

Crockett, at Newark, New Jersey. Agents of theirs sold the article in England as "Crockett's Leather Cloth." Afterwards a company was formed entitled "The Crockett International Leather Cloth Company," and the business previously carried on by the Crocketts was transferred to this company, which carried on business at Newark, in America, as a chartered company, and at West Ham, in England, as a partnership. In 1856, one Dodge took out a patent in England for tanning leather cloth and transferred it to this company. In 1857 the complainant company was incorporated, and the international company sold and assigned to it the business carried on at West Ham, together with the letters patent, and full authority to use the trade-mark which had been previously used by it in England. A small part of the leather cloth manufactured by the complainant company was tanned or patented. It, however, used a label which represented that the articles stamped with it were the goods of the Crockett International Leather Cloth Company; that they were manufactured by J. R. & C. P. Crockett; that they were tanned leather cloth; that they were patented by a patent obtained in 1856, and were made either in the United States or at West Ham, in England. Each of these statements or representations was untrue so far as they applied to the goods made and sold by the complainant.

The defendant having used on goods manufactured by it a mark having some resemblance to that used by the complainant, the latter brought suit to enjoin the use. Vice-Chancellor Wood granted the injunction, but on appeal to the Lord Chancellor the decree was reversed and the bill dismissed. In giving his decision the Lord Chancellor said that the exclusive right to use a trade-mark with respect to a vendible commodity is rightly called property; that the jurisdiction of the court in the protection of trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which property of that description can be effectually protected. But, he added:

"When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making

false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation ; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity."

And again :

"Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained."

When the case reached the House of Lords the correctness of this doctrine was recognized by Lord Cranworth, who said that of the justice of the principle no one could doubt ; that it is founded in honesty and good sense, and rests on authority as well as on principle, although the decision of the House was placed on another ground.

The soundness of the doctrine declared by the Lord Chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim that he who seeks equity must present himself in court with clean hands. If his case discloses fraud or deception or misrepresentation on his part, relief there will be denied.

Long before the case cited was before the courts, this doctrine was applied when protection was sought in the use of trade-marks. In *Pidding* v. *How*, 8 Simons, 477, which was before Vice-Chancellor Shadwell in 1837, it appeared that the complainant was engaged in selling a mixed tea, composed of different kinds of black tea, under the name of "Howqua's Mixture," in packages having on three of their sides a printed label with those words. The defendant having sold tea under the same name, and in packages with similar labels, the complainant applied for an injunction to restrain him from so doing. An *ex parte* injunction, granted in the first instance, was dissolved, it appearing that the complainant had made false state-

ments to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured. "It is a clear rule," said the vice-chancellor, "laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth."

In *Perry* v. *Truefitt*, 6 Beav. 66, which was before Lord Langdale, master of the rolls, in 1842, a similar ruling was had. There it appeared that one Leathart had invented a mixture for the hair, the secret and recipe for mixing which he had conveyed to the plaintiff, a hair-dresser and perfumer, who gave to the composition the name of "Medicated Mexican Balm," and sold it as "Perry's Medicated Mexican Balm." The defendant, one Truefitt, a rival hair-dresser and perfumer, commenced selling a composition similar to that of plaintiff, in bottles with labels closely resembling those used by him. He designated his composition and sold it as "Truefitt's Medicated Mexican Balm." The plaintiff thereupon filed his bill, alleging that the name or designation of "Medicated Mexican Balm" had become of great value to him as his trade-mark, and seeking to restrain the defendant from its use. It appeared, however, that the plaintiff, in his advertisements to the public, had falsely set forth that the composition was "a highly concentrated extract from vegetable balsamic productions" of Mexico, and was prepared from "an original receipe of the learned J. F. Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist;" and the court, therefore, refused the injunction, the master of the rolls holding that, in the face of such a misrepresentation, the court would not interpose in the first instance, citing with approval the decision in the case of *Pidding* v. *How*.

In a case in the Superior Court in the city of New York—*Fetridge* v. *Wells*, 4 Abbott (N. Y.), 144—this subject was very elaborately and ably treated by Chief Justice Duer. The plaintiff there had purchased a recipe for making a certain cosmetic, which he sold under the name of "The Balm of a Thousand Flowers." The defendants commenced the manufacture and sale of a similar article, which they called "The Balm of Ten Thousand Flowers." The complainant, claiming the name

used by him as a trade-mark, brought suit to enjoin the defendants in the alleged infringement upon his rights. A temporary injunction was granted, but afterwards, upon the coming in of the proofs, it was dissolved. It appeared that the main ingredients of the compound were oil, ashes and alcohol, and not an extract or distillation from flowers. Instead of being a balm, the compound was a soap. The court said it was evident that the name was given to it and used to deceive the public, to attract and impose upon purchasers; that no representation could be more material than that of the ingredients of a compound recommended and sold as a medicine; that there was none so likely to induce confidence in its use, and none, when false, that would more probably be attended with injurious consequences. And, it also said:

"Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

See also *Seabury* v. *Grosvenor*, 14 Blatchford, 262; *Hobbs* v. *Francais*, 19 How. (N. Y.) 567; *Connell* v. *Reed*, 128 Mass. 477; *Palmer* v. *Harris*, 60 Penn. St. 156. The doctrine enunciated in all these cases is founded in honesty and good sense; it rebukes fraud and encourages fair dealing with the public. In conformity with it, this case has no standing before a court of equity.

The decree of the court below dismissing the bill must therefore be affirmed; and it is so ordered.

MEMPHIS & CHARLESTON RAILROAD COMPANY *v.* UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Decided April 2d, 1883.

Dividends—Internal Revenue—Tax.

1. A railroad company whose railroad was in the military possession of the United States during the civil war, and whose rolling stock was in the possession of the company within the confederate lines, and which earned or distributed dividends during the war by the use of its rolling stock, which dividends were paid in confederate notes, is *held* liable to pay an income tax on the dividends so earned and paid.
2. A railroad company which after the close of the civil war, with the consent of its stockholders, applied its surplus earnings to the restoration of its property and distributed to its stockolders bonds at a discount in lieu of money, with option, however, to take money, is *held* not liable to an income tax on the income so applied.
3. On the facts in this case the court finds no error in the instruction to the jury respecting the exclusion of evidence in regard to the understanding of the defendants below about an alleged compromise.

Suit to recover income tax. The principal facts appear in the opinion of the court. The questions argued were:

1st. Whether the railroad company was liable for a tax upon its income during the war, earned from the use of its rolling stock within the confederate lines, and divided; its road being at the time the dividends were earned in the military possession of the United States?

2d. Whether it was liable for an income tax on income earned after the war and applied to construction and repair of the road with consent of the stockholders, who received mortgage bonds at a discount for their dividends, having the option to receive cash?

3d. Whether a compromise effected between the parties was a bar to the suit, and whether the evidence of the understanding of that compromise by the company was improperly excluded at the trial? It appeared that the United States made claim against the company for 5 per cent. tax on coupons of

the company's mortgage bonds, amounting to $438,550. The tax amounted to $21,927.50. There was also a claim for a penalty and an assessed penalty, aggregating $25,940.25. The company offered $24,000 : the government accepted $24,038.25, which was paid, and the following receipt taken :

"UNITED STATES INTERNAL REVENUE,
"COLLECTOR'S OFFICE, 8TH DISTRICT, TENN.,
"*Memphis, Sept.* 24, 1870.

"Received of M. J. Wicks, president Memphis and Charleston Railroad Company, twelve thousand dollars, being balance due on twenty-four thousand thirty-eight and $\frac{25}{100}$ dollars for penalty of neglect to make returns of interest on its bonds maturing from May, 1866, to July, 1869, agree'bly to instructions from commissioner under date of August 27th, 1870, accepting proposition in compromise made to him by Memphis & Charleston Railroad Company.

"$12,000.00.] R. F. PATTERSON, *Collector.*"

Mr. Humes for the plaintiff in error.—I. During the period from June 6th, 1862, to Sept. 12th, 1865, by a military power the persons in charge of this railroad, with all its rolling stock and equipments, were forcibly detained within the military lines of the confederate armies. It would have been physically impossible for these persons in charge of said company to know of the existence of these laws; it would have been in violation of the acts of Congress of the United States, and of the laws of war for the defendant company and those in charge of it, to have attempted to communicate with the government, or officers or people of the United States outside of the confederate military lines. It would have been equally illegal for the persons in charge of the defendant company to have attempted to deduct the 3 per cent. tax from the coupons as they were paid, or to have attempted to make the report, or to make the payment of the tax, or to have assessed the tax. This country which the confederate military authorities and forces held in possession from June, 1862, to September, 1865, the enemy held that firm possession of, which enabled this enemy to exercise the fullest rights of sovereignty over. And over this territory

the sovereignty of the United States was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the military occupation the inhabitants passed under a temporary allegiance to the confederate government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. *United States* v. *Rice*, 4 Wheat. 246; *Thorington* v. *Smith*, 8 Wall. 1; *Hanauer* v. *Woodruff*, 15 Wall. 439; *Fleming* v. *Page*, 9 How. 603; *Nelson* v. *Dean*, 10 Wall. 172; *Lasere* v. *Rochereau*, 17 Wall. 437.—II. The case on the compromise therefore showed a demand by the government of all taxes due on account of coupons and dividends, a report by Wicks as president of the company giving all he knew of as due; and although his report apparently only covered coupons from January, 1866, yet in fact it included and embraced the coupons that fell due and were paid before 1866, that is, the very coupons on which the tax is claimed as now due under this suit. Wicks proposed to pay the $24,000 if accepted and receipted "for in full for all past due taxes, fines and penalties, &c., due in the United States arising out of the failure to report payment of coupons." This proposal was accepted, and the money received as tax in full. The plea of accord and satisfaction is made out, and should have been sustained by the court.

Mr. Solicitor-General (*Mr. J. S. Blair* was with him) for the United States.—I. The funding in second mortgage coupons was done after June 1st, 1866. By the act of 1864 the tax became due whenever the interest was payable. Instalments of interest which had matured prior to June 30th, 1864, although under the act of 1864 taxable only when "paid," became the subject of tax *eo instanti* on the passage of the act of 1864, being then "payable;" so far, therefore, as this funding was of interest which matured prior to June 13th, 1866, it makes no difference whether the interest was or was not *paid*. Its pay-

ment in second mortgage bonds was therefore immaterial. After that date, in order to relieve the company from the tax, proof was required not merely of actual failure to pay such interest, but also of *inability* to pay.—II. The defendant sought to escape liability, on the ground that some of the interest coupons and all of the dividends were paid in confederate money. The force to be given to transactions based upon such currency has been frequently considered by this court. The following cases seem to be decisive of this exception. *Thorington* v. *Smith*, 8 Wall. 1; *The Confederate Note Case*, 19 Wall. 548; *United States* v. *Villalonga*, 23 Wall. 35; *Wilmington, &c., Railroad Company* v. *King*, 91 U. S. 3; *Stewart* v. *Salamon*, 94 U. S. 434.

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

This is a suit to recover taxes upon dividends and interest paid by the Memphis & Charleston Railroad Company between the first day of July, 1862, and the first day of December, 1865. The items which go to make up the amount of the judgment brought here for review are thus stated in the verdict of the jury:

1. "On dividend declared March 17, 1863, a tax of $1,625.45, being three per centum of $57,515.60, the value in legal currency, when paid, of $143,789, the whole amount of said dividend then paid in Confederate money."

2. "On interest coupons of said defendent falling due November 1, 1862, May 1, 1863, November 1, 1863, and May 1, 1864, a tax of $819.17, being three per cent. on $27,326.55, the value, when paid, in legal currency, of $88,935, the portion of such conpons paid in Confederate money; and the further tax of $2,274.45 on the remaining portion of said coupons falling due as aforesaid, being three per cent. on $75,815.83, such remaining portion of said coupons."

3. "On interest coupons of said defendant falling due November 1, 1864, May 1, 1865, and November 1, 1865, a tax of $6,793.50, the same being five per centum on $135,870, the amount of said last-named coupons."

The questions presented by the bill of exceptions may be separated into three classes, as follows:

1. Those which relate to dividends and interest paid in Confederate money and during the late civil war;

2. Those which relate to the payments of interest after the close of the war; and,

3. Those which relate to an alleged compromise between the United States and the railroad company under date of September 24th, 1870.

These will be considered in their order.

1. As to payments in Confederate money.

Upon this branch of the case the facts are these: At the beginning of the war the Memphis and Charleston Railroad Company was the owner of an equipped line of railroad extending from Memphis, in the State of Tennessee, through the States of Tennessee, Mississippi, and Alabama, to Stephenson, in the last-named State. It was divided into two divisions, one known as the Eastern Division, extending from Stephenson westward to Bear Creek, on the line between Mississippi and Alabama, having its principal office at Huntsville, Alabama; and the other, known as the Western Division, extending from Bear Creek to Memphis, and having its principal office at Memphis. On the 11th of April, 1862, the military forces of the United States took possession of the Eastern Division of the road, with all its rolling stock and equipment, and kept it until the close of the war. The Western Division was run by the officers of the company under the control of the military superintendent of the Confederate authorities until the 6th of June, 1862, when it was taken possession of by the United States. Three days before the capture of Memphis by the military forces of the United States the officers and rolling stock of the Western Division were moved south within the Confederate lines by command of the Confederate military authorities, and were kept there until the end of the war. During this period the rolling stock was hired by the officers of the company to other railroad companies, and in this way a large amount in Confederate treasury notes came into the hands of the officers of the company within the Confederate

lines. On the 17th of March, 1863, a resolution was passed within the Confederate lines declaring a dividend of four per cent. on the capital stock, payable in Confederate treasury notes on the 15th of April. Under this resolution payments were made to the amount stated in the verdict. The Confederate money used to pay the coupons, as stated in the verdict, was all obtained from the hire of the rolling stock within the Confederate lines.

Upon this state of facts the court instructed the jury, in substance, that the United States were entitled to such a verdict as was rendered, and the question presented here is, in effect, whether that instruction was right.

At the times when the dividend and interest now in question were paid, the entire railroad of the company and its two principal offices were within the lines of the military forces of the United States. The act of 1862, c. 119, which provided for the tax, was not passed until after the United States had established their military possession of the territory traversed by the railroad, and within which the principal offices were located. The corporation was, therefore, subject to the actual governmental control of the United States, and the laws of the United States were both operative upon and enforcible against it. No one will deny that the internal revenue laws were intended to reach all persons and corporations within the dominion of the United States against whom they could for the time being be enforced by judicial process or otherwise. They were broad enough in their language to embrace all, and could be limited only in their operation by the power of the United States to enforce them. Clearly, then, if this dividend had been declared, and the dividend and interest paid at either of the principal offices of the company, or within the military lines of the United States, the taxes sued for would have been recoverable, notwithstanding the payments were made out of earnings derived from the use of property which had been taken inside the lines of the enemy. Thus the question now to be determined seems to be whether the company is exempt from the tax, because the resolution declaring the dividend was adopted within the Confederate lines, and the payments, on

account of which the taxes are demanded, were actually made there.

In *Railway Company* v. *Collector*, 100 U. S. 595, followed in *Erie Railway Company* v. *The United States*, 106 U. S. 327, it was held that the internal revenue tax on interest and dividends was an excise tax on the business of corporations, to be paid by the corporations out of their earnings, income and profits. The payments made in this case were for dividends to stockholders and interest to bondholders out of the earnings, income, and profits of the corporation in its business. By means of the dividend the surplus earnings were distributed to the stockholders, and the debts of the company were discharged to the extent of the interest paid. In this way the earnings on the inside of the Confederate lines were made available to the corporation which was subject to the actual control of the United States, and bound for the payment of all internal revenue taxes chargeable by law against it. To our minds it is a matter of no importance that the income came from property which was within Confederate territory. The property, although within the Confederate lines, belonged to the company, and the income derived from its use was actually paid out by the company in dividends to stockholders, and to discharge the corporate debts for interest. We think it would hardly be claimed that if a private individual, living in one of the loyal States during the war, derived an income which he actually reduced to possession, or used in the payment of debts, from property in Confederate territory, he would be exempt from the income tax imposed on him by the internal revenue laws, because of the source from which his income was derived; and if he would not be, it is difficult to see how this corporation is. In both cases the tax is in legal effect on the income of persons subject to the actual dominion and control of the United States. The tax is payable by the person because of his income, according to its amount, and without any reference to the way in which it was obtained.

Under the instructions which were given the jury the verdict was only for the taxes on the value of the Confederate treasury notes in legal currency at the times the dividend and interest

were paid. In this way the company has only been charged with an income estimated in lawful money. Without, therefore, considering in detail the particular instructions given to the jury or refused as stated in the bill of exceptions, it is sufficient to say that upon the undisputed facts it would have been proper for the court to have directed the verdict for the United States which was given in this branch of the case.

2. As to the payments of interest not made in Confederate notes.

All these payments were made after the close of the war, and there is no pretence that they were made out of earnings or income. The statement in the bill of exceptions is that they were paid "either in cash or in second mortgage bonds of the defendant company at a discount, at the option of the holder." As to this the court instructed the jury as follows:

"The defendant's counsel insists that a portion of the interest on which a tax is claimed by the plaintiffs was funded in second mortgage bonds of the company, and that such funding did not amount to a payment of such interest. If you find that any of the interest on the bonds of the defendant on which a tax is claimed in this suit was so funded, and that it was optional with the holders of such interest coupons to have the same paid in cash or funded in second mortgage bonds at a discount, I charge you that if such holders of interest coupons took second mortgage bonds in preference to the cash, that it did amount to a payment, and the plaintiffs would be entitled to recover the tax claimed on the amount so funded."

And again:

"It is in proof that some of the coupons were not paid in cash, but were funded in second mortgage bonds. It appears that the creditor had his option to take payment in cash, or take these new bonds at a certain agreed discount. It was, therefore, substantially a payment in cash, and a reinvestment of the amount in second mortgage bonds. This can constitute no defence to the suit."

In this, we think, there was error. Although the tax is im-

posed on interest paid, the evident intention of Congress was to tax only such payments as were either in fact or in legal effect made from the income. As was said in *Railroad Company* v. *Collector*, *supra*, "the tax . . . is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of a system of taxing incomes, earnings, and profits, adopted during the late war, and abandoned as soon after the war was ended as it could safely be done." Under ordinary circumstances, it will be conclusively presumed that payments of interest were made from earnings, but when it appears that at the end of a civil war, during which interest had fallen in arrear, and earnings had been substantially suspended, the company, in reorganizing its affairs for future business, either funded its past due coupons in a new issue of bonds, or paid them from the proceeds of the sales of new bonds, no such presumption can arise, and if the facts are established they will constitute a complete defence to a suit for the recovery of a tax charged on such payments of interest. Any other construction would be in violation of the whole spirit and purpose of the statute. The bondholder would undoubtedly be taxable for his income derived in that way, but the payment would not be one upon which the company could be taxed.

3. As to the alleged compromise.

Without recapitulating the facts connected with this part of the case, it is sufficient to say that in all the correspondence which preceded the payment of the money on the 24th of September, 1870, and in the receipt given for the money when paid, reference was had only to the payments of interest maturing from May, 1866, to July, 1869. It was not erroneous, therefore, for the court to exclude all testimony showing a different understanding on the part of the officers of the company, and to instruct the jury that the legal effect of the papers in evidence was to confine the compromise to the claims of the United States for taxes and penalties growing out of the interest maturing between the dates specified in the receipt of the collector. It nowhere appears that the officers of the United States had any knowledge of the payments,

either of interest or dividends, which had been made at earlier dates.

There are other assignments of error, but those already considered dispose of the entire case in a way to render the others immaterial on another trial.

The judgment is reversed, and the cause remanded for such further proceedings, not inconsistent with this opinion, as justice may require.

EX PARTE NORTON.

ORIGINAL.

Decided April 2d, 1883.

Appeal—Judgment—Mandamus.

A decree is final for the purposes of appeal when it terminates the litigation between the parties, and leaves nothing to be done but to enforce the execution which has been determined. Several cases on this point decided at this term referred to and approved.

An assignee in bankruptcy filed a bill to set aside, as fraudulent, conveyances of real estate of the debtor made before the bankruptcy and a mortgage put upon the same by the owner after the sale, and to restrain the foreclosure of the mortgage. The court denied the relief asked for, and ordered any surplus that might remain above the mortgage debt after sale or foreclosure, to be paid to the complainant. The assignee appealed to the circuit court: *Held,* That the decree appealed from was a final decree, disposing of the litigation between the parties.

This was an application for a writ of mandamus to the Circuit Court of the United States for the Eastern District of Louisiana, requiring that court to take jurisdiction of, and hear and determine an appeal by the petitioner, Emery E. Norton, from a decree of the district court of that district.

The case as presented shows that Norton, being assignee in bankruptcy of Govy Hood, filed in the district court a bill in equity against Hood, the bankrupt, John Asberry, sheriff of the Parish of East Carroll, and Henry Frellsen, setting forth that Hood, being insolvent, in April, 1866, confessed a judg-

ment in favor of Frellsen for $39,319.49; that in July, 1868, execution was issued on this judgment and levied on three plantations belonging to Hood, known respectively as "Black Bayou," "Home Place," and "Hood and Wilson Place;" that on the 5th of September, 1868, there was a pretended sale of these plantations to Frellsen under an execution issued on his judgment for the sum of $24,000; that on the 23d of November, 1868, another execution was issued on the judgment and levied on other property, which was also nominally sold under the execution to Frellsen; that in December, 1869, the Black Bayou plantation was sold to William Alling for $32,000, one-half of which was paid in cash, and for the other half Frellsen took from Alling a half interest in the land; that in January, 1869, Hood was adjudged a bankrupt on his own petition, and in January, 1871, received his discharge; that in May, 1871, Frellsen reconveyed to Hood all the property he had bought under the executions, except the Black Bayou plantation, for $30,152, payable in seven instalments, and evidenced by mortgage notes; that all these transactions, except the sale of the one-half of the Black Bayou plantation to Alling, were a fraud upon the bankrupt law, and devised for the purpose of giving Frellsen an unlawful preference, and to keep the property from the other creditors; that from the beginning it was the understanding between Hood and Frellsen that Frellsen should buy the property under his judgment, hold it for Hood during the bankruptcy proceedings, and then reconvey it to Hood, subject only to any balance that might remain due upon the judgment, after deducting the rents and profits and the proceeds of any sales in the meantime received by Frellsen; and that all the facts were unknown to Norton, the assignee, until certain disclosures were made on the trial of a suit between Frellsen and Hood in the Thirteenth District Court of the Parish of East Carroll, growing out of proceedings by Frellsen to foreclose his mortgage notes received on the reconveyance of the property. It further appears that in the proceedings for foreclosure, Asberry, the sheriff, had been empowered to sell the property reconveyed to Hood to pay what remained due on the mortgage debt.

Statement of Facts.

The prayer of the bill of Norton, as stated in the petition for mandamus, was that Norton "be decreed to be the owner, in his capacity as assignee of said bankrupt, of all the property described in his said bill, from the 29th day of December, 1868 (when said Hood filed his petition to be decreed a bankrupt), and entitled to recover the rents and revenues thereof from the said Hood and Frellsen; that said Hood be ordered to transfer to complainant the property reconveyed to him by said Frellsen as aforesaid; that the mortgage put upon the same by said Hood in favor of said Frellsen be cancelled, annulled, and erased, and the sale thereof, under said executory process foreclosing said mortgage, or any other process against said Hood, be enjoined and prohibited; that said Frellsen be ordered and decreed to convey to complainant one-half of the Black Bayou plantation, which he had retained by some arrangement with William Alling, the purchaser, and to pay the complainant the sum of $16,000, received from said Alling for the sale of the other half of said plantation, together with the interest thereon from the date of said sale, and for general relief, process, &c."

Answers were filed and testimony taken. After hearing, the district court entered a decree declaring "that the judgment in favor of Henry Frellsen against Govy Hood, in the parish of Carroll, in the year 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, as shown in the record, have been established as valid and operative, and that no fraud, collusion, nor malpractice is established against him; that these proceedings entitle him to the property so conveyed to him, discharged of any claim of the plaintiff in this suit;" and further declaring "that whatever surplus may arise from the sale of the property under the process in favor of Henry Frellsen, . . . which is described in the plaintiff's bill and which is now held by the sheriff, and has been levied on the plantations known as the Home Place and Hood and Wilson Place, the said surplus shall not be paid to the said Hood, but shall be paid to the complainant. . . . after deducting such costs as this court may decree shall be paid out of the same." The injunction which had been allowed restraining the sheriff from the execution of the process was

dissolved, and he was permitted to proceed, but was to dispose of the surplus that might remain in his hands after the payment of the debt specified in the process as due to Frellsen, and the costs of suit, as directed by the District Court of the United States. Leave was granted the complainant to apply for further orders regulating the sale in respect to time, and appraisement and sale on credit, according to the laws of Louisiana. The sheriff was directed to make a return of his sale to the District Court of the United States, and the question of costs was reserved until the coming in of the return.

From this decree an appeal was taken to the circuit court, where, on the 27th of May, 1882, the appeal was dismissed on the ground that the decree appealed from was not a final decree within the meaning of that term as used in the statute regulating appeals from the district to the circuit court. The writ now asked for is to require the circuit court to set aside its order of dismissal and take jurisdiction.

Mr. J. D. Rouse for the petitioner.—I. This decree appealed from is final. It disposes of the whole controversy. It is decreed "that the judgment in favor of Henry Frellsen against Govy Hood in the parish of Carroll, in the year 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, as shown in the record, have been established as valid and operative, and that no fraud, collusion nor malpractice is established against him; that these proceedings *entitle him to the property so conveyed to him, discharged from any claim from the plaintiff in this suit.*" This determined all the issues between Norton and Frellsen in favor of the latter. It disposed of the controversy between them. In the language of Chief Justice Taney in *Forgay* v. *Conrad:* "It decided the right to the property in contest."—II. The decree provides, "that whatever surplus may arise from the sale of the property under the process in favor of Frellsen from the District Court of East Carroll parish . . . *shall not be paid to the said Hood, but shall be paid to the complainant as assignee.*" This *finally* disposes of Hood's right to such surplus, and awards the same to the complainant. It directs that it (the surplus)

Argument against Petitioner.

"be delivered up to the complainant," in the language of *Forgay* v. *Conrad*. The petitioner is without remedy in the premises, except by the aid of this court; and it is now well settled that where, on an appeal from the district to the circuit court, the latter court, without considering the exceptions or errors assigned, dismisses the cause for want of jurisdiction, mandamus, and not error or appeal, is the proper remedy. *Insurance Company* v. *Comstock*, 16 Wallace, 258; *Railroad Company* v. *Wiswall*, 23 Wallace, 507; *Ex parte Hoard*, 105 U. S. 578; *Ex parte Bradstreet*, 7 Pet. 634.

Mr. John A. Campbell, contra.

Unless the decree of the district court be final, an appeal is not authorized, and this exception may be made in the Supreme Court if the case shall reach that court. *Mordecai* v. *Lindsay*, 19 How. 199; *Montgomery* v. *Anderson*, 2 How. 386.—III. In this case the district court dissolved the injunction which it had allowed to the plaintiff to operate upon a suit in the District Court of Carroll parish, between Frellsen and Hood, and which had been pending these several years, this plaintiff never having been a party, and that suit was upon contracts posterior to the discharge of Hood from bankruptcy. The mere dissolution of this injunction is not the subject of revision in any court on appeal. *Verden* v. *Coleman*, 18 How. 86; *Ex parte Schwab*, 98 U. S. 240; *Buffington* v. *Harvey*, 95 U. S. 99.—IV. The retention of control over the sheriff of Carroll parish, the directions in respect to the sale and the distribution of the price, and the reservation of the subject of costs and the avoidance of a decree to dismiss the bill against Frellsen, furnish satisfactory evidence that the district court had not designed to make a final decree at this date. *Beebe* v. *Russell*, 19 H. 283; *Barnard* v. *Gibson*, 7 How. 650; *Cushing* v. *Laird*, 15 Blatch. 219, 236–8. The judge of the circuit court in May, 1882, dismissed the appeal, because the decree of the district court was not a final decree.—V. The question whether a decree be final or interlocutory is a judicial question, sometimes of difficulty, and requiring discrimination and judgment to decide. The record shows that the decision was rendered after

argument and deliberation, and that the judgment has been acquiesced in for the remainder of the term in the circuit court in 1882, and until the early part of this year, when notice was given of this motion. The question whether a court can exercise jurisdiction under the Constitution or laws, continually arises, either upon a motion, a plea, a demurrer, or an appeal or writ of error. It is involved in every judicial act. It has not been considered that when the decision has been made in court after argument, and that judgment recorded, that the court can be ordered to justify its judgment, and that the litigation should be conducted between the plaintiff and the judge. The authorities seem to be to the contrary of this. No mandamus is allowable. . *Ex parte Newman*, 14 Wallace, 152, 165; High on Extraordinary Remedies, §§ 188, 189, 190; *The State* v. *Morgan*, 12 La. 118.

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

We have had occasion at the present term, in *Bostwick* v. *Brinckerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Mutual Life Ins. Co.*, 106 U. S. 429; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Southern Express Co.*, *ante*, 24, to state the rule applicable to the determination of the question here involved, and we there say:

"A decree is final for the purpose of an appeal . . . . when it terminates the litigation between the parties, and leaves nothing to be done but to enforce by execution what has been determined."

Under this rule, we think, this appeal was well taken. The decree settled every question in dispute between the parties, and left nothing to be done but to complete the sale under the proceedings in the State court for foreclosure, and hand over to Norton any surplus of the proceeds there might be after satisfying the debt due Frellsen as stated in the process under which the sale was made. The case stands precisely as it would if Frellsen were proceeding in the district court for the foreclosure of his mortgage, and a decree had been entered

establishing his rights, ascertaining the amount due to him, and ordering a sale of the property and the payment to Norton of the surplus after discharging the mortgage debt. Here the bill was filed by Norton to set aside the proceedings for foreclosure and obtain a conveyance of the mortgaged property. The court refused to set aside the proceedings or to order a conveyance, but did order the sale to go on, and that the proceeds, after the mortgage was satisfied, be paid to Norton. It adjudged the case on the merits in favor of Frellsen as against Norton, and in favor of Norton as against Hood. The bill was not dismissed in form because it asked relief both as against Frellsen and Hood, and relief was granted as against Hood. It was in legal effect dismissed as to Frellsen when the decree was entered in his favor on all the questions in which he was interested.

The writ of mandamus asked for is granted, but without costs.

DISTRICT OF COLUMBIA *v.* WASHINGTON MARKET COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided April 9th, 1883.

Charitable Gift—Contract—Corporation—District of Columbia—Evidence.

In May, 1870, Congress authorized the Washington Market Company to construct a market building on a tract in Washington between Pennsylvania and Louisiana avenues and B street, and between Seventh and Ninth streets, then belonging to the United States, and to occupy the same for a term of 99 years, paying a rental therefor to the city of Washington of $25,000 a year. Buildings were to be constructed thereon by the company, within a period named and in accordance with specified plans. In 1871, some changes were made in the plans, and in March, 1873, no building having been erected, Congress authorized the governor and board of public works of the District of Columbia (the successor of the city), to erect a building for District offices and to "make arrangements to secure sufficient land fronting on Pennsylvania avenue between Seventh and Ninth streets." Under this authority the market company conveyed to the District a part of the tract described in the act of 1870;

Statement of Facts.

the District assumed the obligations of the company respecting that part, and released it on the payment of an agreed sum from liability for back rents, and from the obligation to pay in future any other rental than $7,500 a year; and the company paid the back rents and bound itself to pay the newly agreed rental for the future; and has paid rent since then at the rate of $7,500 per annum. On suit by the District to recover at the rate of $25,000, *Held*,

1. That the act of 1873 fully empowered the District and the company to make the new agreement, transferring a part of the land to the District and diminishing the rent for the remainder.
2. That there was nothing in the act of 1870 which established an irrevocable charitable trust for the benefit of the poor of Washington.
3. That in this case the debates on the passage of the act are not to be accepted as evidence of the meaning of the clause in controversy.

Action to recover $53,847.23, with interest, alleged to be due from the Washington Market Company, by virtue of the terms of its charter, to the city of Washington, of which the plaintiff in error was the legal successor.

The act of Congress to incorporate the Washington Market Company (16 Stat. 124) took effect May 20th, 1870. By the 2d section, it was enacted that the company

"Is hereby authorized and empowered to locate and construct a suitable building or buildings upon the following described grounds, namely, commencing at the intersection of the centre line of B street north with the west line of Seventh street west, running thence north along the west side of Seventh street to the southerly side of Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street west; thence along the east line of Ninth street to the centre line of B street; thence along the centre line of B street to the place of beginning; and to use and occupy the same by the erection of a suitable building or buildings for a public market house, including the necessary stalls and sheds, and also for stores, public halls, and such other purposes as may be determined by said company, not inconsistent with its use as a public market. The buildings herein designated to be used for the purposes of a market shall be used for no other purpose inconsistent therewith, but the same shall remain a public market as hereinbefore described."

Provision was made, when the building was ready for occupancy, for letting out parts of the same as stalls and stands for market purposes, the rents for which were to belong to the Market Company. The buildings were to be constructed according to plans set forth in a schedule made part of the act. The company was required to purchase and pay for all buildings and fixtures then on the premises belonging to individuals, at prices to be fixed, if not agreed on; and to completely finish its structures and improvements within two years and sixty days after obtaining possession of the premises described. The 12th, 13th, and 14th sections of the act were as follows:

"SEC. 12. *And be it further enacted*, That the privileges conferred by this act shall be enjoyed by said company for the term of ninety-nine years, unless sooner terminated for a non-compliance or abuse of the conditions herein imposed upon said company, which may be done by suit in the name of the United States, to recover possession of said property. At the end of said period of ninety-nine years, the said lands, with all the erections and improvements thereon, shall revert to the United States, unless Congress shall by law extend the period of occupation thereof by said company: *Provided*, That if the corporation of the city of Washington shall, after a period of thirty years from the approval of this act, by a vote of the councils thereof express a desire to possess itself of the said market buildings and grounds, Congress may authorize the corporate authorities to take possession of the same upon payment to the said Market-House Company of a sum of money equal to a fair and just valuation of the buildings and improvements then standing on said grounds, and the mode and manner of ascertaining such valuation shall be determined by Congress.

"SEC. 13. *And be it further enacted*, That the real estate herein described is hereby vested in the said corporation for and during the said term of ninety-nine years, or until a forfeiture of its rights and privileges by a breach of the conditions herein imposed on said company, and said estate shall be taken and considered as a determinable fee. The real and personal property of said corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same ex-

tent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation.

"SEC. 14. *And be it further enacted*, That in consideration of the privileges granted by this act to the Washington Market Company, the said company shall pay, yearly, every year during the said term of ninety-nine years, unto the city of Washington, the sum of twenty-five thousand dollars, which sum shall be received by said city, and set apart and expended by and under the direction of the city government of said city, for the support and relief of the poor of said city and of the District of Columbia; and said city may enforce the payment of said sum from time to time as the same shall become due, either by an action at law or by the same proceedings now authorized by law for the collection of taxes by said city."

The real estate granted by this act was public property of the United States. It had been, and at the time of the passage of the act was, used as a market, and the buildings thereon, erected by individuals for such use, and which the Market Company were required to purchase, were subsequently destroyed by fire. Thereupon Congress passed the following joint resolution, which took effect December 20th, 1870, 16 Stat. 589:

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the chairman of the committees on public buildings and grounds of the Senate and House of Representatives, with the mayor of Washington, be, and hereby are, constituted commissioners to require the Washington Market Company, organized under the fifteenth section of the act of May twentieth, eighteen hundred and seventy, promptly to furnish temporary market accommodations for the marketmen who were driven out by the late fire; and also to erect, at the earliest possible day, the first stories or market portions of the permanent market buildings provided for in said act; and that said commissioners be authorized to make such alterations in the buildings and such arrangements with said company as shall be best calculated to secure the speedy erection of buildings creditable to the city, and sufficiently commodious for all the wants of the public: *Provided, however*, That the passage of this resolution shall not be construed to supersede, delay, or in any way affect

the pending investigations into the affairs of said company, nor to relieve the company or any person from consequences of any acts under investigation."

On February 21st, 1871, the municipal government of the city of Washington was superseded by the act of Congress of that date, providing a government for the District of Columbia as its successor, and the legislative assembly of the District of Columbia, on August 23d, 1871, passed the following resolution:

"*Be it resolved by the Legislative Assembly of the District of Columbia*, That the governor be authorized and required to act as one of the commissioners of the Washington Market Company, under the resolution of Congress approved December twenty, eighteen hundred and seventy; and that he be requested to procure such alterations in the plan of the buildings to be erected by said company as shall transfer the proposed hall from the Ninth-street wing to the main building on Pennsylvania avenue, and also to secure a reduction from twenty-five thousand dollars to twenty thousand dollars of the annual rental required to be paid by said company, and which is now assessed by the company upon the stall-holders."

The act of Congress making appropriations to supply deficiencies, etc., approved March 3d, 1873, 17 Stat. 540, contains the following paragraph:

"For the purchase by the United States of the interest of the District of Columbia in the present City Hall building in Washington, now used solely for government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the government of the United States shall not be liable for any expenditures

for said land, or for the purchase money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon for such building."

On June 26th, 1873, the legislative assembly of the District of Columbia passed an act appropriating the sum of $90,000 for the erection of a suitable building for the District offices, under the direction of the governor and board of public works, which included the sum of $75,000, receivable for its interest in the City Hall building under the provisions of the above paragraph from the deficiency appropriation act.

In view of that expenditure the Governor and Board of Public Works made the arrangement for a site for the intended structure with the Washington Market Company, contained in the following memorandum of agreement between them:

"In pursuance of the act of Congress of March 3d, 1873, authorizing the governor and board of public works, if they deem it advisable, for the purpose of erecting thereon a suitable building for District offices, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, it is hereby agreed that—

"1. The Washington Market Company shall, by good and sufficient quitclaim deed, release and convey to the District of Columbia, all the title and interest of said company, acquired under act of Congress of May 20th, 1870, incorporating said company, in and to so much of the land within said District, described in section two of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the following limits:

"Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly line of Pennsylvania and Louisiana avenues; and thence on a line parallel with the aforesaid southerly side of Pennsylvania

avenue to the westerly line of Seventh street, at a point eighty-six feet from the corner began at ; thence northerly along the west line of Seventh street eighty-six feet, to the corner began at.

"The Washington Market Company shall also, in said deed, convey to said District the right to use in common with said Market Company, as a passage-way and court-yard, all the land between the lot conveyed in said deed and a line drawn westerly from Seventh to Ninth streets, ten feet north of the north walls of the present Seventh and Ninth street buildings of said Market Company.

"2. In consideration of the aforesaid release and conveyance by the Washington Market Company to the District of Columbia, the District will assume and fulfil all obligations imposed upon the company by section 14 of said act of May 20th, 1870 (as modified by act of the legislative assembly of the District of August 23d, 1871), except as follows :

"The Market Company shall pay annually to the District of Columbia, during the term and for the purpose mentioned in said section fourteen, *the sum of seven thousand five hundred dollars*, payable quarterly, which sum shall during said term be in the place of all rental for the ground occupied by the market buildings of said company ; and in case in any year the general District taxes upon said ground and market buildings shall exceed five thousand five hundred dollars, the excess above that amount shall be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for rental and taxes shall not exceed thirteen thousand dollars ; the District, however, not hereby releasing, but expressly reserving, and the Market Company hereby confirming, the right of the District, given by section two of the act of May 20th, 1870, of fixing and controlling, for the protection of the market dealers and of the public, the amount of rentals of the stalls and stands in said market buildings ; and it is also hereby agreed that the annual rental of stalls and stands in the other markets in the city of Washington shall not be fixed by the District authorities at a lower rate per square foot of area than seventy per cent. of the rate fixed under said section for stalls and stands in the market buildings of said company ; and the District shall not use the land released and conveyed as aforesaid for the purpose of a market.

"This agreement shall take effect April 1st, 1873, and the

Market Company shall at once settle its past rental account to that time at the rate, since August 23d, 1871, fixed by the resolution of the legislative assembly of that date; and shall immediately pay the balance due the treasurer of the District.

"Possession of the land conveyed shall be given the District upon the day of executing this agreement.

"Dated at Washington, March 18th, 1873.

"WASHINGTON MARKET COMPANY,
BY M. G. EMERY, *President.*
"H. D. COOKE, *Governor,*
"ALEX. R. SHEPHERD,
"JAMES A. MAGRUDER,
"S. P. BROWN,
"ADOLF CLUSS,
"*Board of Public Works.*"

By a deed of the same date the Washington Market Company conveyed and released to the District of Columbia the real estate described in the agreement, which deed was delivered and recorded.

From the bill of exceptions, taken upon the trial of the action in the Supreme Court of the District of Columbia, it appeared that, "To further maintain the issues upon its part joined, the defendant offered and gave evidence to the jury tending to prove that immediately upon the execution of said agreement of March 18th, 1873, said defendant settled with the proper officers of said District of Columbia its past rental account on the terms and in the manner fixed in said agreement, and paid to the treasurer of said District the balance agreed in said settlement to be due from the defendant to said District; that defendant had paid its said rental account from and including March 18th, 1873, to April 1st, 1873, at the rate of $20,000 per annum. Defendant further gave in evidence a letter dated April 1st, 1873, signed officially by the comptroller at that date of said District, and addressed to said defendant, acknowledging that defendant had settled and paid to said District all amounts due from defendant on rental account up to said April 1st, 1873. Defendant further proved that from said last date to the date of this suit it has paid to

the plaintiff, on account of said rent, at the rate of $7,500 annually; that immediately subsequent to the date of said agreement and execution and delivery of said indenture, conveying to the plaintiff the property fronting on Pennsylvania avenue between Seventh and Ninth streets northwest, in the city of Washington, District of Columbia, the plaintiff took possession of the ground between said limits, and made excavations for a foundation for a building for offices for the District of Columbia, but had not proceeded more than a few days in excavating before the work was stopped; that the defendant has not, from the date of said indenture, been in possession of or exercised any power or authority over the ground so conveyed, or any part thereof."

And there was no evidence inconsistent with this.

The amount sought to be recovered by the plaintiff was the annual rental of $25,000, accrued during the period specified in the declaration, giving credit for payments actually made, but without regard to the reduction and settlement claimed by the defendant under the agreement of March 18th, 1873. This agreement the plaintiff in error claimed to be void. The court below being of a different opinion, directed a verdict for the defendant, the judgment on which was brought into review by this writ of error.

Mr. A. G. Riddle for the plaintiff in error.—I. It cannot be contended that the District had any power to acquire this property under any provision of the organic law. Sec. 53 provides that "the District shall never pay, *assume* or become responsible for the debts or liabilities of, or in any manner give, loan, or extend its credit to or in aid of, any public or other corporation, association, or individual." Rev. Stat. D. C. 6. Sec. 55 declares "the legislative assembly shall have no power to *release* or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to the District, or to any municipal corporation therein," &c. By the 14th section of the charter of the defendant, it became indebted to the corporation of Washington in the sum of $25,000 per annum, for the benefit of the poor. By the

second paragraph of this arrangement, the District undertakes to *assume* this very debt, in violation of the 53d section. It also undertakes to *release* the Market Company from a payment of a part of the same, in violation of the 55th section referred to. The 12th section of the charter authorizes the corporation of Washington to acquire the property under certain conditions; but further legislation is expressly made necessary. —II. The 13th section of the charter vesting the land in the Market Company declares that the estate shall "be taken and considered as a determinable fee." Plowden says that a determinable fee is an estate that may continue forever. This estate could not be acquired by the municipal corporation except by vote of its councils, and act of Congress, as provided in the 12th section; nor could Congress repeal the charter in an indirect way. The property is charged with the servitude of $25,000 rent per annum, which enters into the fibre of its property. The beneficiary was in existence, and the interest vested. The District became the trustee, and it could not acquire the property; nor could it and the defendant in any way change or modify any of the conditions of the trust. It may be doubted whether Congress itself could, even by a direct exercise of its power in the premises. Thus, then, we have Congress, the owner of the property in fee, dedicating it to a specific purpose for ninety-nine years. It calls into existence, by special act of creation, a person to hold it and execute that purpose, with power for no other use or object. As a legal consequence of this action it ordains that this property shall be used for no other purpose whatever. It forbids all other possible uses and purposes by withholding all power in the premises. There was no power on the part of the Market Company to sell; none on the part of the District to buy.—III. The act of March 3d, 1873, is the sole source of power in the premises. It can never be presumed that Congress would intend any other and different disposition of this property, unless such intention is clearly expressed. All acts bearing upon this matter must be construed in harmony with this disposition, if such construction can be fairly made. Any other will be yielded with reluctance, and only on legal compulsion.

The debates on the passage of the act show that Congress did not understand that it was authorizing such an agreement as was actually made, or that it was dealing with a property which it had previously granted to another, and dedicated to another purpose. For the right to refer to the debates to aid the construction of the act, see *Blake* v. *National Banks*, 23 Wall. 307; *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72.—IV. If the act of 1873 is to be construed as having reference to the land granted to the Market Company by its charter, then they are *in pari materia*, and must stand together. On its face it authorizes the District to do a certain thing. The District is a corporation, and its powers are to be strictly construed. If it applies to the Market Company, then the same rule applies. Sedgwick on Statutes, 1st ed., p. 340. The Market Company is not even named in the act. Suppose that in thus authorizing the District the act also authorizes the company to arrange with it, what is the extent of the power conferred? To purchase, close out the transaction, and take the company's title? Not at all. The act does not so say, as it would, had it so intended. Clearly this is not an act whose meaning is to be forced by construction beyond the obvious scope of its language. Had it intended that the officers of the District should buy, it would have so said. They are "authorized to purchase," would have been the language, and not "to make arrangements to secure," as the language is. When the whole matter is taken into consideration, if Congress is to be supposed to have understood what it was doing, what it intended was that the District should arrange and report back, and ask for the further aid of Congress to carry the arrangement out, if it saw fit; and hence, at that time, it would make no grant of its title to the land, and no appropriation of money; and it knew that without both the District could never build such a building as it required on that site. It would not permit the District to pay the $75,000 for land. Its use was expressly limited to the erection of a building. If Congress did intend that the District, by making an arrangement to secure, should actually buy, would that authorize the convention entered into? Does the language of this act au-

thorize the District, 1. To discharge the company from the payment of the $25,000 for the poor—bearing in mind, all the time, that Congress has usually made an annual appropriation equal to that, for the relief of the poor of the District? 2. To discharge the company from the building of the great structure pursuant to the specifications of its charter, and render its erection impossible? 3. Does it authorize the District to change the rate of taxation of the company's property, which the 13th section of the charter places in the status of all other property? 4. To tax the stalls and stands in the other markets for its benefit? Clearly no construction can extend the language of the act to include these powers.

Mr. William Birney and *Mr. B. F. Butler* for the defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the above language, he said:

We see no ground of support for the suggestion of counsel, that Congress, by the act incorporating the Washington Market Company and fixing the terms for their use of the public property granted to them, established an irrevocable charitable trust for the poor of Washington city, and thereby disabled itself from authorizing any subsequent changes in the mode and conditions of that grant; nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act of March 3d, 1873, as evidence of the meaning of the clause on which the controversy in this case depends.

The question is whether, according to its correct construction, that clause authorized the parties to execute the agreement into which they entered.

Upon a consideration of the language of the provision, it becomes apparent that the sum of money appropriated by it as compensation to the District of Columbia, for its interest in the City Hall building, was to be applied only for the erection of a suitable building for the District offices. No part of it could lawfully be expended in the purchase of land for a site.

It is equally plain that no public lands belonging to the United States were granted to be used for that purpose. Express authority is given to the Governor and Board of Public Works to make arrangements to secure land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, if they deem it advisable, for that purpose. It is not denied that, in connection with the express declaration that no right to use any public ground was thereby granted, this description necessarily covered a portion of the real estate granted to the Market Company by their act of incorporation. Any arrangement to secure it as a site for the District buildings must necessarily be made with them. And power granted to the authorities of the District of Columbia to make such an arrangement also carried with it power on the part of the Market Company to become parties to it. The fact that the latter are not expressly named is without legal significance. The designation of the property was also the designation of its owner.

It is evident, also, that the arrangement authorized to be made was described as intended to have the effect of securing the land for the purpose. This necessarily implied that the arrangement, when made as authorized, should be final. The suggestion that it was intended to be preparatory and preliminary only, as the basis of a report to be made afterwards to Congress for its approval and ratification, finds no warrant in the context, and is quite clearly negatived by the terms in which the act repels the idea that the arrangement to be made should in any way commit the United States to any liability to pay for any expenditures, either for the land itself or the improvements to be made upon it. It is, therefore, clearly to be inferred that the arrangement intended was to be made with the Market Company for a designated portion of their land, and that it must be effected without the outlay of any money.

This could be accomplished in but one way. It was to induce the Market Company to relinquish their right to the exclusive use of the specified portion of their land, upon the basis of some modification of the terms upon which it was held. As these embraced payments of money, which the Market

Company were under obligation to pay to the District of Columbia, and which the government of the District had exclusive power to administer for the purposes described in the act, it follows that it must have been intended to authorize such an arrangement in respect to these obligations of the Market Company as would furnish to the latter a consideration and inducement for a release of a part of their property. And no consideration for the release of a part of demised property is more suitable to the nature of the relation between the parties than an equitable or agreed apportionment of the rent. Such was the form and substance of the arrangement in question. The adjustment of the arrearages of rent was a legitimate incident, whether the prior agreement for a reduction of the amount from $25,000 to $20,000 was lawful, at the time it was first made, or not. It became so by becoming part of the arrangement finally entered into. Whether other provisions of the arrangement, not brought into this controversy, such as the provision relating to the maximum of taxes thereafter to be assessed, and in respect to the rental of stalls, to be charged to occupants in the market-house building, are lawful and binding, it is not necessary to decide, as they are not proper matters of consideration in the present action.

We are of opinion that there is no error in the record of this judgment, and it is accordingly

Affirmed.

WILKINS *v.* ELLETT, Administrator.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Decided April 16th, 1883.

Conflict of Laws—Executor and Administrator.

When a debt due to a deceased person is voluntarily paid by the debtor at his own domicil in a State in which no administration has been taken out, and in which no creditors or next of kin reside, to an administrator appointed in another State, and the sum paid is inventoried and accounted for by him

in that State, the payment is good as against an administrator afterwards appointed in the State in which the payment is made, although this is the State of the domicil of the deceased.

The nature of the action and the facts appear in the opinion.

Mr. W. Y. C. Humes and *Mr. D. H. Poston* for plaintiff in error.

Mr. S. P. Walker and *Mr. R. T. McNeal* for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant the sum of

money due to Quarles, amounting to $3,455.22 (which is the same for which this suit is brought), and included it in his inventory, and in his final account, which was allowed by the probate court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicil of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicil was in Tennessee, they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicil.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicil at the time of his death; that the proper place for the principal administration of his estate is that domicil; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the

debtor, being in that State, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage* v. *Chapel*, 16 Mass. 71; *Biddle* v. *Wilkins*, 1 Pet. 686.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper* v. *Butler*, 2 Pet. 239; Shaw, C. J., in *Rand* v. *Hubbard*, 4 Met. 252, 258–260; *Petersen* v. *Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett* v. *Barrett*, 8 Greenl. 353; *Robinson* v. *Crandall*, 9 Wend. 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicil of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins* v. *Ellett*, 9 Wall. 740.

The fact that the domicil of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicil; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must therefore be reversed, and the case remanded with directions to set aside the verdict and to order a

New trial.

Statement of Facts.

HAMPTON, Administrator, & Others *v.* PHIPPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Decided April 16th, 1883.

Equity—Mortgage—Subrogation—Surety.

1. When one of two sureties gives a mortgage of his real estate to his co-surety to protect him against loss by reason of having become security for the principal, a creditor of the principal is not entitled to be subrogated in equity in place of the co-surety, and enjoy the benefit of the mortgage.
2. The distinction in principle between the rights of creditors of the principal debtor in the security where the debtor furnishes it to his sureties, and their rights where such security is furnished by one co-surety to the other, examined and explained.
3. When each of two co-sureties gives security to the other, to protect him against liability on account of the principal beyond a fixed sum, no right to resort to the security exists, until obligations on the part of the principal have been met by the surety beyond the sum named.

Bill in equity by a creditor to obtain the benefit of securities held by sureties of the principal debtor.

The appellee, who was complainant below, was the holder, and filed his bill in equity, on behalf of himself and the other holders of bonds, executed and delivered by Theodore D. Wagner and William L. Trenholm, to the amount of $710,000, and paid to creditors in settlement of the liabilities of two insolvent firms, in which they were two of the copartners. These bonds were dated January 1st, 1868. The payment of the principal and interest of each of these bonds was guaranteed, by writing indorsed thereon, by George A. Trenholm and James T. Welsman, who were sureties merely. These sureties entered into a written agreement each with the other, dated May 3d, 1869, in which it was recited that, in becoming parties to said guaranty, they had agreed between themselves that the said George A. Trenholm should be liable for the sum of $400,000, and the said Jas. T. Welsman for the sum of $310,000, of the aggregate amount of the bonds, and no more, and that each would be respectively liable to the other for the full discharge of the said sum and proportion by them respectively undertaken, and

that each would save and keep harmless and indemnify the other from all claim, by reason of the said guaranty, beyond the amount or proportion respectively assumed, as stated; and it was thereby further agreed that, at any time when either of them should so require, each should, by mortgage of real estate, secure to the other more perfect indemnity, because of the said guaranty. Thereupon, and on the same date, each executed to the other a mortgage upon real estate of which they were respectively the owners, the condition of which was that the mortgagor should perform on his part the said agreement of that date. The guarantors, as well as the principal obligors, had become insolvent before the bill was filed.

It also appeared that, of the sum of $573,300 due on account of outstanding bonds, George A. Trenholm, one of the guarantors, had paid $108,454, leaving still due from his estate to make good the proportion assumed by him, $214,532; and that the proportion for which the estate of James T. Welsman, the other guarantor, was liable, was $250,314, of which nothing had been paid. The appellees claimed that the mortgages interchanged between the guarantors inured to their benefit as securities for the payment of the principal debt, and prayed for a foreclosure and sale for that purpose.

This was resisted by the appellants, one of whom, Hampton's administrator, as a judgment creditor of George A. Trenholm and James T. Welsman, claimed a lien on the mortgaged premises; the others, executrixes of James Welsman, deceased, being subsequent mortgagees of the same property.

A decree passed in favor of the complainants, according to the prayer of the bill, from which appeal was taken.

Mr. Theodore G. Barker and *Mr. W. G. De Saussure* for appellants.

Mr. James Lowndes for appellee.—I. All securities given to a surety, whether in terms to pay the debt for which he is surety, or to indemnify and save him harmless from any harm or loss by reason of his suretyship, inure to the benefit of the creditor, who is entitled to apply the same in satisfaction of the

debt. *Maure* v. *Harrison*, 1 Eq. Cas. Ab. 93, is the leading case on this proposition. In this case it was decided that "a bond creditor shall in this court, have the benefit of all counter-bonds or collateral security given by the principal to the surety. This was followed in *Wright* v. *Morley*, 11 Ves. 12. In *Moses* v. *Murgatroyd*, 1 Johnson's Ch. 119, where an assignment had been made as a collateral security, by the maker of notes to secure his indorser, Chancellor Kent held that the holders of the notes were entitled to the benefit of this collateral security given by this principal debtor to his surety. So in *Phillips* v. *Thompson*, 2 Johnson's Ch. 418, it was held that a holder of a note is entitled to the benefit of any collateral security given by the maker to the indorser for his indemnity. *Hayes* v. *Ward*, 4 Johnson's Ch. 123. In *Haggarty* v. *Pitman*, 1 Paige, 298, the chancellor held that where a debtor makes an assignment to his surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt, and the surety has no right to divert it to any other object. *Heath* v. *Hand*, 1 Paige, 329; *Hopewell* v. *Bank of Cumberland*, 10 Leigh, 206. The case of *Curtis* v. *Tyler*, 9 Paige, 432, is very strong. The chancellor held that suit well brought, because where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. See also *Vail* v. *Foster*, 4 Comstock (N. Y.) 312; 1 Jones on Mortgages, § 387; *Hand* v. *Savannah, &c., Railroad Company*, 12 So. Ca. 314; *Young* v. *Montgomery, &c., Railroad Company*, 2 Woods, 606; *North Carolina Railroad Company* v. *Drew*, 3 Woods, 691.—II. The rule applies to all securities by whomsoever given to the surety to indemnify him; and the security given by one co-surety to secure and save harmless his co-surety, comes within the rule, and the creditor is entitled to the benefit of the same. —III. The creditor has the right to proceed directly on the security. *Hopewell* v. *Cumberland Bank*, 10 Leigh, 206; *Curtis* v. *Tyler*, *supra*; *Young* v. *Montgomery, &c., Railroad Company*, *supra*; *Re Jaycox & Green*, 8 Nat. Bank. Reg. 241.

Opinion of the Court.

MR. JUSTICE MATTHEWS delivered the opinion of the court. After reciting the facts in the above language, he continued:

The ground on which the court below proceeded seems to have been that the mortgages given by the co-sureties, each to the other, were in equity securities for the payment of the principal debt, which inured to the benefit of the creditors upon the principle of subrogation.

The application of the principle of subrogation in favor of creditors and of sureties, has undoubtedly been frequent in the courts of equity in England and the United States, and is an ancient and familiar head of their jurisdiction.

It was distinctly stated, as to creditors, in the early case of *Maure* v. *Harrison*, 1 Eq. Ca. Abr. 93, where the whole report is as follows:

"A bond creditor shall, in this court, have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

And the converse of the rule was stated by Sir Wm. Grant, in *Wright* v. *Morley*, 11 Vesey, 12, where he said:

"I conceive that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor."

And it applies equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all.

Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those

equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made.

It follows that the present case cannot be brought within either the terms or the reason of the rule; for, as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to payment of the debt, so no equitable construction can convert it by implication into a security for the creditor.

It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character and by whomsoever given. But this suggestion is founded on a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom, nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a *cestui que trust;* but the question concerns the creation of a

trust, by operation of law, in favor of a creditor, in a case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such a case, neither co-surety nor creditor could, upon any ground of privity in interest, claim to share in the benefit of such a benevolence.

There may be, indeed, cases in which it would not be inequitable for the debtor himself to make specific pledges of his own property, limited to the personal indemnity of a single surety, without benefit of participation or subrogation; as, when the liability of the surety was contingent upon conditions not common to his co-sureties, and which may never become absolute. *Hopewell* v. *Cumberland Bank*, 10 Leigh, 206.

We are referred by counsel to the case of *Curtis* v. *Tyler*, 9 Paige, 432, as an instance in which the rule has been extended to securities in the hands of a surety not derived from the principal debtor. But the fact in that case is otherwise. The question was as to the right of an assignee of a mortgage to the benefit of the guaranty of one Allen to make good any deficiency in the mortgaged property to pay the mortgage debt. This bond had been given to one Murray, a prior holder of the mortgage, who had assigned it to the complainant. The court say, in the opinion, p. 436:

"In the case under consideration, Murray had assigned the bond and mortgage given to him, and had guaranteed the payment thereof to the assignee. He, therefore, stood in the situation of a surety for the mortgagor, when the latter procured the bond of Allen as a collateral security, or as a guaranty of the payment of his original bond and mortgage. The present holders are, therefore, in equity entitled to the benefit of this collateral bond, in the same manner and to the same extent as if it had been given to Murray before he assigned his bond and mortgage, and had been expressly assigned by him to Beers, and by Beers to the complainants."

It thus distinctly appears that the bond of Allen, which was the collateral security in controversy, was procured by and derived from the original mortgagor, the principal debtor. We have been referred to no case which forms an exception to the rule as we have stated it.

But the claim of the complainants fails for another reason. The right of subrogation, on which they rest it, is merely a right to be substituted in place of each of the co-sureties in respect to the other, in order to enforce the mortgages given by them respectively according to their terms. But the conditions of those mortgages have not been broken, and the very fact, which is supposed to confer the right upon the creditor to interpose—the insolvency of the sureties—has rendered it impossible for either to fasten upon the other a breach of the condition of his mortgage. As neither can pay his own proportion of the liability they agreed to divide, neither can claim indemnity against the other for an over-payment. It is entirely clear, therefore, that neither of the sureties could be, under the circumstances as they appear, entitled, as mortgagee, to foreclose the mortgage against the other. The condition of each mortgage was, that the mortgagor would perform his part of the agreement and indemnify the mortgagee against the consequences of a failure to do so. Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. And the amount which the mortgagor could be required to pay, as a condition of redeeming the mortgaged premises, in case of foreclosure, would be, not the amount which the mortgagee, as between himself and the common creditor, was bound to pay on account of the debt, but the amount which, as between himself and his co-surety, the mortgagor, he had paid beyond the proportion which, by the terms of the agreement between them, was the limit of his liability. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other. As to which of them has there been as yet any default? Plainly none as to

either. And yet the complainants assert the right to foreclose them both—a claim that is self-contradictory, for, by the very nature of the arrangement, it is impossible that there should be a default as to both. The fact that one mortgagor had failed to perform his part of the agreement could only be on the supposition that the other had not only fully performed it on his part, but had paid that excess against which his co-surety had agreed to indemnify him. There is, therefore, no right to the subrogation insisted on, because there is nothing to which it can apply.

It results, therefore, that the complainants were not entitled to participate in the benefit of the mortgages in question, nor to share in the proceeds of the sale of the mortgaged premises; but that the same should have been applied to the payment of the other judgment and mortgage liens upon the premises, in the order of their priority. The decree of May 29th, 1879, therefore, being the one from which the appeal was taken, is reversed, and the cause remanded with directions to take such further proceedings therein, not inconsistent with this opinion, as justice and equity require.

Decree reversed.

BASKET *v.* HASSELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Decided April 16th, 1883.

Probate—Statutes—Will.

The attempted transfer of a certificate of deposit on the donor's death-bed, reported in *Basket* v. *Hassell*, 107 U. S. 602, cannot be enforced here as a will of personalty, because such will does not take effect under the statutes of Tennessee until probate.

Motion for a rehearing. The case was decided at October term, 1882, and is reported 107 U. S. 602.

Argument for Appellant.

Mr. P. Phillips and *Mr. W. Hallett Phillips* for the appellant and petitioner.—We ask rehearing on a single point involved in the opinion of the court, viz., when the court say: "As the gift was to take effect only upon the death of the donor, it was not a present executed *donatio causa mortis*, but a testamentary disposition, void for want of compliance with the statute of wills." The gift was executed in the State of Tennessee. In Tennessee there is no statutory provision governing such a testamentary disposition—the principles of the common law being there in force. Rev. Stat. Tenn. 1871, § 2162, *n*; *Suggett* v. *Kitchell*, 6 Yerger, 425. "The English law (says Kent) is very loose as to the nature of the instrument disposing of personal property; and marriage articles, promissory notes, assignments of bonds, letters, &c., &c., although not intended as wills, yet if they cannot operate in one way, may be admitted to probate as wills of personal property—provided the intention of the deceased be clear that the instrument should operate after his death." 4 Kent, 518. This is recognized to be the law of Tennessee in the case of *McLean* v. *McLean*, citing the declaration of Lord Hardwicke: "There is nothing which requires so little solemnity as a will of personal estate, for there is scarcely any paper writing which the courts will not enforce as such." 6 Humph. 452; *Watkins* v. *Dean*, 10 Yerg. 321. "It is not to be doubted that a will of personal estate, if written in the testator's own hand, though it has neither his name or seal to it, *nor witnesses present at its publication*, is effectual, provided the handwriting can be sufficiently proved." 1 Roberts on Wills (1 Am. Ed.), p. 148; 2 Black. Com. 501, cited in *Suggett* v. *Kitchell*, 6 Yerg., at p. 428. When, therefore, it is said that this disposition was void for want of compliance with the "*statute of wills*," it is evident that the court fell into an error. If we have shown that there was here a good testamentary disposition, then the decree must be reversed. Less than a month after the decease of Chaney, the bill is filed for the delivery to complainant of the certificate. This is resisted by defendant, by showing all the circumstances accompanying its indorsement and delivery. The court held there was neither a *donatio causa mortis* nor a valid testamentary

disposition, and decreed accordingly that the money should be paid over to the complainant, Hassell. The case is the same as it would be if the sole question presented was as to the testamentary disposition. The indorsement was urged by the complainant to constitute a testamentary paper. There was no question as to probate, even if the defendant was under any obligation to produce one. *Tarver* v. *Tarver*, 9 Pet. 174. Were this the case of a complainant seeking relief on a will not probated, it would have been error in the court to have dismissed his bill absolutely. *Armstrong* v. *Lear*, 12 Wheat. 169.

Mr. Justice Matthews delivered the opinion of the court.

It is urged that the indorsement and delivery of the certificate of deposit, if void as a gift *mortis causa*, is nevertheless good as a will of personalty under the laws of Tennessee, and, passing the title as such, entitled the appellant to a decree for the payment of the money.

But the conclusion is not justified by the assumption, for a will of personalty in Tennessee does not take effect until probate (Statutes of Tennessee, 1871, § 2169; *Suggett* v. *Kitchell*, 6 Yerger, 425); and, until probate and the appointment of an executor or an administrator *cum testamento annexo*, the title to the fund passes to the administrator appointed previously, as in case of intestacy, to whom the decree in this case awarded it.

The petition is therefore denied.

ROUNDTREE *v.* SMITH & Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Decided April 16th, 1883.

Evidence.

When the question at issue is whether certain contracts for the sale and purchase of merchandise were gambling, and the defendant who impeaches

them in his pleadings, says as a witness testifying about them, "I could not say that I had any understanding on the subject of the nature and character of the board of trade deals, whether the property was to be actually delivered or whether it was be settled for," the court rightly instructed the jury that there was no evidence in regard to this issue which they could consider.

Action to recover moneys paid out and expended by the plaintiffs below to the use of the defendant below. The second count in the complaint set forth:

"That the said plaintiffs during the time hereinafter mentioned were and are copartners in business in the city of Chicago and State of Illinois under the name and style of Smith & Lightner, and engaged in purchasing and vending grain, pork and lard, and transacting a general commission business as commission merchants.

"That on or about the second day of February, 1879, at the city of Chicago aforesaid, said defendant employed said plaintiffs, as such copartners as aforesaid, to purchase large quantities of grain of various kinds and pork and lard for him and to make thereon certain advances of money to and for the use and benefit of said defendant, and also to make sales of said grain, pork and lard for him; and that in consideration of such purchases, and making such advances by said plaintiffs to and for the use and benefit of said defendant, and for making such sales, he agreed to pay and allow them certain reasonable commissions by way of compensation on all such purchases so made by them for him, and on all sales so made by them for him as aforesaid.

"That under and pursuant to such employment they, said plaintiffs, in good faith and in the usual course of business, purchased for said defendant, at divers times between the first day of February, 1879, and the twenty-ninth day of April, 1879, large quantities of wheat, pork, lard, oats and corn, to wit, sixteen thousand seven hundred fifty barrels pork, twenty-two hundred fifty tierces of lard, forty thousand bushels of wheat, twenty thousand bushels of oats, and fifty thousand bushels of corn, and made advances thereon for said defendant, which advances amounted in the aggregate to the sum of nine thousand five hundred six dollars and twenty-five cents, and that during the time aforesaid they sold,

under and pursuant to the directions and authority of said defendant, all of said lard, pork, wheat, oats and corn for said defendant.

"That their services in the purchase of said pork, lard, wheat, oats and corn, and making sales thereof, and in making such advances as aforesaid, were reasonably worth the sum of twelve hundred forty-three dollars and seventy-five cents.

"That during the time aforesaid the defendant paid, to apply thereon, and was credited by said plaintiffs with divers sums of money, amounting in the aggregate to the sum of five thousand three hundred thirty-seven dollars and fifty cents.

"That all of said business transactions were concluded by the sale of the last part of said property on the 29th day of April, 1879; that on that day, after making such last sale and giving the defendant the benefit of all the credits to which he was entitled, there remained due and owing to said plaintiffs from said defendant for such advances so made as aforesaid, and for their commissions on such purchases and sales as aforesaid, the sum of five thousand four hundred twelve dollars and fifty cents, which now remains due and unpaid."

The answer admitted the partnership and the employment of the firm, and said that the defendant had deposited large sums in their hands for the purchase of options upon representations made by the firm, and further said—

"that certain articles, that is to say, wheat, oats, corn, lard and pork, would probably and almost certainly bear a higher price in the market within a short time than they then bore in such market. That by making contracts agreeing in form to purchase such articles for future delivery at the end of said time above named *he would*, without receiving or handling, or actually purchasing or paying for the said articles, or any of them, realize large profits from the difference between the price said articles then bore in the market and the price they would probably bear at the end of the time aforesaid; that it would not be necessary, nor was it expected, or in any way understood, that either this defendant or the plaintiffs as his brokers should ever actually see, touch, handle, pay for, or own, receive, or possess any of the said articles. That the large sums of money placed by this defendant in the hands of said plaintiffs should be used to

keep good the margins, so called, upon the said articles purchased; that is to say, said plaintiffs were to purchase, in their own names, the said 'options,' but the same were to be so purchased and held by them for the use and benefit of this defendant. If the said articles should rise and increase in value the said profits should be his, and if they should decrease in value the loss would fall on him.

"That said plaintiffs should so purchase such articles for such future delivery to a nominal amount of many times the money so placed by this defendant in their hands. The said sum of money so placed by this defendant in the hands of said plaintiffs being equal to about per cent. of the whole nominal value of the said articles so to be bought for future delivery as aforesaid, and the said moneys were to be held by said plaintiffs to protect them from loss in case of a depreciation in value of said articles, and the same was adjudged and deemed by them sufficient for that purpose. That afterwards and during the month of February, 1879, this defendant placed in the hands of said plaintiffs certain other large sums of money with which to purchase other options, in all amounting, including said moneys so first placed in their hands as aforesaid, to the sum of about three thousand one hundred and fifty dollars. That all of said moneys were paid by this defendant to them, to be used, and were in fact used as he is informed, solely for the purpose of making and keeping good the 'margins' so called, to protect said plaintiffs from loss in case of depreciation in the market value of such articles so to be bought by them on his account as aforesaid. That this defendant has no knowledge or information sufficient to form a belief as to whether the statement in said complaint contained of articles bought by said plaintiffs for him is a true statement of the amount of such articles actually purchased or not, and he therefore denies the same and asks that said plaintiffs may be required to make proofs thereof, and of the prices agreed to be paid therefor, and the prices for which the same was sold if it was ever sold. That on the 11th day of March, 1879, he gave said plaintiffs notice that he had no more money to put up or pay over for margins, and that he would not pay or advance another dollar, or invest, or be, or become liable for another dollar in or about the transactions or any of them. That as he is informed and believes, all of the articles bought or agreed to be bought or bargained for by said plaintiffs,

for him or on his account, were bought and carried in the names of said plaintiffs and not in the name of this defendant; that it was within their power at any time to close out and end the said transactions."

The answer further charged that if the firm had closed up the transactions, there would have been no loss, and it denied any liability. It further charged, as to both counts, that the transactions were gambling and void.

At the trial the parties were the principal witnesses, and sundry questions upon the evidence arose, which are explained in the opinion of the court, so far as they are important. The jury returned the following general and special verdict:

"We, the jury sworn and empanelled to try this case, find for the plaintiffs, and assess their damages at the sum of five thousand six hundred and fourteen and $\frac{46}{100}$ dollars. And we further find, in answer to certain special questions submitted to us by the court, as follows:

"First. Did the defendant notify the plaintiffs, or either of them, on or about March 11th, 1879, that he would not be responsible for any money beyond the amount of money they then had in their hands belonging to him? Answer. Yes.

"Second. If he did so notify them, or either of them, state, if you are able, whether the amount of money he then had in their hands was sufficient to cover all losses he had then sustained? Answer. We are unable to state.

"Third. If you find that the defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between the plaintiffs and defendant on or about March 11th, 1879, that the defendant should not be held liable on the contracts made on his behalf by the plaintiffs beyond the amount of money then already placed by the defendant in the plaintiffs' hands? Answer. No.

"Fourth. If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant, by his subsequent acts, declarations, directions, or conduct, waive the same and become liable for further losses incurred over and above the money so placed in plaintiffs' hands? Answer. Yes."

Opinion of the Court.

The case was brought here on a writ of error. The material assignments of error were the third and fourth.

"Third. Said court further erred in withdrawing from the said jury and refusing to allow said jury to consider the defence set up by said defendant in the answer herein, that the contracts upon which the said action was based were gaming contracts and illegal and void.

"Fourth. The court further erred in holding and deciding that there was no evidence in said cause to impeach the legality of said contracts, and the said contracts were valid and binding."

Mr. W. E. Carter, for plaintiff in error.

Mr. C. B. Lawrence, and *Mr. Francis H. Kales* for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

Smith and Lightner, plaintiffs in the circuit court, recovered against Roundtree, plaintiff in error, a judgment for $5,614.46 for services rendered and money advanced by them, as brokers and members of the Board of Trade of Chicago, for Roundtree at his request.

The case was tried before a jury, the parties being the principal, if not the only witnesses, and their testimony, with some correspondence by letters and telegrams, was all the evidence.

The record presents but two questions necessary to be decided.

It was alleged by the defendant that on the 11th of March, 1879, he had notified the plaintiffs in writing that thereafter he would advance them no more margins, and would not be responsible for any losses on contracts made by them in his name. To which their answer was a denial of such instruction, and an allegation that, if it had been given, it was subsequently withdrawn and waived by other instructions and actions of defendant.

Specific questions on this subject were submitted by the court to the jury, under the practice allowed by the Wisconsin statute.

Some objection is made to the form of some of these questions, which we do not think necessary to consider here, for

the fourth question and the answer of the jury to it render the other questions and answers immaterial. That question and answer are as follows:

"Fourth. If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant, by his subsequent acts, declarations, directions, or conduct, waive the same and become liable for further losses incurred over and above the money so placed in plaintiffs' hands? Answer. Yes."

It was undoubtedly competent for defendant to withdraw, waive, or countermand his former order on this subject, and this could be done verbally or by actions, and need not be in writing, and the fact found by the jury that he did so, renders his former notice wholly immaterial to the issue.

The counsel for defendant resisted recovery against him, on the ground that the sales and purchases made for him by plaintiffs were gambling contracts on the prices of the various articles of produce to which they related, never designed to be actually performed by delivery, but the damages were to be adjusted and payments made and accepted, according to the difference between the contract price and the market price at the date fixed for delivery. And on this subject he asked certain instructions of the court, which were refused. The court also charged the jury that there was no evidence on this subject which they could consider. An exception was taken to this ruling, and a bill of exception purports to embody all the testimony.

The evidence of the defendant on this point was that he gave the instructions to buy. He says: "I could not say that I had any understanding on the subject of the nature and character of the board of trade deals, whether the property was to be actually delivered or whether it was to be settled for."

It is obvious, therefore, that so far as plaintiff, one of the parties to all these contracts, which he now impeaches, is concerned, they were not gambling contracts, and that he had no

understanding or agreement, expressed or implied, that they were bets upon the future price of the article.

The other party to these contracts, or rather parties (for the contracts were numerous), are not produced, nor their testimony given, and there is no direct evidence that any of them either bought or sold with any other purpose than to perform the agreement as its terms bound them.

The plaintiffs, in answer to questions on this subject, say that in no instance had they any agreement with the parties to the contracts made by them for Mr. Roundtree, that performance was not expected or intended, but a mere adjustment of differences, and they say that actual delivery of the article was made in some of them. So that as to these contracts, in regard to which the services were rendered and money advanced by plaintiff for defendant, there is no evidence whatever that they were not *bona fide* contracts, enforceable between the parties, and made to be performed.

Evidence was given that a very large proportion of all the contracts made for the sale of produce at the board of trade of Chicago, were settled by payment of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is said to be so large as to justify the inference that it was so in these cases.

But since the plaintiff testifies that he had no such understanding, since nothing is proved of the intention of the other parties, and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law, or to justify a jury in making such a presumption.

It is also to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request; and though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it if proved, they

are certainly not in the same position as a party sued for the enforcement of the original agreement.

Without pursuing the subject further, we are of opinion that there was no evidence on this subject which ought to have been submitted to the jury, and the court was right in withdrawing it from their consideration.

We see no error in the record.

The judgment of the circuit court is affirmed.

LITTLE MIAMI & COLUMBUS & XENIA RAILROAD COMPANY *v.* UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Decided April 16th, 1883.

Income Tax—Internal Revenue—Practice—Railroads.

The provisions in the act of June 30th, 1864, 13 Stat. 284, ch. 173, § 122 ; and in the act of June 13th, 1866, 14 Stat. 139, ch. 184, § 9, that the profits of a railroad company carried to the account of any fund, or used for construction shall be subject to and pay a tax, do not apply to earnings by a railroad company which are used for construction or carried to a fund, unless, on a rest made and balance struck for the period for which the tax is demanded, the operations of the company show a profit. In this respect the rule in the statute differs from that which it lays down in respect to earnings used to pay interest or dividends, which were taxable whether there were actual profits or not.

In a suit to recover taxes alleged to be in arrear on the profits of a railroad company carried to a fund or expended in construction, the burden of proof is on the United States to show that the company earned such profits, and that losses shown by the company were not suffered during the period.

When the law is settled in the court above, but the findings show uncertainty as to the facts on which judgment is to be based, the cause should be remanded for such further proceedings to be had in the inferior court as the justice of the case may require.

Action to recover five per cent. tax on profits alleged to have been carried to a fund, or expended in construction. All the

material facts necessary to the comprehension of the controversy are stated in the opinion of the court.

Mr. William M. Ramsey for plaintiff in error.
Mr. Solicitor-General for the United States.

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

This was a suit begun by the United States on the 29th of March, 1875, to recover of the Little Miami and Columbus and Xenia Railroad Company a tax of five per cent. on alleged profits of the company "carried to the account of any fund or used in construction," provided for by the act of June 30th, 1864, c. 173, sec. 122, 13 Stat. 284, amended by the act of July 13th, 1866, c. 184, 14 Stat. 139. A jury was waived and the trial had by the court. The case comes here on a finding of facts. From this finding it appears "that during the period covered by the petition, viz., from the 1st day of July, 1864, to the 30th day of November, 1869, inclusive, the defendant, in good faith, regularly made returns of earnings, profits, income, and gains, and of profits carried to the account of any fund, or used for construction, arising or accruing to it during said period, intended and believed by it to embrace all such profits, incomes and gains, and all such profits carried to the account of any fund, or used for construction, which by law it was bound to return; which returns were received and accepted, and for the amount of which assessments from time to time were made of the taxes payable thereon, which taxes were regularly paid by it to the officer lawfully authorized by law to collect the same." In addition to this it also appears "that over and above the amount so returned, on which taxes were paid as aforesaid, the defendant did in fact make additional earnings, which by it were carried to the account of some fund, or used for construction during said period, amounting in all to the sum of $168,707.22, on which no tax has been paid."

The finding also shows that during the year 1869 the defendant carried to the debit of profit and loss on its books, various items amounting in all to $184,395.06. In this way the books show no profits between July 1st, 1864, and November 30th,

1869, beyond the amount on which taxes were paid in the regular course of business. Of the sum so charged up, one item of $51,155.44 was for loss and depreciation on book accounts and other choses in action, acquired by the company prior to July 1st, 1864, and which had been standing on the books until 1869 at their par value; another item of $22,000 was for the depreciation in the value of bonds purchased after July 1st, 1864; another item of $106,014.62 was for the depreciation in the value of what was known as the "street connection track," and another item for $5,225 was for losses on a purchase in 1867 of shares of capital stock in a cotton-press company.

Upon these facts, so found, the company claimed that, in ascertaining the amount of profits liable to taxation, there should be deducted from the earnings during the period for which the tax was claimed these several items of loss and depreciation, but the court ruled, as a matter of law, "that for the purpose of taxation the defendant is not entitled by law to make the deduction as claimed," and gave judgment for five per cent. on the whole sum of $168,707.22.

In our opinion there was error in this ruling. The tax in question is not upon *earnings* "carried to the account of any fund or used for construction," but upon *profits*. Earnings used to pay interest or dividends are taxable, whether actual profits or not, but earnings used for construction, or carried to the account of a fund, are not to be taxed, unless they represent profits of the company in its business as a whole, that is to say, the excess of the aggregate of gains from all sources, over the aggregate of losses. The law evidently contemplated an annual statement of accounts, and in this way an annual striking of balances between gains and losses. When, in such statements, it appeared that a part of the excess of gains over losses had been used for construction or added to some fund, then a tax was to be paid on what had been so used or appropriated. This was part of the system adopted for the taxation of the "profits, income, or gains" of railroad corporations, which, as was said in *Railroad Company* v. *Collector*, 100 U. S. 595, it was the object of this statute to provide. A tax was

put on dividends, interest paid in the ordinary way, and *profits* used for construction or carried to some fund. This was a classification of the income of the corporation for the purposes of taxation.

In the present case there has been no assessment of a tax, but the United States have sued to recover such sum as, upon an investigation of the accounts of the company, it shall appear ought to have been paid. The burden of proof is upon the government. No more can be recovered than is shown to be due. In presenting the evidence no attempt seems to have been made by the United States to state annual accounts and ascertain the amount to be paid on that basis. The court has found that between July 1st, 1864, and November 30th, 1869, earnings to the amount of $168,707.22 had been used for construction or carried to the account of some fund, but it has also found that between the same dates the company lost $22,000 by depreciation in its investments in bonds, and $5,225 by depreciation in the stock of a cotton-press company. In the view we take of the law, these sums should have been deducted from the earnings as ascertained before fixing the amount of profits on which the tax was to be paid. It is not stated with certainty in the finding at what dates the losses actually occurred which are represented by the items of $51,155.44, depreciation in the value of book accounts and choses in action, and $106,014.62, depreciation in the value of the street connection track. For this reason we are unable to decide whether these losses, or any part of them, should be deducted. As the omission to make the finding sufficiently specific in this particular undoubtedly arose from the fact that the court ruled as a matter of law that no deductions could be made on account of losses of this character, we will remand the cause, so that further inquiry may be had on that point. This we have authority to do under section 701 of the Revised Statutes, which allows a cause to be remanded for "such further proceedings to be had in the inferior court as the justice of the case may require."

The judgment of the circuit court is reversed and the cause remanded, with instructions to deduct from the amount of earnings, as ascertained upon the former trial, the items of

$22,000, depreciation in the value of bonds, and $5,225, depreciation in the value of cotton-press stock, together with such other sums included in the items of $51,155.44, depreciation in book accounts and choses in action, and $106,014.62, depreciation in value of the street connection track, as, upon further hearing, shall be found to represent losses accruing to the company between July 1st, 1864, and November 30th, 1869, and to render judgment only for such an amount of tax as shall appear to be due upon that basis.

WRIGHT & Others *v.* UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Decided April 16th, 1883.

Internal Revenue—Statutes.

When an indorsement is made upon a distiller's bond, "We hereby accept the within survey and consider the same as binding upon us on and after this date," which is signed by the obligees in the bond, the parties thereby waive the delivery of a copy of the survey, and the difference between the capacity of the still and the returns of production may be recovered in a suit on the bond.

Suit upon a distiller's bond to recover internal revenue tax.

Mr. R. McP. Smith, for plaintiff in error.
Mr. Assistant Attorney-General Maury for United States.

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

This was an action on a distiller's bond, to recover the difference between taxes assessed according to the producing capacity of the distillery and those calculated on the reports of production. The defence was that a copy of the official survey had not been served on the distillers. Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector and a written report thereof in triplicate, "of which one copy shall be delivered to the distiller, one copy shall be re-

tained by the collector, and one copy shall be transmitted to the commissioner of internal revenue, and the survey shall take effect upon the delivery of such copy to the distiller." In *Peabody* v. *Stark*, 16 Wall. 240, it was held, following the rulings of the commissioner of internal revenue, that the distiller was not liable for the capacity tax until a copy of the survey had been delivered to him.

In the present case it appeared that no copy of the survey had ever been delivered to the distillers, but when the bond sued on was executed the distillers signed the following indorsement, written on the report of the survey which had been made: "We hereby accept the within survey, and consider the same as binding upon us on and after this date, September 12th, 1873. John B. Wright. Thomas Tucker." The court below decided that this indorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the act is that "the survey shall take effect upon the delivery of such copy to the distiller." This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller in this case accepted the survey and stipulated that it was binding on him, he in effect said that he would consider the survey as having effect without the formal delivery of a copy. This he might do.

The judgment is affirmed.

LEWIS *v.* CITY OF SHREVEPORT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided April 16th, 1883.

Municipal Bonds—Municipal Corporations—Ratification.

1. *Ottawa* v. *Cary*, *ante*, 110, reaffirmed.
2. Unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad corporations, bonds issued for that pur-

Statement of Facts.

pose, and bearing evidence of the purpose on their face, are void, even in the hands of *bona fide* holders.

3. Corporate ratification, without authority from the legislature, cannot make a municipal bond valid, which was void when issued for want of legislative power to make it.

Action to recover interest due on municipal bonds issued in aid of a railway. Defence that the charter of the municipality and the laws affecting it conferred no power to issue such bonds, and that the bonds were issued without authority and are void. The charter of Shreveport contained no express authority for the issue of such bonds. The parties agreed to the facts on the hearing below. The following are the most material parts of that agreement:

"2. That on the 26th of June, 1872, an ordinance was introduced and passed by the city council of Shreveport, authorizing purchase of real estate by the city to be donated to the Texas & Pacific Railway Company, upon which depots and machine shops were to be permanently established and maintained by said company, and providing that for purchase of said property 260 forty-year $1,000.00 bonds should be issued and sold on market, said bonds bearing interest at rate of 8 % per annum, payable semi-annually, with coupons attached; providing further that said ordinance should be submitted to the vote of the people for their ratification and approval, and it is admitted that said ordinance was never considered by said council on any other day prior to said 26th June, 1872, and that it further provided for levying a tax to pay interest and create a sinking fund for redemption of bonds.

"3. That, in pursuance of said ordinance, an election was held in said city on July 1st, 1872, and said ordinance was then and there ratified and approved by the voters, 705 votes being cast for said ordinance and 3 against it.

"4. That in pursuance of said ordinance and said vote ratifying same, the said city issued 260 bonds, each for $1,000, payable at 40 years, bearing interest at 8 %, payable semi-annually, with interest coupons attached, said bonds bearing date July 1st, 1872, a copy of which said bonds is attached to and made part of plaintiff's petition, a copy of coupons attached to said bonds being set out in and made a part of plaintiff's petition.

Argument for Plaintiff in Error.

"17. That plaintiff acquired ninety of said bonds with coupons attached, in open market, being bonds to which the interest coupons sued on belong, paying therefor 85 cents on the dollar, and that said plaintiff is *bona fide* holder of said bonds and of interest coupons sued on for value.

"18. It is admitted that the Texas & Pacific Railway Company has not now and never had any charter from the State of Louisiana, or any right arising from any statute of that State passed in favor of said company, but that said company held a lease from the Vicksburg, Shreveport & Texas R. R. Co., not yet expired, of the railroad from Shreveport to Texas line.

"19. It is admitted that the ordinance of June 26th, 1872, is the only ordinance of said city authorizing the issue of said 260 forty-year bonds."

The court below held that the bonds were issued without lawful authority, and were null and void. The plaintiff below excepted, and brought the case on error here.

Mr. William M. Grant for plaintiff in error.—I. It was the general policy of the State of Louisiana to allow municipal corporations to purchase, hold, and dispose of real property to the same extent as individuals, without express grants. *Edey* v. *Shreveport*, 26 La. Ann. 636. This case shows that the discretion of the city council extended even to a donation to the Texas & Pacific Railroad Company, a foreign corporation. —II. Where a corporation is authorized to do any act and no mode is pointed out for its exercise, it may adopt any which in its judgment will best secure the purpose contemplated. *Southern Life Ins. & Trust Company* v. *Lanier*, 5 Fla. 110; *City of Galena* v. *Corwith*, 48 Ill. 423; *State Board* v. *Citizens, &c., Railway Company*, 47 Ind. 407. The power in a municipal corporation to purchase carries with it power to incur indebtedness for the purchase money, and to issue its negotiable obligations promising to pay the indebtedness at a future day. *The People* v. *Brennan*, 39 Barb. 522–45; 1 Dillon on Municipal Corporations, 3d ed., § 117, p. 144; Daniel on Negotiable Instruments, vol. 2, p. 461; *Mills* v. *Gleason*, 11 Wis. 470; *Bank* v. *Chillicothe*, 7 Ohio, 354; *State ex rel. Dean* v. *Madi-*

son, 7 Wis. 688; *Clark* v. *School District*, 3 R. I. 199; *Ketchum* v. *Buffalo*, 14 N. Y. 356, holding that municipal corporations generally have the power to issue bonds and notes without express authority. See also *Commonwealth* v. *Pittsburg*, 41 Penn. St. 278; *Douglas* v. *Virginia City*, 5 Nevada, 147; *Moss* v. *Harpeth Academy*, 7 Heisk. 283; *Adams* v. *Memphis, &c., Railroad Company*, 2 Cold. 645; *The Evansville, &c., Railroad Company* v. *Evansville*, 15 Ind. 395; *City of Galena* v. *Corwith*, 48 Ill. 423; *Miller* v. *The Board*, 66 Ind. 162.—III. When the power of taxation is given merely as an incident to enable the corporation to carry out the usual purposes of its organization, and it is authorized to do other and independent things which require the use of money, it may, when not expressly prohibited, borrow money and give evidences of indebtedness therefor. *Williamsport* v. *Commonwealth*, 84 Penn. St. 487; *Mills* v. *Gleason*, 11 Wis. 470; *Bank* v. *Chillicothe*, 7 Ohio, 354; *Board* v. *Day*, 19 Ind. 450; *Lynde* v. *The County*, 16 Wall. 6; *Police Jury* v. *Britton*, 15 Wall. 566. Power to borrow money is almost universally conceded to carry, by implication, authority to a municipal corporation to issue bonds and other securities. *Commonwealth* v. *Pittsburg*, 34 Penn. St. 496; *The Evansville, &c., Railroad Company* v. *Evansville*, 15 Ind. 395; *Middletown* v. *Alleghany Co.*, 37 Penn. St. 237; *Reinboth* v. *Pittsburg*, 41 Penn. St. 278; *Seybert* v. *Pittsburg*, 1 Wall. 272; *Rogers* v. *Burlington*, 3 Wall. 654; *De Voss* v. *Richmond*, 18 Gratt. (Va.) 338; *City of Galena* v. *Corwith*, 48 Ill. 423; *Williamsport* v. *Commonwealth*, 84 Penn. St. 487; *Kelly* v. *Mayor*, 4 Hill, 263; *Police Jury* v. *Britton*, 15 Wall. 572; *Milner's Administrators* v. *Pensacola*, 2 Woods, 632; *Mayor* v. *Inman*, 57 Ga. 370; *Tucker* v. *Raleigh*, 75 N. C. 267; *Mercer Co.* v. *Hacket*, 1 Wall. 83; *Meyer* v. *Muscatine*, 1 Wall. 384; *Lynde* v. *The County*, 16 Wall. 6.—IV. The charter of the city authorized it to build structures of public necessity and utility. The money given to the company was to enable it to erect depot buildings and machine shops, which are of public utility. The purpose was a lawful one, and as the bonds recite it on their face the city is estopped from showing that they were not issued for

that purpose. *Hacket* v. *Ottawa*, 99 U. S. 86; *Ottawa* v. *National Bank*, 105 U. S. 342.—V. There was no prohibition against granting this aid to a foreign corporation. The result was the same to it as if the railroad company had been a Louisiana company, and the same rule of law applies as though it had been. *Railroad Company* v. *Otoe County*, 16 Wall. 667; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *Sharpless* v. *The Mayor*, 21 Penn. 147; *Quincy, &c., Railroad Company* v. *Morris*, 84 Ill. 410.—VI. In any event the city has acted upon it, and obtained the money, and its action has been ratified by the voters.

Mr. B. F. Jonus for defendant in error.

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

This was a suit brought to recover the amount of certain coupons cut from bonds issued by the city of Shreveport, Louisiana, which appear on their face to have been issued "in aid of the Texas & Pacific Railroad Company." In point of fact, the bonds were used to buy lands to be donated to the railroad company as a site for depots and machine shops.

We have had occasion, at this term, in the case of *City of Ottawa* v. *Cary* (*ante*, 110), to repeat and apply a rule which has always been recognized and adhered to in this court, to the effect, that unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of the municipality, issued for such a purpose, and bearing evidence of the purpose on their face, are void even in the hands of *bona fide* holders, and this whether the people voted the aid or not. Every purchaser of such a bond is chargeable in law with notice of the want of power in the municipal authorities to bind the body politic in that way. This principle is elementary.

In the present case it is not pretended that any such power was expressly granted to the city of Shreveport, and we find no provision of the charter from which anything of the kind can be implied. The authority to purchase and hold property of all kinds relates only to such property as is needed for mu-

nicipal purposes. It is a matter of no importance that the city employed agents to sell the bonds, or that its law officer gave an opinion in favor of their validity, or that they have been recognized in official statements as binding obligations, or that taxes have been levied to pay either principal or interest. Corporate ratification, without authority from the legislature, cannot make a municipal bond valid which was void when issued for want of legislative power to make it. These bonds carried on their face full notice to every purchaser that they were issued for a purpose not authorized by law, that is to say, to aid a railroad corporation. This whole subject was so fully considered in *City of Ottawa* v. *Cary*, *supra*, 110, that we deem it unnecessary to discuss the subject further now.

In *Edey* v. *Shreveport*, 26 La. Ann. 636, which is relied upon as establishing the power of the city to issue the bonds, the question was whether the vendor of the land, which had been only partly paid for out of the proceeds of the bonds, could enforce his mortgage and vendor's privilege on the land to recover the balance of purchase money due him, and it was decided that he could. This is no more than was in effect held by this court at the present term in *City of Parkersburg* v. *Brown*, 106 U. S. 487. All that was said by the Supreme Court of Louisiana must be construed in connection with the question then up for decision. There is not a word about the validity of the outstanding bonds, nor of the right of the holders to recover upon them in a suit against the city. The whole effect of the decision is that the city could not keep the land as against the vendor without paying for it. That the court would have held the bonds void, if it had been called on to decide that question, is shown beyond all doubt in the case of *Wilson* v. *Shreveport*, 29 La. Ann. 673, where the power to issue bonds, apparently of a much less objectionable character, was expressly denied.

The judgment is affirmed.

Statement of Facts.

FARLOW, Receiver, *v.* KELLY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Decided April 16th, 1883.

Common Carrier—Negligence, contributory.

1. It is culpable negligence in the managers of a railroad, if their servants permit a car to stand upon a side track for five or ten minutes before the arrival of a train upon the main track, and to remain there until the arrival of that train in such a position that the incoming train must strike it; and it entails liability upon the company as a common carrier for accidents happening in consequence.
2. A passenger who rests his elbow on the sill of an open window in a car, but without protruding it beyond the car, and whose arm is then thrown by the force of a collision outside of the car, and is injured in the collision, does not contribute to the cause of the injury by his own negligence.

Proceedings against a receiver of a railroad corporation to recover damages against him as common carrier for injuries suffered in a collision.

While the Cincinnati, Sandusky and Cleveland Railroad was being operated by John S. Farlow, a receiver appointed by the Circuit Court of the United States for the Northern District of Ohio, in a suit for the foreclosure of a mortgage on the road, Sylvanus Kelly, a passenger on one of the trains, was injured by the collision of a car in which he was riding with a freight car standing on a side track. Kelly thereupon petitioned the circuit court for leave to sue the receiver in the Court of Common Pleas of Sandusky County, Ohio, to recover for the injuries he had sustained. This was denied. He then asked leave to file his complaint against the receiver in the suit for foreclosure. This was granted, and the receiver ordered to make his defence. Kelly thereupon filed in the circuit court his complaint, in which he set forth his claim growing out of the alleged carelessness and neglect of the receiver and his agents, and prayed that an inquiry might be had as to the amount of his damages, and the receiver ordered to pay the same. The receiver answered, denying that the injury com-

plained of was occasioned by his negligence or that of his servants or agents, and averring that it was "caused by the negligence and want of care by the said Sylvanus Kelly in improperly exposing himself to injury while riding on said car, by so placing his arm in an open window of said car that it projected outside thereof, and thereby came in contact with said standing car." After the issue was thus made up, the matter was referred to a special master, on the application of Kelly, "to hear the matters set forth in said complaint, answer and replication, and such evidence as the parties may offer relevant and pertinent to the issues therein made, and determine and report whether, under the law, the said receiver is liable for the injuries complained of by the said Sylvanus Kelly; and, if so, the amount of compensation which said Sylvanus Kelly shall be entitled to receive for the same; . . . and that he report his findings, together with the evidence and costs of his proceedings, to this court as soon as possible, at the January term thereof."

Under this order the master heard the case and reported in substance the following facts: Bellefontaine is a station on the line of the road at which passenger trains stop and pass each other. Immediately south of the town is a side track, of about one thousand feet in length, with a switch at each end uniting it with the main track. This side track has a descending grade from north to south of about four feet in the whole distance of one thousand. On the morning of the 23d of August, 1877, three freight cars were standing on the side track, two of them near the north switch, and one about one hundred and thirty-five feet from the south switch. Kelly was a passenger on a passenger train going north on the road that day, and had a seat about midway of the car, near an open window. Having a severe headache, shortly before the train reached the south end of the side track, he placed his right elbow on the sill or base of the open window and rested his head on his right hand. The train on which he rode was to pass another going south at Bellefontaine about noon of the day. The train going south arrived at the north end of the side track about twenty minutes before that on which Kelly was riding reached the south end.

The train from the north was switched from the main track on to the side track at the north end, and to make room for itself pushed the two freight cars southward, putting them in motion toward the south end of the side track on the down grade. The brakes on the freight cars were not attended to, and the impulse given them by the incoming train caused them to move the single car standing near the south end of the side track to a point so near the main track that the train from the south could not pass without contact. This freight car remained in that position from five to ten minutes before the train from the south arrived. While the freight car stood in this dangerous proximity to the main track, the train from the south came up at more than ordinary speed, and the forward right-hand corner of the coach in which Kelly was riding struck the freight car and jarred his elbow from the window sill outward over the window sill and outside of the car, bringing his forearm in contact with the freight car, while his arm above the elbow was pressed against the side of the window. The train in which Kelly was riding being in motion, his arm was crushed and broken below and above the elbow in such a manner as to require amputation near the shoulder.

As conclusions of law from these facts, the master found that there was negligence in the management of the railroad, in allowing the freight car to stand so near the main track when the train from the south came up, and in not keeping the train from the south under control as it approached the station. He also found that Kelly was not in fault under the circumstances for resting his elbow on the sill of the open window.

To this report exceptions were filed by the receiver: 1, because the master found as a fact that the elbow of Kelly rested on the sill or base of the window until it was thrown outside by the force of the collision; and, 2, because he found as a conclusion of law that it was not an act of negligence for Kelly to ride with his elbow on the sill of the open window.

The court overruled the exceptions and ordered the receiver to pay Kelly for his damages the sum of $5,001. From this order an appeal was taken.

Opinion of the Court.

Mr. S. A. Bowman for the appellant.—The cases upon which the master based his decision are clearly against the weight of authority, and against the rule, well established in Ohio, on the doctrine of contributory negligence. In *Todd* v. *Old Colony, &c., Railroad Company*, 3 Allen, 208, the court say, in a similar case: "His own testimony shows that it was resting on the sill of the window of the car, and that a portion of it, when the injury was inflicted, was beyond the sash, so as to be outside of the external surface of the window. Nor was there any doubt or dispute that if the plaintiff had kept himself entirely within the limits of that part of the car intended for, and appropriated to passengers, the accident which occasioned the injury would not have happened. It was the plaintiff's own act which contributed to the injury." This case is followed and sustained by the following authorities: *Pittsburg, etc., Railroad Company* v. *McClurg*, 56 Penn. St. 294; *Louisville, &c., Railroad Company* v. *Sickings*, 5 Bush, 1; *Pittsburg, &c., Railroad Company* v. *Andrews*, 39 Md. 329; *Geisleman* v. *Scott*, 25 Ohio State, 5.

Mr. Chief Justice Waite, after reviewing the facts as above recited, said:

The questions argued here are those presented by the exceptions below. After examining the testimony reported by the master, we are entirely satisfied with his findings of fact. There can be no doubt whatever of the culpable neglect of the managers of the road in leaving the freight car to stand on the side track so near the main track as to make a collision with the approaching train from the south inevitable, and in our opinion it was not contributory negligence for Kelly, under the circumstances, to ride with his elbow on the sill of the open window.

The judgment is affirmed.

ENSMINGER *v.* POWERS & Wife.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Decided April 23d, 1883.

Appeal—Decree—Exceptions—Practice—Taxation—Statutes.

A decree, in a suit in equity, set forth a hearing on pleadings and proofs, and awarded relief, but it ordered that a bill of exceptions signed by the court be filed as a part of the record. The bill of exceptions showed that the judge who held the court refused to permit the counsel for plaintiff to argue the cause, and allowed the counsel for the defendant to determine whether the case fell within a prior decision of another judge, and refused to determine that question himself, and then directed that the decree be entered, which was in favor of the defendant. On a bill of review, filed by the plaintiff: *Held*, that the decree must be held for naught.

A decree was made by a circuit court, in December, 1873, against two plaintiffs. In January, 1874, they appealed to this court. In December, 1875, the appeal was dismissed for the failure of the appellants to file and docket the cause in this court. In September, 1876, a bill of review was filed for errors in law: *Held*, that the bill was filed in time, though not within two years from the making of the decree, because the control of the circuit court over the decree was suspended during the pendency of the appeal.

A lot of land, part of the navy yard at Memphis, Tennessee, not under lease to a private party, being exempt from State and county taxation by section 9 of the act of the legislature of Tennessee, which took effect February 20th, 1860, ch. 70, Private Acts of 1859–'60, 284, was, by section 13 of the act of Congress of August 5th, 1861, ch. 45, 12 Stat. 297, exempt from taxation under the direct tax on land authorized by that act.

Bill in equity. The facts and the issues in controversy are fully stated in the opinion of the court.

Mr. N. Wilson and *Mr. W. B. Gilbert* for appellant.
Mr. Wm. M. Randolph for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

In May, 1867, a bill in equity was filed by the board of mayor and aldermen of the city of Memphis and Bridget Powers against Marmaduke L. Ensminger and J. J. Sears, in the Circuit Court of the United States for the Western District of Tennessee. The bill was sworn to by John C. Powers as

agent for Bridget Powers. The substantial allegations of the bill were that the city then owned in fee seventy-five acres of land in Memphis, known as the navy yard, which land, after having been dedicated by its owners, in 1844, to the government of the United States, in fee, for naval purposes, was ceded to said city by the government, in fee; that the city, in February, 1866, leased lot 10, part of said land, to said Bridget Powers, for twenty years, and she took possession of it; that Ensminger, and Sears, as his agent, were setting up a claim to said lot, as having been purchased by Ensminger at a sale of it by the United States direct tax commissioners in June, 1864, and had procured said commissioners to issue a writ of possession on April 30th, 1867, to put Ensminger in possession of said lot; that the tax sale was void because (1) the act of Congress under which the sale was made was unconstitutional; (2), the assessment was excessive and unauthorized; (3), the enforcement of the act was premature in time; (4), the act was not followed as to advertising the sale in a newspaper or as to the length of time of the advertisement; (5), the sale was made on a day subsequent to that for which it was advertised. The bill prayed for a decree declaring the sale void, and for an injunction restraining the issuing or execution of any writ dispossessing the plaintiffs. A temporary injunction was issued.

Ensminger answered, setting up his tax title, as evidenced by a certificate of sale, alleging the validity of the sale and denying the allegations of the bill. The cause was heard on pleadings and proofs, and on the 27th of December, 1873, the court entered a decree that the injunction be dissolved; that lot 10 was duly sold to Ensminger, and he acquired thereby a title to it in fee simple; that he should have a writ to the marshal to put him in possession; that there be a reference to a master to take an account of the damages to Ensminger from the injunction, for which purpose only the bill should be retained; and that the plaintiffs pay the costs of the suit. The city and Bridget Powers appealed to this court. John C. Powers signed the appeal bond for costs, as surety. There was no supersedeas bond. On the 13th of December, 1875, the cause came on for hearing in this court, and it appearing that the appellants had

failed to file and docket the cause in this court in conformity with its rules, the appeal was docketed and dismissed by this court with costs, execution was awarded against the plaintiffs for the costs of the defendants in this court, and the cause was remanded to the circuit court, for execution and further proceedings. The mandate of this court was filed in the circuit court, and on the 19th of June, 1876, that court made a decree that the reference as to the damages from the injunction proceed, and that the referee also report the damages to Ensminger from the loss of rents and profits of the land; and under its order an alias writ of possession was issued by it, on July 8th, 1876, to the marshal to put Ensminger in possession of lot 10.

On the 9th of September, 1876, the said John C. Powers, describing himself as the husband of the said Bridget Powers, and the said Bridget Powers, filed a bill in equity against the said Ensminger and the said Sears and the said city, in the said circuit court. The bill prays for a decree that the plaintiffs, or the plaintiff Bridget, have a right to the leased premises for the term of the lease; that the sale to Ensminger be declared void; that the said decrees of December, 1873, and June, 1876, be reviewed and set aside; and that Ensminger and Sears be enjoined from collecting rent from the plaintiffs, or either of them, for said lot, and from interfering with their possession of it. Ensminger and Sears having demurred to the bill, the court gave leave to the plaintiffs to file said bill as a bill of review, and then the demurrer was heard and overruled, with leave to the defendants to embody in their answer the matters of the demurrer, and a temporary injunction was granted according to the prayer of the bill, and the bill was dismissed as to the city, and the other defendants were allowed to answer the bill. They answered, there was a replication, the case was heard on pleadings and proofs, and in December, 1878, the court rendered a decree adjudging that the said decrees of December, 1873, and June, 1876, in the first suit be reversed, vacated, set aside and cancelled, and the plaintiffs, as against the defendants, be restored to all they had lost under and by virtue of said decrees and the process which had been issued thereunder;

that the plaintiff Bridget has a good title, as against the defendants, for the term of her lease from the city, to said lot 10, subject only to said lease; that Ensminger be perpetually enjoined from setting up any title to said lot under said tax sale certificate; that the said temporary injunction be made perpetual; that a writ issue to put the plaintiffs in possession of said lot; and that the plaintiffs recover from the defendants the costs of both of the suits and have execution therefor. Sears having died after the cause was submitted, the suit was ordered to be abated as to him, and Ensminger took an appeal to this court from said decree.

The bill in this suit sets forth that the land for the navy yard, after having been dedicated by its original proprietors, in 1828, for a landing for public purposes of navigation or trade forever, was conveyed to the government by the city of Memphis, in 1844, for a navy yard, without lawful authority, because it had been dedicated to public purposes by the original proprietors, and the city had accepted the dedication; that, in 1854, by an act of Congress, the government ceded the land to the city, for the use and benefit of the city, and after that, the rights of the public remained the same as before the conveyance to the government; that the city leased lot 10 to the plaintiff Bridget for the term from February 28th, 1866, to December 31st, 1886, for a yearly rent of $127.19, payable half-yearly; that the lot was vacant and she agreed with the city to put buildings on it, with the right to her to remove them as her own property at the end of the lease; that Ensminger and Sears had compelled John C. Powers to take a lease of the lot from Ensminger in order to enable the plaintiffs to avoid being turned out of possession, and also, as a condition of remaining, to give his 5 notes for $25 each as rent for 5 months from July 19th, 1876, one of which notes he had paid; that the plaintiff Bridget had put buildings on the lot, which were now on it, at a cost to her of $9,000 or $10,000; that after the plaintiffs had constructed much the larger part of the buildings they learned of the claim of Ensminger, and the plaintiff John C. applied to the city attorney to protect the plaintiffs, and he filed the bill in the first suit, not making

John C. a party; that Ensminger answered, setting up his tax title; that no cross-bill was filed, nor was the answer made a cross-bill, nor was any affirmative relief prayed in the answer; that some proof was taken and the cause was treated as at issue, though no replication was filed; that the decree entered was not entered on a hearing of the case by the judge who held the court, although the plaintiffs in the suit asked for a hearing, but the judge allowed the counsel for the defendants to enter the decree at his peril, subject to the right of the plaintiffs to bring a bill of review; that the plaintiffs excepted to such ruling, and the judge signed a bill of exceptions; that the appeal to this court was dismissed because the city refused to pay the necessary money for filing the transcript of the record, which had been made, and docketing the appeal; that the marshal was proceeding to execute the alias writ of possession when the plaintiff John C. accepted said lease and gave said notes, and the plaintiffs remain in possession; and that the said decree and proceedings did not bind either of the plaintiffs, because Bridget was a married woman and her husband was not a party. The bill alleges that the former decrees, so far as they undertook to decree the validity of the title of Ensminger to the premises, or to award a writ of possession to him, or to do anything more than dismiss the bill of the plaintiffs, departed from the established practice of the court, and were void or erroneous; and that the decree was erroneous, if not void, because it was not the deliberate judgment of the court upon the facts in the record, and because the cause was not at issue or ready for hearing. The bill then sets forth various reasons why the purchase and title of Ensminger were invalid. Among other things the bill says:

"These plaintiffs further state and show, that, in the year 1861, and from thence up to the date of the lease aforesaid, the said premises were not and had not been leased by the city of Memphis to any one, or, if any such lease had been made, the same had been abandoned and forfeited, and was not for any part or period of the same time in force or subsisting as a valid and effectual contract. The plaintiffs further state and show, that

by a special act of the general assembly of the State of Tennessee, in force in the year 1861, the said premises were not taxable by the State of Tennessee, or the United States of America, the same not being under a lease from the city, and, for that reason, that the said sale was void. And the plaintiffs further state and show, that the title to the said premises in 1861, and before and since that time, was in the city of Memphis, which held the same as public property, for municipal or public purposes, as provided by law, and therefore, by the law of the State of Tennessee, the said premises were not in the year 1861, or before or since, liable to a direct tax by the government of the United States, and for that reason the said sale was void."

The bill also prays that the lease taken and the notes given by John C. be cancelled. The decree granted this relief also.

The answer of Ensminger and Sears asserts the validity of the title of Ensminger under the tax sale; that the decree in the first suit was an adjudication in his favor as to all the allegations in this bill; that none of the alleged objections to the tax sale proceedings are tenable; that, although the lease to Bridget was not made until 1866, the property had been divided into lots and offered for lease by the city before the assessment of said tax in 1864, and at one time before that date a lease of lot 10 had been made by the city, which was not carried into operation because of the failure of the lessee to comply with it; that the property was not exempt from taxation under any act of the legislature of Tennessee, and was not in 1861, or before or since, held for municipal purposes; that the said Bridget has no right to the improvements she put on the land; that the former suit was commenced at the instance and request of John C., and he swore to the bill and prosecuted it in conjunction with Bridget; that said suit, under which all of the plaintiff's rights were fully considered and passed upon by the court, was a final adjudication of all of the questions and rights therein set up, and the decision, being upon the same facts and rights as are claimed by the plaintiffs in this suit, and between the same parties, is *res judicata* as to this suit; and that the defendants plead the

same as a complete bar to this suit. The answer then sets up as a defence most of the matters which had been so set up in the demurrer.

After the decree of June, 1876, in the former suit, the reference as to the damages from the injunction in that suit proceeded, and in November, 1876, a report was made awarding to Ensminger, as damages, $12,962.10. The city of Memphis excepted to the report, and on the 11th of January, 1878, the court made a decree that it had no jurisdiction to assess the damages from the injunction, and that the bill be dismissed, without prejudice to a suit at law on the injunction bond.

The first question to be considered is as to whether the decree of December, 1873, can be considered as a decree of the court for any purpose. The bill in the present suit sets forth certain facts as having occurred in court when the case came up for hearing, and refers to a bill of exceptions embodying such matters as having been signed by the judge who was holding the court, and ordered to be filed and form a part of the record of the cause, and alleges that the decree was erroneous, because it was not the deliberate judgment of the court upon the facts in the record. The decree states that the case was heard on the bill, answer, exhibits, agreement of counsel, and proof, and had been fully argued, and the court had duly deliberated thereon, but it also says:

"It is further ordered, that the bill of exceptions tendered and signed by the court be filed as part of the record, which is done accordingly."

There is in the record a bill of exceptions filed the same day the decree was made. This bill of exceptions states that the cause came on to be heard before the judge holding the court "under the following circumstances, to which counsel for the city of Memphis excepted, and prayed a bill of exceptions to, upon the record of the facts below, stated as they occurred: First. Duncan K. McRae, Esq., of counsel for the claimants of the tax titles, stated that he had been instructed by his honor H. H. Emmons, lately presiding at this term of the said court,

but who had then left the city of Memphis, where said court is held, to enter decrees in the series of causes in said court known as the 'United States tax-title cases,' in all such of these cases as fell within the purview of the decision of his honor, rendered in certain of those cases tried before the said Judge Emmons before that time; and that said decrees were to be entered in those cases which the said counsel thought came within his decision aforesaid, but to be so entered at the peril of said parties, because said judge would, upon a bill of review, set aside said decrees if it appeared to him by such a bill of review that the case did not properly fall within his said decision; that he had, at the further suggestion of said judge, published a notice in the city papers, that on Saturday, the 20th December aforesaid, he would proceed to take such decrees, when the counsel interested in the several cases could appear, which said newspaper notice is hereto attached. Secondly. The said counsel then proceeded to read from a list the cases and to designate such as he desired to enter decrees in and such as he would pass or continue. When the above-entitled cause was called the counsel for the city objected, and stated that the city attorney would insist that this cause did not come within the class of causes to which Judge Emmons referred, and stated that the city would contend that the property of its municipality was not liable to taxation; that it was exempt under an act of the legislature; that the proof showed the city was entitled to a decree. The counsel for the claimants of the tax titles, the said McRae, insisted that he was to be the judge of the cases in which he was entitled to take decrees, and was to take them at his peril, subject to a bill of review; and that if the city attorney would convince him, before the decree was entered, that the case was not one proper for a decree he would not enter it. The counsel for the city insisted that the presiding judge here present was to determine that question. Whereupon the presiding judge remarked 'that he did not know what Judge Emmons' decision was, nor the scope of it; that he had promised said justice to have entered decrees in such cases as fell within the decision, and that he understood that it was left to counsel for the claimants of the tax titles to determine which

were such cases, and that he would enter decrees in such cases as the said counsel should designate, with the understanding that such proceedings were at his peril.' Thereupon counsel for the city inquired if Judge Emmons' decree or decision, or the order under which these proceedings were had, were of record; and the counsel for the tax-title claimants informed the court that such order was not of record, but that it would be entered of record before the decrees were entered. And thereupon B. M. Estes, Esq., who was of counsel and argued the cases in opposition to the tax titles, stated to the court, that Judge Emmons' written opinion had been lost or mislaid, having been rendered some time ago and then withdrawn for revision, since which time it could not be found; that in it he had only decided that the acts of Congress under which the sales were made were constitutional, and the proceedings of the commissioners thereupon regular; that, prior to the final determination of the case by the judge, and while he had it under advisement, the case had been compromised, and hence no decree had ever been entered. Counsel for the city then objected to a decree in this case, because it involved other questions than the constitutionality of the acts of Congress and the regularity of the proceedings of the commissioners appointed under them, and asked to have those other questions argued. Whereupon counsel for the tax-title claimants insisted, that if the case contained other questions the city could show it on bill of review and the decree would be set aside under Judge Emmons' order; to which counsel for the city objected, that a bill of review would not lie, and insisted on a determination of the question by the court, whether this case came within Judge Emmons' order for the entry of decrees. And thereupon the court decided, that the counsel for the claimants should enter decrees in such cases as he designated, as, under the undertaking with his brother Emmons, he had only to direct such decrees to be entered as the counsel should determine. To all of which counsel for the city excepted, and prayed that by bill of exceptions the city should be allowed to show the proceedings in court as they occurred and its exceptions thereto. And now accordingly the said city here tenders this bill of excep-

tions, and objects to the said decree and all said proceedings as heretofore on the hearing they were objected to, and prays that said bill of exceptions may be signed and sealed by the judge presiding, and made a part of the record, which is done accordingly."

Under this state of facts the bill of exceptions must have the same effect as if the narration it contains of what occurred were incorporated in the body of the decree. Thus considered, it appears that, against the objection and exception of the counsel for the city, who represented both of the plaintiffs in the suit, the plaintiffs were denied by the court a hearing of the case on the merits, and the judge holding the court refused to decide whether the case fell within the prior decision or order of Judge Emmons, and allowed the counsel for the defendant to determine that question. Notwithstanding the statements in the decree that the case was heard on the pleadings and proofs and fully argued, and that the decree was the decree of the court, these statements are contradicted by the bill of exceptions, forming virtually part of the same decree. It is quite apparent that the judge intended that what occurred should be spread before this court on an appeal, so that its effect on the validity of the decree might be considered. There can be no doubt that it could be so considered; and, if on appeal, it must have a like effect on a bill of review, as it is to be looked at as forming a part of the decree. What, then, does it show, except that the proper forms of the administration of justice were disregarded, the functions of the judge were abnegated, there was no hearing or decision by the court, and the counsel for the defendant was allowed to prepare and enter such a decree as he chose? Words need not be multiplied to argue that a decree rendered under such circumstances must, on a bill of review, be held for naught and as if it did not exist. Though not the case of actual fraud practised on the court or on the opposite party, what was done operated as a legal fraud in respect of the rights of such party, through the illegal co-operation of the judge with one of the parties. In *McVeigh* v. *United States*, 11 Wall. 259, an information had been filed by the United States against certain property belonging to McVeigh, to forfeit it. He appeared and

put in a claim and answer. The district court struck it out because McVeigh resided within the Confederate lines and was a rebel, and condemned the property by default. This court, on a writ of error, reversed the judgment, on the ground that McVeigh was denied a hearing and the first principles of the due administration of justice were violated. Equally in the present case, the plaintiffs in the suit were denied a hearing, and their answer might as well have been stricken out. In addition to this, there was no judicial action by the court, and the defendant was allowed virtually to decide the cause in his own favor. For these reasons it must be held, that the decree in question cannot, in this suit, be regarded as a decree adjudicating any rights between the parties to the former suit, and that it forms no obstacle to the consideration of the issues raised in the present suit, provided the bill was filed in time, as a bill of review.

It was not filed within two years after the decree of December, 1873, was rendered. But the plaintiffs in that decree appealed from it to this court, it being a final decree. A bill of review must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed, where, as here, the review sought is not founded on matters discovered since the decree. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Whiting* v. *Bank of United States*, 13 Pet. 6; *Kennedy* v. *Georgia State Bank*, 8 How. 586; *Clark* v. *Killian*, 103 U. S. 766. But the appeal to this court was perfected by the giving of a bond for costs in January, 1874, and, although this court in December, 1865, dismissed the appeal for the failure of the appellants to file and docket the cause in this court, yet the cause was out of the court below and in this court until within two years before the bill in this suit was filed. The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged, and, inasmuch as the appeal was not heard here on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no supersedeas,

the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control. The time during which that control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal, is not to be reckoned against Bridget Powers in this case, although she joined in the appeal. She was exercising a right in doing so, and, as the city of Memphis was the principal plaintiff and appellant, and was endeavoring to protect its title in fee, and thus her right as a lessee, it may very well have been, as is alleged in the bill, that the appeal fell because the city refused to pay the necessary money for filing the transcript of the record. Being thus left to the protection of her own rights, she may well have concluded that a bill of review was preferable to the further prosecution of the appeal, when she had such good cause for that course, as now appears, although the same error might have been corrected if the appeal had been heard on the merits.

This bill of review is properly brought, therefore, because of the error on the face of the decree which has been considered, and, the decree being set aside, as it must be, we are free to examine the question as to the validity of the tax title set up by Ensminger.

Although the sale of the lot for taxes preceded the lease to Bridget Powers, the sale was invalid as to her if the lot was not subject to be sold for taxes. By section 13 of the act of Congress of August 5th, 1861, chap. 45, 12 Stat. 297, providing for a direct tax and for its assessment on land, there was exempted from tax all land permanently or specially exempted from taxation by the laws of the State wherein it was situated, at the time of the passage of that act. The same section provided that, in making such assessment, due regard should be had to the latest valuation under the authority of the State. The exemption of land exempted from taxation by the laws of the State is repeated in section 1 of the act of June 7th, 1862, chap. 98, 12 Stat. 422, and it is there provided that the direct taxes shall be charged on lands and lots of ground as the same were enumerated and valued under the last assessment and valuation thereof made under the authority of the State before

January 1st, 1861. Section 7 of that act, which makes the certificate of the sale of the land for the tax *prima facie* evidence of the regularity and validity of the sale, and of the title of the purchaser, provides that the certificate may be affected, as evidence of the regularity and validity of the sale, by establishing the fact that the property was not subject to taxes. These acts of 1861 and 1862 governed the sale in question. By section 9 of the act of the legislature of Tennessee, which took effect February 20th, 1860, chap. 70, Private Acts of 1859–'60, 284, it was enacted "that all buildings and grounds owned by said city of Memphis and used exclusively for public purposes, such as for fire-companies and fire-engines, city waterworks, markets and market-houses, and their grounds, and such parts of the navy yard as are not leased to private parties, be and the same are hereby declared free and exempt from all State and county taxes so long as owned by the city, and so used for public purposes."

The lot in question is shown by the testimony in the present suit to have been part of the navy yard, and to have been the property of the city of Memphis from before the passage of the act of 1861 until after the sale of it for taxes. It is not shown to have been leased to any private party between those dates. The decree in the first suit and the tax-sale certificate refer to the lot as "assessed to G. McLean in 1860," and the evidence shows that it was assessed to G. W. McLean in 1860, 1865, 1866 and 1867. The lease to Bridget Powers provides that she shall save the city harmless from any damages "to be claimed by the original lessees of said lot." But there is no legal evidence whatever of any subsisting lease during the period named. The bill alleges that there was none, and the answer substantially admits this averment, by saying that at one time before the assessment of the tax in 1864, a lease of the lot by the city had been made, "which was not carried into operation, by failure of the lessee to comply." This is equivalent to saying that there was no subsisting lease when the tax was assessed for which the lot was sold. There is the evidence of a witness for the plaintiff familiar with the premises, and residing near them, that he never knew of any

assertion of any claim to the lot by any lessee, and the case is one where, on all the facts, and in the absence of affirmative proof by the defendant of the existence of such lease, the evidence that there was none must be held sufficient.

We do not perceive that any of the objections set up by demurrer and repeated in the answer are tenable. The decree of the circuit court is affirmed in all respects, except in so far as it erroneously gives the date of July 19th, 1876, to the decree of June 19th, 1876, and recites erroneously the contents of said decree; and except in so far as it may be construed as enjoining the defendant Ensminger from setting up any title to said lot 10 as against the city of Memphis, or as quieting or confirming the possession of the plaintiffs as against the city of Memphis under the said lease from said city; and except in so far as it adjudges that the lease made by the defendants to the plaintiff John C. Powers, and the five notes executed by him, be delivered up and cancelled. As to this last-named lease, the plaintiff John C. Powers, having voluntarily entered into it, no ground is shown for setting it aside. It was correct to charge Ensminger with the costs of both suits. The decree of this court in the first suit imposed on the plaintiffs herein only the costs of the appeal to this court. The costs of the present appeal must be paid by the appellant.

So ordered.

THE JESSIE WILLIAMSON, JR.

STARIN *v.* THE JESSIE WILLIAMSON, JR., AND WILLIAM H. SISE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided April 23d, 1883.

Admiralty—Appeal—Jurisdiction.

The libellant in a suit *in rem*, in admiralty, against a vessel, for damages growing out of a collision, claimed in his libel, to recover $27,000 damages.

Argument for Appellant.

After the attachment of the vessel in the district court, a stipulation in the sum of $2,100, as her appraised value, was given. The libel having been dismissed by the circuit court, on appeal, the libellant appealed to this court: *Held*, that the matter in dispute did not exceed the sum or value of $5,000, exclusive of costs, as required by § 3 of the act of February 16th, 1875, 18 Stat. 316, and that this court had no jurisdiction of the appeal.

A decree against the vessel for $27,000 would not establish the liability of the claimant to respond for that amount *in personam*, unless he was the owner of the vessel at the time of the collision, and that fact must appear by the record, in order to be so far a foundation for such liability as to authorize this court to consider the $27,000 as the value of the matter in dispute on said appeal.

Libel in admiralty for a collision, alleging a damage to barge and cargo of upwards of $27,000. The offending vessel was appraised at $2,100, and a statutory stipulation for that amount was taken. Judgment was rendered below against the libellant, who appealed. The appellees moved to dismiss the appeal for want of jurisdiction.

Mr. R. D. Benedict for the appellant.—The case of *The Enterprise*, 2 Curtis, 317, is a strong and sufficient authority against the motion. In that case a libel was filed for wages, and a decree rendered in the district court for more than $50. The vessel was sold, and after paying the marshal's fees, there remained only $13.10, which was paid into court. The claimant of the vessel insisted on his right to an appeal to the circuit court, which was resisted by the libellant, on the ground that the "matter in dispute" was the proceeds of the vessel, and did not equal $50. But the circuit court, Curtis, J., held otherwise and allowed the appeal, saying, "what is in dispute in this case is not the vessel or even the existence of a lien thereon as a security for any wages which may be due; but it is whether any wages are due, and, if any, what is their amount." So in this case the "matter in dispute" is not the vessel, nor her proceeds, nor the stipulation which "takes the place of the vessel," nor the existence of a lien on the vessel for the damages claimed; but it is whether any damages are due, and, if any, what is their amount? While we have found no authority in this court, which is as directly in point as the case of *The Enterprise*, yet authorities which adopt the principle and cover the

case are not wanting in the decisions of this court. "When the plaintiff sues for an amount exceeding $2,000 and the *ad damnum* exceeds $2,000, if by reason of any erroneous ruling of the court below the plaintiff recovers nothing or less than $2,000, then *the sum claimed by the plaintiff* is the sum in controversy for which a writ of error will lie." Story, J., *Knapp* v. *Banks*, 2 How. 73. See also *Ross* v. *Prentiss*, 3 How. 771; *Wilson* v. *Daniel*, 3 Dall. 401; *The Falcon*, 17 How. 19; and *Richmond* v. *Milwaukee*, 21 How. 391. The question of the amount or value or the security which the party plaintiff has for his claim has never been considered by the court. In the case of *Ross* v. *Prentiss*, 3 How. 771, an effort was made by an appellant, in order to sustain an appeal, to have the court consider the value of land on which an execution had been levied as being the matter in dispute. But the court refused to do so, holding that the matter in dispute was the amount of the execution, against which the appellant sought relief, saying, "the only matter in controversy is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not." So here the matter in controversy is the libellant's claim for damages. Whether the vessel is of value enough to pay the claim does not affect the dispute. In the case of *Wilson* v. *Daniel*, 3 Dall. 401, Chase, J., while saying that the demand of the plaintiff ought not to be made the sole criterion, says: "It must be acknowledged, however, that in actions of tort or trespass, from the nature of the suits, the damages laid in the declaration afford the only practicable test of the value of the controversy." This rule is subject to this exception, that if the amount of the damages in such a case has been fixed by a judgment, the amount of the judgment is the "matter in dispute," as far at least as concerns an appeal *by the defendant.* In this case of *Wilson* v. *Daniel*, above cited, the existence of this exception to the rule was denied, and attention called by Ch. J. Ellsworth to the inequality between the parties which the exception would create. But later cases have established the existence of the exception. *Gordon* v. *Ogden*, 3 Pet. 34. That exception, however, does not exist in this case, which comes

squarely within the general rule that the *damages laid* are the "matter in dispute" in cases of tort or trespass. The argument is adduced that "if the libellants had recovered a decree for the full amount of their damages, the claimants could only be called on to pay the $2,100, the value of their vessel, and they could not appeal." But that this is an error is shown by the case of *The Enterprise*, *supra*. The claimants could appeal, because the decree in the suit *in rem* fixes the right between the parties. And in the admiralty, "in a suit *in rem*, it is not usual to render a decree *in personam*, but if the case proved shows a clear right to recover *in personam*, the libellant may be permitted, after a decree *in rem*, to introduce the proper allegations *in personam*, and proceed upon them to a further decree against the person." Benedict's Admiralty, 2 ed. § 541. See Betts Practice, p. 99. The error of the brief for appellees is in confounding the liability of the stipulators with the matter in dispute between the principal parties. The liability of the stipulators arises out of their stipulation, and, of course, cannot be greater than the amount of the stipulation. But that has nothing to do with the liability of the claimants for the damages sustained by the libellant. This arises out of the collision. And it is this which is the "matter in dispute" between the parties, entirely irrespective of the amount of security which the libellant may have for the payment of the damages.

Mr. Henry J. Scudder for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit *in rem*, in admiralty, to recover damages for a collision, brought in the district court, where the libel was dismissed. The decree was affirmed by the circuit court, on appeal, and the libellant has appealed to this court. The amount of damages claimed in the libel is $27,000. The collision occurred on the 2d of November, 1875. The libel was filed on the 5th day of the same month, and the vessel was attached, under process, on the same day. On the 9th, Richard H. Seaward, describing himself as master of the schooner sued,

filed a claim to her, in which he stated that he intervened, as agent of the owners of the schooner, "for the interest of Daniel Marcy, William H. Sise, and others, owners of said schooner," in her, and made claim to her, and averred that he was in possession of her when she was attached, and that "the persons above named and others are the true and *bona fide* owners" of her, and that no other person "is" her owner. The master signed the claim as "agent," and made oath to it "that the owners of said schooner reside in Portsmouth, N. H., and Kittery, Maine, and that this deponent is duly authorized to put in this claim in behalf of the owners of the said schooner, &c." On the 12th of November the value of the schooner was fixed by appraisement at the sum of $2,100, and a stipulation for value in that amount was entered into pursuant to the rules and practice of the district court, signed "W. H. Sise & Co., by R. H. Seaward," and also signed by two sureties, not claimants. A stipulation for costs, entered into on behalf of the claimants, on November 9th, pursuant to the rules and practice of the district court, recites that a claim had been filed in the cause "by Daniel Marcy, William H. Sise, and others, owners of said vessel, &c." The answer, which was sworn to December, 18th, 1875, purports to be the answer of seventeen persons (two of whom are Daniel Marcy and William H. Sise), whom it states to be "claimants of the schooner" and "respondents," and the answer speaks of the vessel as the "respondents' schooner." The oath to the answer is made by a person who swears that he is "agent for the schooner," "and transacts business for her owners," and "that the owners are not, nor is either of them, or the master thereof, within this district."

The appellees move to dismiss the appeal for want of jurisdiction in this court to entertain it, on the ground that the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs, as required by § 3 of the act of February 16th, 1875, ch. 77, 18 Stat. 316. We have held, at this term, on a full review of the subject, in *Hilton* v. *Dickinson*, *ante*, page 165, that while we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing,

the actual matter in dispute in this court, as shown by the record, and not alone the damages alleged or prayed for in the declaration, must be looked to in determining the question of jurisdiction. We have also held, in *Elgin* v. *Marshall*, 106 U. S. 578, that the required valuation is limited to the matter in dispute in the particular suit in which the jurisdiction is invoked; that any estimate of value as to any matter not actually the subject of that suit must be excluded; and that there cannot be added to the value of the matter determined in that suit any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. As is remarked in the latter case:

"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."

In the present case, although the libellant may recover $27,000 against the vessel, because he demands that amount against her, it is plain that he cannot recover, on the stipulation for value, which represents her, more than $2,100, and cannot recover against the sureties in the stipulation more than that amount. Therefore, this being a suit *in rem* only, the value of the vessel, represented by the stipulation, is all that is in dispute, because that is all that the libellant can obtain or the stipulators can lose, in this suit.

The libellant contends, however, that a decree for him for $27,000 against the vessel would establish the liability of the claimants for that amount. But it could not be contended that this would be so in any case but one where the claimants were alleged and shown to have been the owners of the vessel sued, at the time of the collision. In the case of *The Enterprise*, 2 Curtis, 317, the record showed that the claimant of the vessel was an owner of her during the voyage for which the wages sued for were claimed, and that by his answer he contested in that character the right to wages. For these reasons it was held that the decree in the suit *in rem* bound him personally, as *res judicata;* that a libel *in personam* against him would

lie to execute that decree; and that the matter in dispute in that case was not the vessel or the existence of a lien on her. The proceeds of the sale of the vessel were $13.90, the decree was for more than $50, and $50 was the amount necessary for jurisdiction on an appeal. Under these circumstances an appeal was allowed.

There is no allegation, in the libel, in this case, as to who were the owners of the vessel at the time of the collision, and nothing is set forth therein as a foundation for any ultimate recovery against any particular persons, as such owners, of so much of the $27,000 claimed as may exceed the appraised value of the vessel. Rule 15, in admiralty, provides that "in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*." This rule, as is well settled, excludes the joining in one suit of the vessel and her owners; but it does not prevent the introduction into the libel of allegations as to the ownership of the vessel at the time of the collision, with a view to a proceeding to obtain such ultimate relief *in personam*, on the basis of a recovery *in rem*, as the libellant may be entitled to. Nor is there in the record in this case anything which can be held to establish, as against the claimants of the vessel, though they were her owners when the claim was filed, that they were her owners at the time of the collision, and so in a position to be liable to respond *in personam* for the damages suffered by the libellant, in a proper proceeding *in personam*.

If the libellant had recovered more than $5,000 in this case, in the circuit court, against the vessel, the claimants could not have appealed to this court, because for the reasons above set forth, the amount in dispute would have been only $2,100, on the record as it stands. As we held in *Hilton* v. *Dickinson*, the statute does not give to the plaintiff an advantage over the defendant, under the same circumstances.

The appeal is dismissed for want of jurisdiction.

TUTTON, Collector, *v.* VITI & Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Decided April 23d, 1883.

Customs Duties.

Marble statues, executed by professional sculptors in the studio and under the direction of another professional sculptor, whether from models just made by a professional sculptor, or from antique models whose author is unknown, are "professional productions of a statuary or of a sculptor," liable to a duty of only ten per cent. ad valorem, under the Revised Statutes, § 2504, Schedule M.

Assumpsit to recover back duties alleged to have been illegally collected on works of art.

Mr. Solicitor-General for plaintiff in error.
Mr. Edward Shippen for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is an action of assumpsit to recover back an excess of duties paid upon seven marble statues imported from Italy. The importers contend that these statues were liable to pay a duty of only ten per cent. ad valorem; but the collector exacted payment of fifty per cent. ad valorem.

The decision of the case turns upon the true construction of those provisions of the Customs Act which impose upon "All manufactures of marble, not otherwise provided for, fifty per cent. ad valorem;" and upon "Paintings and statuary not otherwise provided for, ten per cent. ad valorem. But the term 'statuary,' as used in the laws now in force imposing duties upon foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only." Rev. Stat. § 2504, Schedule M.

The material facts, as found by the special verdict returned in the circuit court, are as follows: Of the seven statues, two were of boys, taken out and sculptured from antique original models, the author of which is unknown. The other five

statues were taken out and sculptured from original models, two of angels, made by Achille de Cori, and three, representing Summer, Autumn and Winter, made by Carlo Nicoli, both of whom were professional sculptors of good reputation, and who had won at the Royal Academy of Fine Arts of Carrara the prize of a government pension at Rome; and they were the first productions from those models. All the seven statues were executed by Giovanni Padula and Alessandro Gemignani, professional sculptors, in the studio and under the direction of Pietro Salada, who has been a professional sculptor in Carrara for the last thirty-four years. The cost of the statues of the two boys was 300 lire, or $58, each; of those of the two angels, 690 lire, or $133.40, each; and of those of the three seasons, 480 lire, or $92.80, each.

Judgment was given for the plaintiffs upon the special verdict. See 14 Fed. Rep. 241. The only question presented by the record is whether this judgment was right.

The evident intent of Congress, in putting a much lower duty on statues which are "professional productions of a statuary or of a sculptor" than on other "manufactures of marble," is to encourage the importation of works of art, by distinguishing between the productions of an artist, and those of an artisan or mechanic; between what is done in a sculptor's studio, by his own hand or under his eye, and what is done by workmen in a marble shop.

In the same spirit, Congress has exempted from all duty the importation of "paintings, statues, fountains and other works of art," which are either "the production of American artists," or are "imported expressly for presentation to national institutions, or to any State, or to any municipal corporation." Rev. Stat. § 2505.

There is nothing in the acts of Congress to limit the professional productions of a statuary or sculptor to those executed by a sculptor with his own chisel from models of his own creation, and to exclude those made by him, or by his assistants under his direction, from models or from completed statues of another sculptor, or from works of art, the original author of which is unknown. An artist's copies of antique masterpieces

are works of art of as high a grade as those executed by the same hand from original models of modern sculptors.

The instructions of the Treasury Department (pursuant to which these duties were imposed) and the argument for the appellant proceed upon the ground that the statues were made by men not really professional sculptors, though calling themselves such, and were not real works of art, but mere manufactures of marble by good artisans. If this court were at liberty to consider the testimony sent up with the record, it might perhaps not reach the conclusion at which the jury have arrived. But the insurmountable difficulty in the way of the appellant is that by the special verdict the jury have found in the most explicit terms that all these statues were executed in the studio of a professional sculptor, and under his direction, by two other professional sculptors. These facts being conclusively settled by that verdict, the law requires that the

Judgment be affirmed.

HOWARD COUNTY *v.* BOONEVILLE CENTRAL NATIONAL BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Decided April 23d, 1883.

Municipal Bonds—Railroads.

When an act of the legislature authorized a county to subscribe for stock in a railroad or its branches, and the inhabitants of the county at legally convened meetings voted to exercise the power thus conferred, and the subscription was made, and county bonds issued therefor and exchanged for stock in a branch of the railroad for which the subscription was made, and the county, for a series of years, paid the interest on the bonds, and then resisted payment solely on the ground that the road constructed was not the road to whose stock the statute authorized the county to subscribe: *Held*, On the special finding found at the trial below, that the road is one of the branches for which the act authorized counties to subscribe.

Action to recover on coupons of bonds issued by the county

in payment for subscriptions to the stock of the Tebo & Neosho Railroad Company. The only controversy was whether the road as constructed was the road for whose stock the county was authorized to subscribe.

Mr. John D. Stevenson for plaintiff in error.
Mr. W. M. Williams for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The Tebo and Neosho Railroad Company was authorized by its charter to construct and operate a railroad from some point on the Pacific Railroad, between the west bank of the Laramie River and Muddy Creek, in Pettis county, in a southerly or southwesterly direction through Henry county, to some point on the State line between the northwest corner of Jasper and the southeast corner of McDonald county. It was also expressly authorized "to extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction, to Booneville, through the county of Howard, the county court of that county, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company, and issued county bonds therefor. One-half of the bonds were sold by the county and the proceeds paid to the company, while the remainder were delivered in full payment of the balance due on the subscription. The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it

"lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company, ... and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court, may appoint an agent to represent the county, vote for it, and receive its dividends." Act of January 16th, 1860, §§ 6 and

8; act of November 21st, 1857, charter of Osage Valley & Southern Kansas Railroad Company, Laws of Mo., 1857, adjourned session, p. 62.

The railroad was constructed through Howard county as proposed, and has been in operation ever since. The county court levied and collected a tax to pay the interest on the bonds for seven years, regularly paid the semi-annual interest until March, 1878, redeemed a number of the bonds, voted the county's stock at several meetings of stockholders, and when, in 1874, the road so constructed northeasterly through Howard county was sold to the Missouri, Kansas & Texas Railroad Company, the county received 4,000 shares of the stock of the latter company in exchange for its stock in the Tebo & Neosho Railroad Company. Counsel for the defendant in error states that the county sold its stock in the Missouri, Kansas & Texas Railroad Company for $140,000. But no such fact appears in the findings. But it does appear that the county, when the case was tried below, still held that stock.

And now it is contended in behalf of the county—and no other question is presented for determination—that there was no legal authority for this subscription or issue of bonds. The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard county could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road, but only an unauthorized *extension* of the *main* line.

We are of opinion that the road constructed through Howard county was, within the meaning of the statute, a branch of the original or main line. The defence cannot be sustained.

The judgment is affirmed.

Statement of Facts.

BALTIMORE & POTOMAC RAILROAD COMPANY *v.* FIFTH BAPTIST CHURCH.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided April 23d, 1883.

Corporation—Damages—Legislative Grant—Nuisance.

1. In an action at law damages may be recovered against a person who maintains a nuisance which renders the ordinary use and occupation of property physically uncomfortable to its owner; and if the cause of the annoyance and discomfort be continuous, equity will restrain it.
2. The measure of damages in an action at law against the maintenance of a nuisance affecting real estate is not simply the depreciation of the property. The jury are authorized also to take into consideration personal discomfort which may be caused by the nuisance, and any causes which produce a constant apprehension of danger in their estimate of damages, even if there be no arithmetical rule for the estimate.
3. Corporations are equally responsible with individuals to respond in damages for injuries caused by nuisances maintained by their servants by the authority of the corporation.
4. Corporations may recover as plaintiffs for injuries done to their property by a nuisance; and where the corporation plaintiff is a religious corporation, and its members suffer personal discomfort and apprehension of danger in the use of the corporate property, the corporation may recover for such injuries. A religious congregation has the same right to the comfortable enjoyment of its church for its own purposes, that a private individual has to the comfortable enjoyment of his house.
5. Legislative authority to a railroad company to bring its tracks within municipal limits and to construct shops and engine houses there, does not confer authority to maintain a nuisance.
6. Legislative authorization exempts from liability to suits civil or criminal, at the instance of the State; but it does not affect claims of private citizens for damages for special inconvenience and discomfort, not experienced by the public at large.

Action in the nature of an action on the case to recover damages for the discomfort occasioned by the establishment of a building for housing the locomotive engines of a railroad company, contiguous to a building used for Sunday schools and public worship by a religious society. The following is the statement of facts as prepared by the court:

The Fifth Baptist Church, the plaintiff in the court below,

was a religious corporation, created under the general incorporation act of Congress in force in the District of Columbia. It owned a building in the city of Washington situated on D street, between Four-and-a-half and Sixth streets, which was erected and has been used by it as a church for many years. The defendant in the court below, the Baltimore & Potomac Railroad Company, was a corporation created under the laws of Maryland, and was authorized by act of Congress to lay its track within the limits of the city and construct other works necessary and expedient to the proper completion and maintenance of its road.

The plaintiff alleged that the defendant, in 1874, erected an engine house and machine shop on a parcel of land immediately adjoining its church edifice, and had since used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday schools, and destroy the value of the building as a place of public worship. It therefore brought the present suit in the Supreme Court of the District for the damages it had sustained. The defendant pleaded the general issue.

On the trial evidence was given to show that the Fifth Baptist Church had owned and used the premises described as a place of worship since 1857; that the present church building was begun in 1867, and since 1868 or 1869 had been continuously occupied by the church as its house of worship; that in 1872 the defendant erected upon a parcel of ground immediately adjoining the premises on the west, and from April, 1874, till the commencement of this suit, maintained, an engine house and machine shop, where a large number of locomotives and steam engines were housed and their fires made, and to and from which the engines were propelled, and in which they were coaled, watered, repaired, and otherwise used; that when the ground was first broken for the erection of these works the plaintiff advised the company that, if put there, they would prove to be a nuisance and ruinous to the plaintiff's interest, and protested against their erection; that the company, however, paid no heed to this protest, but proceeded to erect the

works upon the building line of its own premises within five and a half feet from the church edifice, and constructed upon the engine house sixteen smokestacks, lower in height than the windows of the main room of the church; that the nearest of the smokestacks was less than sixty feet from the windows, and the others were in a semicircular curve, at gradually increasing distances; that during this period—from April, 1874, to the commencement of the present suit—the plaintiff was accustomed to have on every Sabbath day Sunday school exercises in the morning, preaching in the forenoon, and preaching in the evening; and that religious services were also held in it on Wednesday evening of every week, and on the first Tuesday and Friday evenings of every month, and at intervals protracted religious meetings were held in it every night in the week except Saturday night; that during this period these services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said; that the act of blowing off steam occupied from five to fifteen minutes, and frequently compelled the pastor of the church to suspend his remarks; that this was of habitual occurrence, during the day and at night, and on Sundays as well as other days; and that in the summer time, when the windows of the church were opened for air, smoke, cinders, and dust were blown from the smokestacks through the windows of the church, settling upon the pews and furniture, and soiling the clothes of the occupants, accompanied by an offensive odor, which greatly annoyed the congregation.

Evidence was also given to show that the railroad company, which was authorized to lay its track only along Virginia avenue in this city, had constructed a side track from the avenue to its workshops, crossing a part of D street and its sidewalk at a distance of about 100 feet from the door of the church; that the locomotives were allowed to stand at the entrance of its premises with their cow-catchers protruding

several feet beyond the inclosure, and sometimes to stand across the sidewalk along which two-thirds of the congregation are obliged to pass in going to and from the church; that the access to the church was thereby obstructed and rendered dangerous, and on several occasions members had barely escaped being run over by the sudden starting of the locomotives without note or warning; that the congregation had been thereby diminished, and the attendance upon the Sunday school decreased by about one-fourth; that the Sunday school was a source of revenue to the plaintiff, having contributed to the construction and improvement of the church building, and this revenue was proportioned to the attendance thereon; that the property of the plaintiff was nearly ruined for church purposes by the proximity of the works of the defendant, and the noise, smoke, cinders, and dust which they created; that the rental value was ordinarily from $1,200 to $1,600 per annum, but that with the defendant's works adjoining it could hardly be rented at all; and that those works had depreciated the value of the property fifty per cent.

To meet the facts thus established, and as a defence to the action, the railroad company gave evidence to show that it ran about sixty trains a day over its road in the city of Washington during week days, and about ten trains on Sundays; that its locomotives were the best known in the business; that it employed about 200 men, who were all skilful in their particular branches of work, and well-behaved; that in the engine and repair shop no more noise was made than was necessary; that every precaution was taken on Sundays to preserve quiet in the neighborhood of the church; that the main shop of the company was in the city of Baltimore, and the shop and engine house in Washington were used only for making casual and temporary repairs in order to keep the machinery and engines in operation; that the smokestacks were higher than required by the building regulations in force in Washington; that the engine house and workshops were skilfully and carefully constructed with suitable appointments and appliances; that the bells of the locomotives were not rung, nor the whistles sounded, except when an accident was liable to occur; and

that when the engines were brought into the house the steam ordinarily was not blown off but allowed to go down.

The main reliance, however, of the railroad company to defeat the action was the authority conferred upon it by the act of Congress of February 5th, 1867, to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia, the line of which was afterwards designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions, not material here. By its charter it was empowered to make and construct all works whatever which might "be necessary and expedient" in order to the proper completion and maintenance of the road.

The act of Congress provided that the road which the company was authorized to construct should enter the city at such place and pass along such public street or alley to such terminus as might be allowed by Congress, upon the presentation of a survey and map of its proposed location. Subsequently Congress allowed the company to enter the city with its railroad, by one of two routes, as it might select. It selected the one by which the road is brought along Virginia avenue, in front of the church of the plaintiff, to the intersection of South C and West 9th streets.

The testimony of the parties being closed, the plaintiff prayed three instructions to the jury, which were given by the court with additions to each. They were as follows:

First instruction prayed:

"If the jury find from the evidence that the engine house of the defendant is used for receiving its engines when they come into the city after a trip; that after coming into said engine house such engines more or less frequently blow off their steam, and that such blowing off of steam makes a loud and disagreeable noise, and that such engines are put in the stalls in said house, and emit the smoke from their fires through the chimneys of said house, and that the said engine house is used for the purpose of a shop in which to make a certain class of repairs upon the engines and cars of the defendant, and that a loud noise of ham-

mering is created in making such repairs, and that said engine house is also used to receive coal for coaling the engines of defendant before going out, and that they are all coaled therein, and also get up their fire and steam therein, and further find that said house is located so near the church of the plaintiff that the noises from said engine house can be distinctly heard inside of the said church, and also that the chimneys of said engine house are so constructed that the tops thereof are not as high as the tops of the windows of said church, and shall further find that the smoke from said chimneys is thrown through said windows into said church in such quantities and so generally as to be a common annoyance and inconvenience to the congregation worshipping therein, and that said noises in said yard of blowing off steam are of daily and nightly occurrence, and are so distinctly heard in said church on Sundays, as well as the days of the week, as to annoy, harass, and inconvenience the congregation when engaged in divine worship therein, and that they disturb and greatly inconvenience the congregation in the enjoyment of said building as a church, then the plaintiff is entitled to recover, provided the jury find that said church was located upon the spot where it now is before the defendant established its engine house in its present position, and provided the jury further find that the annoyance and inconvenience to said congregation from the smoke and noises above mentioned occurred within three years before the date at which this suit was brought, and provided further that said noises and smoke depreciated the value of the property of the plaintiff within the period from April 1st, 1874, to March 22d, 1877."

The court granted this prayer and gave the instruction, adding to it a charge, as follows:

"If you find all these facts, then this shop is a nuisance, and a special annoyance to the congregation that worship in this church. Every man has a right to the comfortable enjoyment of his own house, in which enjoyment a neighbor cannot molest him; and no grant conferred by proper authority upon any corporation to construct a railroad along the public streets, or to build shops, can be construed as authorizing that company to construct a nuisance. If the work is of such a necessary kind that the com-

pany must have it, if the shop is of that character, and yet is a nuisance in the neighborhood, they must find some other place to put it. No legislature has a right to establish a private nuisance."

Second instruction prayed:

"The actual amount of pecuniary loss to the plaintiff is not necessarily the rule of damages in actions like the present. In estimating the amount of compensation to the plaintiff for the injury, if any, found to have been sustained by it, the jury may determine the extent of the injury and the equivalent damages, in view of all the circumstances of said injury to said plaintiff, of depreciation in the value of its property during the period embraced in this suit, and of interference with the uses to which said property was devoted by said plaintiff during said period, and of all other particulars, if any, wherein the plaintiff is shown to have been injured during said period, and for which, under the instructions of the court, said plaintiff is entitled to recover."

This prayer was granted and the instruction given, accompanied with the following charge to the jury:

"That prayer I think is substantially right. The suit is brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in consequence of the acts of the defendant. It is the personal discomfort more than anything else which is to be considered in regard to the assessment of damages. Now, I can very easily imagine, and it may often happen, that the construction of an improvement such as this might increase the value of property in the vicinity, and I am not sure at all that the erection of this workshop in that neighborhood may not really have increased the intrinsic value of the property belonging to this congregation. The evidence in the case does not, as it seems to me, show that this property has been depreciated by the construction of that workshop. We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus increase the population in that neighborhood, and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might have increased in

value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages."

Third instruction prayed:

"If the jury find from the evidence that, among other purposes, the plaintiff's church was used by the said plaintiff as a school-house for the instruction of children on the Sabbath day, and that a revenue was derived from such school, depending for the amount thereof upon the number of children attending said school, and shall also find that the defendant was in the habit of allowing its engines, with steam on and ready to move out over D street, to lie adjacent to the sidewalk of said D street, adjacent to its workshop and engine house, and that in consequence of said engines being so allowed to occupy such position, the number of pupils attending said school was diminished, and that from the said cause the number of the pupils of the said school was lessened within the period from March 22d, 1874, to March 22d, 1877, then the jury will consider the extent of such special damage to the plaintiff, should they find such special damage an element in making up their verdict in this case."

This prayer was granted and the instruction given, accompanied with the following charge:

"I grant that prayer because there is some evidence that this congregation used that church partly for a Sunday school where children are instructed, and that those children were in the habit of contributing, and have contributed, sums of money to the support of the church. A party is entitled to be compensated, not only for actual damages sustained from the acts of the defendants; but, in a case like this, is entitled to his damages for a continuous and threatened danger. A man is entitled to recover damages from the owner of an adjoining property ready to tumble down upon himself or his family. That is a threatened danger, and although the danger may not have been actually sustained, yet people are not to be kept in alarm constantly by a

threat of danger. It may fall upon him at any time, and a court of chancery would direct it to be removed, and on an indictment for a nuisance of that kind it would be removed.

"But in private actions like this, it may be taken into consideration by the jury whether those engines, standing inside the house and passing out and in so frequently as they do, and in that place, produce a reasonable and fair apprehension of danger to persons passing to that church, especially to children passing to Sunday school. You can take that element into your consideration."

To each of these instructions the defendant excepted. It also requested the court to give several other instructions, the purport of which was that if the railroad company constructed its smokestacks on the repair shop in the usual and ordinary manner, and built them as high as required by the building regulations in force in Washington, the plaintiff could not recover for any damage caused by smoke from such smokestacks; that the company possessed the right to select the location in question, and to construct, maintain, and use upon it such engine house and other works as were necessary and expedient for the construction, maintenance and repair of its road and engines, and to occupy the premises for that purpose; and that if the jury found that the inconveniences complained of were no more nor greater than the natural or probable result of maintaining such engine house and repair shop; or found that, in the occupation and use of the property and management of its business, the company exercised such reasonable care as a person of ordinary prudence and caution would exercise under the circumstances, it was not liable for any damages; and that if the company did not use reasonable care in the construction of the smokestacks on the engine house or repair shop, the plaintiff was only entitled to recover interest for three years on the difference between the value of the property, as it would have been if the defendant's smokestacks had been carefully constructed, and the actual value as reduced by the smoke from them; that the defendant was entitled to construct and use the side track across D street; and that the plaintiff could not recover, being a corporation, for any inconvenience which mem-

bers of the congregation assembled in its church might suffer from the noise and offensive odors occasioned by the defendant's engines and shops.

The court refused to give these instructions, and the jury found for the plaintiff $4,500 damages, and the judgment entered thereon was affirmed at the general term of the supreme court of the district. To review that judgment the defendant brought the case here on a writ of error.

Mr. Enoch Totten for the plaintiff in error.—I. The Baltimore & Potomac Railroad Company was authorized by Congress to maintain the shops complained of, and they were necessary to the conduct of its business. By the act of 18th March, 1869, 16 Stat. 1, the company was authorized to pass along Virginia avenue to the southern terminus of the prescribed line; this terminus was by that act fixed at the junction of West Ninth and South C streets and Virginia avenue. This being the end of the road, the statute must have been passed with the expectation, in the legislative mind, that depots, stations, engine houses and other works would be constructed at or near that point. Power to construct and maintain a railroad necessarily includes power to build depots, stations, side tracks, engine houses, switches, repair shops, &c., &c. *Enfield Toll Bridge Company* v. *Hartford & New Haven Railroad Company*, 17 Conn. 453; *Black* v. *Philadelphia & Reading Railroad Company*, 58 Penn. St. 249; *Speer* v. *Cleveland & Pittsburg Railroad Company*, 56 Penn. St. 325; *Turnpike Company* v. *Camden & Amboy Railroad Company*, 2 Harr. (N. J.) 314. The power of determining whether or not such works are necessary and expedient, and where they shall be erected, is by the statute confided to the president and board of directors of the company, and when they have once exercised that power in good faith, their judgment is not reviewable, but is conclusive on all authority in this District, except that of Congress. *Ford* v. *Chicago & North Western Railroad Company*, 14 Wis. 663; *New York & Hudson River Railroad Company* v. *Kip*, 46 N. Y. 546; *Giesy* v. *Cincinnati & Zanesville Railroad Company*, 4 Ohio St. 308; *Brainard* v. *Clapp*, 10 Cush. 6; *Curtis* v. *Eastern Rail-*

road Company, 14 Allen, 55; Pierce on Railways, 148, 160, 494; *Hawley* v. *Steele*, 6 Ch. Div. 521. It would be difficult to select a location for these works in the city of Washington, or, indeed, in any city, which would be satisfactory to every property owner in the vicinity; some person or persons would be sure to complain of the noise and smoke. These considerations, when this line was traced and established over this wide street and through this particular portion of the city, must have received due attention from Congress, as well as all these other attendant questions. If the railroad company did not exceed its powers and did not exercise them wantonly or unlawfully, it cannot be mulcted in damages. No action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful. *New York & Erie Railroad Company* v. *Young*, 33 Penn. St. 175; *Renwick* v. *Morris*, 3 Hill, 621; *Bridge Company* v. *Kirk*, 46 Penn. St. 112; *Northern Tr. Company* v. *Chicago*, 99 U. S. 635; Angell on Highways, § 237; Addison on Torts, § 1040; *Porter* v. *North Missouri Railroad Company*, 33 Mo. 158; *Navigation Company* v. *Coons*, 6 Watts & Serg. 101; *Henry* v. *Pittsburg Bridge Company*, 8 Watts & Serg. 85; *Radcliff* v. *Brooklyn*, 4 N. Y. 195; *Bellinger* v. *Railroad Company*, 23 N. Y. 42; *Moyer* v. *Railroad Company*, 88 N. Y. 351.

The streets of Washington belong to the United States. It cannot be successfully denied that Congress can legalize the presence of smoke, cinders, noises, railroad trains, and locomotive engines on a public street in the city of Washington, where it is conceded all persons may pass and repass at their will and pleasure, if not interrupted by legalized obstructions. This being so, it would be strange indeed if the same inconveniences cannot be legalized by Congress for railroad purposes upon premises adjoining the railroad, which are the private property of the corporation operating the railroad, and which are used in connection with the conduct of its business. If the right to pass through and over this property belonging to the company could be granted, why could not the right be granted also to stop and remain stationary thereon? The

difference might be but slight in the character and extent of the noise, smoke, and other inconveniences, depending upon the number of passing trains on the one hand and on the extent of yard on the other.—II. The rule which the court below laid down respecting damages was wrong. It told the jury that it might assess damages against the railroad company on behalf of the church corporation for the personal inconveniences and discomforts suffered by individuals worshipping in the church. The true rule was laid down by the Supreme Court of Pennsylvania, in the well considered case of *Sparhawk* v. *Railway Company*, 54 Penn. St. 401, on an application to restrain a railroad company from running its cars alongside a church on Sunday. The court says:

"The bill charges an injury, not physical, but mental or spiritual. One which neither deprives the body of rest, refreshment, or health. That this is the nature of the complaint is most evident, from the fact that the disturbing causes are the same, and no greater on Sundays than on other days, and of this there is no complaint. How are we to determine whether the mind is injuriously disturbed or not? To some it is granted that there may be annoyance in the passing of cars on Sundays. To others it would be but an agreeable sound. To many it would be an annoyance because of their views of the Sabbath. But, as already said, that is not in this case, for want of power in this form to take cognizance of it. It is not possible, in my judgment, to establish a material injury, where alone at most the mind is disturbed without the slightest bodily effect or interference with ordinary comfort. It is but an inconvenience incident to the situation, and not the subject of an adjudication in equity. . . .

"Progress will not be stopped to accommodate anybody's convenience. It must yield in consideration of our interests in the thousand advantages in other respects of city life. We should not attribute the fault in our own position to faults in others."

Mr. R. T. Merrick and *Mr. J. J. Darlington* for defendant in error.

Mr. Justice Field delivered the opinion of the court.

If the facts are established which the evidence tended to

prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the chimneys, with its cinders, dust, and offensive odors, created a constant disturbance of the religious exercises of the church. The noise was often so great that the voice of the pastor while preaching could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with soot and soil the garments of the worshippers. Disagreeable odors, added to the noise, smoke, and cinders, rendered the place not only uncomfortable but almost unendurable as a place of worship. As a consequence, the congregation decreased in numbers, and the Sunday school was less numerously attended than previously.

Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. *Crump* v. *Lambert*, L. R. 3 Eq. 409.

The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing

them, are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice, erected by it, as a place of public worship for its members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted.

The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted, that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support.

It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city.

Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any

premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large.

Thus, in *Sinnickson* v. *Johnson*, 2 Harr. N. J. at 151, it was held by the Supreme Court of New Jersey that an act of the legislature authorizing an individual to erect a dam across a navigable water constituted no defence to an action for damages for an overflow caused by the dam.

"It may be lawful," said the court, "for him [the grantee of the power] and his assignees to execute this act, so far as the public interests, the rights of navigation, fishing, &c., are concerned, and he may plead, and successfully plead, the act to any indictment for a nuisance, or against any complaint for an infringement of the public right, but cannot plead it as a justification for a private injury which may result from the execution of the statute."

In *Crittenden* v. *Wilson*, 5 Cow. 165, it was held by the Supreme Court of New York that an act authorizing one to build a dam, on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. If, said the court, there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them, and the effect of the grant was merely to authorize the defendant to erect a dam, as he might have done, if the stream had been his own, without a grant. In such a case he would have been responsible in damages for all the injury occasioned by it to others.

In *Brown* v. *Cayuga, &c., Railroad Company*, 12 N. Y. 486, the company was sued for overflowing plaintiff's land by means of a cut through the banks of a stream which its road crossed. It pleaded authority by its charter to cross highways and streams, and that the cut in question was necessary to the construction and maintenance of the road. But it was held that the company was liable for damages caused.

"It would be a great stretch," said the court, "upon the language, and an unwarrantable imputation upon the wisdom and justice of the legislature, to hold that it imports an authority to cross the streams in such a manner as to be the cause of injury to others' adjoining property."

And so the court adjudged that the company was under the same obligation as a private owner of the land and stream, had he bridged it; and that the right granted to bridge the stream gave no immunity for damages which the excavation of its banks for that purpose might cause to others.

In *Commonwealth* v. *Kidder*, in the Supreme Court of Massachusetts, 107 Mass. 188, a statute of that State authorized the storage, keeping, manufacture, and refining of crude petroleum or any of its products in detached and properly ventilated buildings, specially adapted to that purpose; and it was held that it did not justify the refining of petroleum at any place, where a necessary consequence of the manufacture was the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.

Numerous other decisions from the courts of the several States might be cited in support of the position that the grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges.

If, as asserted by the defendant, the noise, smoke, and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodelled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes.

There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter-houses, lime-kilns, and tallow-furnaces, are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. *Fish* v. *Dodge*, 4 Denio, 311.

The fact that the smokestacks of the engine house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that chimneys should have a certain height, the regulations did not prohibit their

being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of *Sampson* v. *Smith*, 8 Sim. 271, and *Whitney* v. *Bartholomew*, 21 Conn. 212.

The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Judgment affirmed.

UNITED STATES *v.* AMBROSE.

ON CERTIFICATE OF DIVISION OF OPINION FROM THE SOUTHERN DISTRICT OF OHIO.

Decided April 23d, 1883.

Indictment—Jurisdiction—Perjury—Practice—Statutes.

§ 5392 Rev. Stat. enacts that "every person who, having taken an oath before a competent . . . person in any case in which a law of the United States authorizes an oath to be administered . . . that any written . . . declaration, . . . or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury." . . On an indictment against a clerk of a circuit and district court for perjury in swearing before a district judge to his emolument returns, and an account for services rendered to the United States: *Held*,

1. That the words "declaration" and "certificate," as employed in this section of the Revised Statutes, are used in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged.
2. That the returns and accounts set forth in the indictments were written declarations within the meaning of § 5392 Rev. Stat.
3. That the written statement and oath of the party together constitute the declaration or certificate of the statute, for the falsity of which a party is chargeable with perjury.
4. That the authority of the district judge to administer the oath not having been certified from below as a question of division, cannot be considered.

Indictment for perjury. The perjury charged in the first count was the taking an oath by Ambrose before the district judge for the Southern District of Ohio, that a certain written declaration by him subscribed was true; and the declaration as set out was a statement subscribed to an account against the United States, that the services charged in the account had been actually rendered. The indictment charged that they had not been rendered, and concluded with the usual allegations. The second count charged that the defendant had made a written return of fees and emoluments of his office, and had appeared before the district judge and taken and subscribed an oath, which is set forth at length, that the account is just and true. The count charged that the return was false, set forth in what

particulars it was so, and concluded with the usual allegations, averring that the paper so subscribed was a written declaration. The third count related to another return of fees and emoluments, and averred that the written oath subscribed to it was a written declaration. The fourth count related to an account for services, and the perjury was charged as consisting in a false certificate subscribed to it and sworn to before the district judge.

At the trial in the court below, before Mr. Justice Swayne and Judge Baxter, the judges disagreed, and certified the questions which appear in the opinion of the court.

Mr. Solicitor-General for the United States.

Mr. E. M. Johnson for Ambrose.—I. To constitute a declaration or certificate, under the statute, the paper must be verified before a competent tribunal, officer or person. Our first proposition is that the law of the United States did not vest in the district judge, as such, before whom these instruments were sworn, the authority to administer an oath, and therefore that these were unsworn papers, and could not constitute in law a declaration or certificate such as the statute contemplates. The indictment charges that the affidavit was administered by the judge, not by the court. There is no inherent authority in judges to administer oaths. No statute of the United States confers this authority generally on any judge of the United States. Section 725 contains the following language: "The said *courts* shall have power to impose and administer all necessary oaths." But the oath here was not administered by the court. The indictment does not so charge. It was administered by the judge out of court. It is unnecessary for us to argue that the judge is not the court.—II. Our next proposition is that the instruments in question, in their essential character, are neither declarations nor certificates. The principle governing questions of construction of this character is the ordinary and familiar proposition that penal laws are to be construed strictly, to which this court gave its unqualified assent in *United States* v. *Wiltberger*, 5 Wheaton,

76, and *United States* v. *Reese*, 92 U. S. 214. The instruments in question cannot be both declaration and certificates. In form, they are neither declarations nor certificates. Neither the word "declare" nor "certify" was used. Those described in the second and third counts are affidavits to emolument returns. The others are the proofs, by affidavit, of accounts.

The counsel examined at length the various statutes of the United States making provision for verified "declarations," and for verified "certificates," and contended that the offence contemplated by § 5392 was the falsely subscribing the oath to such certificates or declarations.

Mr. Justice Miller delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the judges holding the Circuit Court for the Southern District of Ohio.

The defendant, who was clerk of the circuit and district courts for that district, was indicted for perjury in swearing before the district judge to his emolument returns and an account for services rendered for the United States. The indictment consists of four counts framed under section 5392 of the Revised Statutes, namely:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall moreover thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

In the first three counts of the indictment, after setting out the emolument returns, and their verification by oath of the defendant, the falsity of the accounts and the corrupt perjury

of the defendant in swearing to them, each count closed with this language:

"And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, present that he, the said Thomas Ambrose, having taken the said oath, before the said officer who was competent to administer the same, that said written declaration by him so subscribed as aforesaid was true, wilfully and contrary to said oath did then and there unlawfully subscribe said matters heretofore set forth, which were material and which he did not believe to be true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A demurrer was filed to the whole indictment, on the ground relied on here, also that the paper to the truth of which defendant swears, as it is set forth in the indictment, is neither a *declaration*, as it is charged to be in the first three counts, nor a *certificate*, as charged in the last, within the meaning of those words in section 5392. And in regard to this question, as it applies to each count, the judges of the court have sent us the following certificate:

"Circuit Court of the United States, Southern District of Ohio.

The United States } *vs.* } 1,472. Indictment.
Thomas Ambrose. }

"This cause coming on to be heard before the Honorable Noah H. Swayne and Honorable John Baxter, judges of said court, sitting therein, upon the demurrer of defendant to the indictment, certain questions thereupon occurred on said hearing to be decided by the court, to wit:

"First. Whether the instrument set forth in the first count of indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

"Second. Whether the instrument set forth in the second count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration within

the meaning of section 5392 of the Revised Statutes of the United States.

"Third. Whether the instrument set forth in the third count of indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

"Fourth. Whether the instrument set forth in the fourth count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written certificate within the meaning of section 5392 of the Revised Statutes of the United States.

"Upon which said questions the judges aforesaid were divided in opinion.

"It is thereupon ordered that the said points of disagreement, stated as above, under the direction of said judges, be certified under the seal of the court to the Supreme Court of the United States at their next session."

We do not think the words *declaration* and *certificate*, as used in the section of the Revised Statutes on which this indictment is founded, are used as terms of art, or in any technical sense, but are used in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged.

Indeed, the word declaration, as a word of art in the law, is generally used to signify the plea by which a plaintiff in a suit at law sets out his cause of action, as the word complaint is in the same sense the technical name of a bill in chancery.

The fact that in many acts of Congress cited by counsel that body has used the word to signify a statement in writing, whether sworn to or not, as the foundation in many cases of official action, or as preliminary to the assertion of rights by the party who makes the declaration, is far from proving that the use of the word in the act concerning perjury is limited to these cases. The inference is strong the other way, for the word is used in the cases cited in regard to so many and such diverse transactions, that it can, in view of them all, have no other meaning than what is attached to it in ordinary use.

And in all these instances it is equivalent to a statement of facts material to the matter in hand.

The paper or statement of the emolument account, the falsity of which is the foundation of the charge, is set out, and if in the charging clause of the indictment it is described by a word equally applicable to other instruments, no harm can come to defendant, since he is precisely informed as to the identical writing which is alleged to be false, and which he swore to be true. Nor can he be misled in any way, because what he says in that writing is, in the correct use of language, his sworn declaration on that subject.

But the perjury in all such cases consists in the oath by which the party indicted swears to the truth of some matter, and this oath may be said to be the false statement of the statute. Or, in another sense, it may be said that the written statement and the oath of the party that it is true, all constitute the *declaration* or *certificate* of the statute, for the falsity of which he is chargeable with perjury and liable to punishment. The previously prepared writing, his oath to its truth, or the whole taken together, is, in our opinion, a declaration of the party within the meaning of the statute, and may be so well described in the indictment.

We are quite satisfied that, as set forth in this indictment, these are material matters under the statute, and if defendant did not believe them to be true when he swore to and subscribed the statement that they were true, that he is guilty of perjury, as declared in section 5392, and we think the word declaration correctly defines such statement. The same rule of construction is applicable to the word certificate used in the statute.

It is attempted in argument to raise the question whether the judge of the district court had authority to administer the oath in which the perjury was committed.

But it is clear that no such question is certified to us by the judges of the circuit court, and we cannot consider it. *United States* v. *Briggs*, 5 How. 208; *Dennistoun* v. *Stewart*, 18 How. 565.

We answer all the questions submitted to us in the affirmative, and it will be so certified to the circuit court.

Argument for Appellants.

THE TORNADO.

ELLIS & Others *v.* ATLANTIC MUTUAL INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided April 30th, 1883.

Affreightment—Contract—Freight—Total Loss.

Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for the carriage of cotton by her to a foreign port, evidenced by a bill of lading, containing the usual and customary exceptions, and providing for the payment of the freight money on the delivery of the cotton at that port, is thereby dissolved, so that the shipper is not liable for any part of the freight money, nor for any of the expenses paid by the vessel for compressing and stowing the cotton.

In admiralty. Libel for freight. The facts appear in the opinion of the court.

Mr. Thomas J. Semmes and *Mr. Richard De Gray* for the appellants cited *The Soblomsten*, L. R. 1 Adm. and Eccl. 293; *The Cito*, 7 L. R. Probate Div. 5; *Cargo ex Galam*, Br. & Lush. 167; *Aitchison* v. *Lohre*, 4 App. Cases, 755; *The Kathleen*, L. R. 4 A. & E. 269; *Jones* v. *Holm*, L. R. 2 Exchq. 335; *Tindall* v. *Taylor*, 4 Ellis & B. 219; 1 Parsons Maritime Law, 158–9; *Clark* v. *Insurance Company*, 2 Pick. 104; *Palmer* v. *Lorillard*, 16 Johns. 348; *Campbell* v. *Conner*, 70 N. Y. 424; *Bulkley* v. *Cotton Company*, 24 How. 386; *Jordan* v. *Warren Insurance Company*, 1 Story, 342; *Hubbell* v. *Great Western Insurance Company*, 74 N. Y. 246; *Shipton* v. *Thornton*, 9 Ad. & E. 314; *Hugg* v. *Banking Company*, 7 How. 595; *Hickie* v. *Rodocanachi*, 4 Hurls. & N. 455.

Mr. P. Phillips, *Mr. J. McConnell*, and *Mr. W. Hallett Phillips* for appellees.

Opinion of the Court.

Mr. Justice Blatchford delivered the opinion of the court.

This is a libel in admiralty against cargo of the ship Tornado, brought by the master and owners of that vessel, to recover freight money. The district court and, on appeal, the circuit court, dismissed the libel. The libellants have appealed to this court. The material facts found by the circuit court are these: On the 24th of February, 1878, the ship, while moored at the wharf in New Orleans, and bound on a voyage to Liverpool, England, and before she had broken ground for said voyage, was discovered to be on fire in her hold. Her master had given bills of lading for the transportation from New Orleans to Liverpool, with the exceptions usual in bills of lading, of 5,195 bales of cotton, of which 5,008 had been put on board, 164 were on the levee, and 23 had not reached the levee. Water was pumped into the ship to extinguish the fire, and, on the 26th, near six o'clock P. M., being filled with water, she sank to the bottom of the river alongside of the wharf, a part of her bulwarks remaining above water. While so resting upon the bottom of the river, the ship, cargo and freight were, on the 27th, libelled in the district court, for salvage, by the New Harbor Protection Company, and about two o'clock P. M. of that day the marshal, by virtue of a warrant of seizure issued by said court on said libel, took possession of the ship and cargo. On the 28th, about noon, the ship was pumped out and raised alongside the wharf, and the discharge of the cargo on board was commenced, all of it being damaged by water, and some of it by fire, 336 bales having been removed by the salvors in an undamaged condition before the ship sank but after the fire was discovered; but salvage was claimed and allowed on the entire cargo. On the same day, the proctor for the salvors filed in the district court a motion in writing, suggesting that the whole cargo then being discharged from the ship was greatly damaged by water and some of it by fire and water, and would in all probability have ultimately to be sold, being in an unfit condition to be sent to its destination, and an order of the court was thereupon made directing a sale of the cargo by the marshal upon the levee as it came out of the ship, on two days' advertisement, in such lots as might

accumulate from day to day. On the same day an application was made to the court by the master of the ship, in which he represented that he was desirous and entitled to bond the ship and cargo, and asked for a rule upon the libellant to show cause on the next day, March 1st, why the order to sell the cargo should not be rescinded, and the master be allowed to bond the cargo. On March 1st the rule came on for hearing. The proctor for the salvors, and counsel representing the insurers of the cargo, appeared and resisted the rescinding of the order of sale, and counsel appeared for the master, who filed a formal claim to the ship and cargo. On the trial of the rule witnesses were examined orally before the judge, among them various representatives of the underwriters on the cargo, who were called as witnesses by the proctor for the salvors, and who testified that if their interest were to be consulted they preferred that the cotton should be sold by the marshal as it came out of the ship, and that the master should not be permitted to bond the cotton. The counsel for the insurers of the cargo then asked leave to be heard on their behalf. To this the counsel for the master and claimant objected, and insisted that counsel for the underwriters on the cargo could not be heard until after the proof of abandonment to them by the owners of the cargo and acceptance of the abandonment. Thereupon Mr. Palfrey, president of the Factors' and Traders' Insurance Company of New Orleans, which was one of the companies represented by said counsel, and one of the witnesses who had been called to the stand as above stated, was recalled by said counsel and testified that so far as his company was concerned the loss on the cargo had been paid or ordered to be paid, and said company had become the owner of the cotton insured by it, and abandonment thereof had been made and accepted by his company. After this said counsel was allowed to and did make an oral argument in behalf of the underwriters, in opposition to the motion to rescind the order to sell which had been obtained by the salvors, but no pleadings were filed in behalf of the underwriters. Upon the trial of the rule evidence was also taken, by order of the court, in relation to the condition of the cargo, and whether the same was or was not a total loss. On

March 5th, and before the district court had made any decision or order on the rule to rescind the order for the sale of the cotton, a proctor representing underwriters at Lloyds, by leave of the court, filed an intervention for the interest of the insurers of the freight on the cargo, in which it was prayed that the order for the sale of the cargo be rescinded. This intervention was supported by affidavits filed by the intervenors and by a brief of the proctor. Afterwards, on March 6th, after consideration of the rule taken by the master of the ship to rescind the order of sale, and of the evidence and arguments thereon, and of the last named intervention, and of the affidavits and brief submitted therewith, the court ordered that the master be allowed to bond the ship and such of the cotton then stored in the levee steam cotton-press as was in good order, amounting to 523 bales, and that the remainder of the cargo on board the ship or upon the levee, which was more or less damaged, be sold by the marshal after three days' notice, and all questions of freight were reserved by the court, and the court appointed a trinity master to advise and assist in making sale of the cotton. On the 19th of March, the underwriters filed their claim, claiming all of the cargo, and procured an order from the judge of the district court to be entered on their claim, suspending the right given to the master, on the 6th of March, to bond such of the cotton as was stored in the levee cotton-press, to wit, about 500 bales, until the further order of the court. On March 26th, the master not having bonded the cotton, a rule was taken and duly served on him to show cause why the order of March 6th, so far as it allowed him to bond a portion of the cotton, should not be rescinded, and the movers of the rule, the insurers of the cargo, be allowed to bond the same. The rule was heard on March 27th, the movers of the rule and the master being represented by their respective counsel, and was by the court made absolute, without opposition, and the order allowing the master to bond said portion of the cargo was rescinded, and the movers of the rule were allowed to bond the same.

On the 30th of March, the present libel was filed. The unsold cargo and the proceeds of that which had been sold

were then in the custody of the marshal, in the suit for salvage. The libel recites the proceedings above mentioned, and alleges that the cotton might have been picked, dried and rebaled, and sent to its destination and freight have been earned thereon, but that the application of the master to bond the cargo was refused, owing to the opposition of the libellant for salvage, and especially to the opposition of the underwriters on the cargo; and that, under the contract of carriage, it was the right as well as the duty and the desire of the libellants to pick, dry and rebale so much of the cotton as might require it, and which could easily have been done, and to carry it to its destination and earn the freight money for carrying it, which they had been unable to do because they had been denied the right to bond it, owing to the opposition of the libellant for salvage and of the underwriters on the cargo, resulting in the taking away of the cargo entirely from the master, in consequence of which the entire freight money agreed on became due, as well as money paid by the libellants for compressing and stowing the cargo in the vessel, and other expenses incident thereto, and for railroad charges, for all of which the libel claims a lien on the cargo and on the proceeds of sale.

The circuit court found the following further facts: The libellants paid for compressing the cargo before it was put on board, and for stowing it on board, and other expenses incident thereto, $14,278.26. The gross freight on the cargo, had it been delivered at its destination in Liverpool, as required by the bills of lading, would have been £4,169 13*s* 1*d*. Of the cotton, 523 bales were in an undamaged and sound condition, being the 23, the 164 and the 336 before mentioned. In consequence of the fire, and as a result thereof, the ship was so badly damaged that the cost of her repairs would exceed her value when repaired, and she was unseaworthy and incapable of carrying freight. The 523 bales were bonded by the underwriters and were appraised at the sum of $19,100. The gross proceeds of the sale of the damaged cotton amounted to $116,000. The purchaser at the marshal's sale shipped to Northern States, in the condition in which it came from the ship, 1,185 bales of the damaged cotton; and 2,896 bales more

were picked, dried, rebaled and shipped, part to Liverpool and the rest to Philadelphia. All the damaged cotton taken from the ship was unmerchantable cotton, even after it had been picked, dried and rebaled, that is, it could not be used for making cotton cloth, but could only be used for making felt hats, paper, wadding and such like articles, having lost, by the submersion and drying, a large part of its natural oil, its fibre being injured and its weight reduced.

On the facts so found the circuit court held that the libellants had no lien on the cargo or its proceeds, for freight or for the money paid by them for compressing and stowing the cargo, and dismissed the libel.

The libellants seek to apply to the present case the principle applied where a voyage partly performed is interrupted by a disaster to the ship, namely, that the ship-owner has a lien on the cargo for the earning of the freight, and so has a right to carry the cargo forward by his vessel or some other conveyance, and deliver it and receive his full freight. As in the case of a disaster to the ship in the course of a voyage the whole freight is payable if, by the fault of the owner of the cargo, the master is prevented from forwarding the cargo from an intermediate port to its destination, it is contended in the present case that the libellants have a right to recover the whole agreed freight, because they had a right to send the cargo to Liverpool and earn full freight, and were prevented from doing so by the action of the underwriters, who became, by abandonment, the owners of the cargo. It is also contended that the owners had a right to repair the ship, even though the cost of repairing would exceed her value when repaired.

The law in regard to the respective rights and liabilities of shipper and ship-owner, where cargo has been carried for a part of a voyage, is nowhere better expressed than by Lord Ellenborough, in *Hunter* v. *Prinsep*, 10 East, 378, 394:

"The ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of their desti-

nation he will pay the stipulated freight ; but it was only in that event, viz., of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination ; but he has no right to any freight if they be not so forwarded ; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight ; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter ; the ship-owner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned and he decline proceeding to earn any, the freighter has a right to the possession."

These remarks were made in regard to a voyage partly performed, and interrupted by a disaster, where freight money was claimed *pro rata itineris peracti*. But no case can be found in which freight money has been allowed, where the voyage was not commenced, and the ship was, by a disaster for which the shipper was not at all responsible, put into the situation of the vessel in this case after the contract of carriage was made.

In the present case the ship was rendered unseaworthy by the fire and incapable of earning freight, and was so badly damaged that the cost of her repairs would exceed her value when repaired. There is no suggestion in the findings that there was any intention of repairing her, and on the facts found it must be presumed she would not have been repaired. All that could have been done, if the cargo had been bonded by the master or ship-owners, in regard to sending it forward, would have been to send it by another vessel. But, although the order of March 6th allowed the master to bond the 523

undamaged bales, and there was no suspension of that order until the 19th of March, they were not bonded.

We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the ship-owner were wanting at the time when the earning of freight could commence. In addition, as the result of the fire, and by no fault of the shipper, all but 523 bales of the cotton was rendered unmerchantable, and put into such a condition that its owner might well hesitate to incur the expense of sending it to Liverpool. As to the undamaged cotton, the master had an opportunity for thirteen days to bond it, and failed to do so.

The money paid by the ship-owners for compressing and stowing the cotton, and for other expenses incident thereto, must be understood as having been included in the freight money, and to be reimbursed out of that, and to be money for which, in any event, the shipper of the cotton would not have been liable in addition to the freight money. If the ship-owner was not entitled to the latter, he was not entitled to anything. He took, as to the expenses, the risk of losing them if he lost the freight money. So, the two are bound up together.

It is an inherent element in a contract of affreightment under a bill of lading, that the vessel shall enter on the voyage named, and begin the carriage of goods shipped, or, as it is technically called, break ground, before a claim to freight money can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods. In the latter case, the circumstances under which the contract was entered into continuing substantially the same so far as respects

the vessel, the shipper cannot reclaim the goods without paying at least full freight. But, subject to this qualification, it is a principle of the maritime law, that if a ship does not begin her voyage at all, does not break ground, no freight can be payable. This was laid down and applied in the early case of *Curling* v. *Long*, 1 Bos. & Pul. 634. That case has never been overruled and no case holding to the contrary is cited or has been found. It is a case directly in point in two particulars, and it will be useful, therefore, briefly to examine it. Some hogsheads of sugar were shipped, under bills of lading, on a vessel while lying in a port in Jamaica, bound for London. Before the vessel sailed she was cut out by privateers and carried to sea, but was recaptured and taken into another port. Under a libel for salvage in the Admiralty Court of Jamaica the cargo was sold by order of the court, and the net proceeds were remitted to the defendants for the owners of the cargo. The ship-owners had expended money in lading the cargo, according to the usage of the Jamaica trade. They sued the defendants to recover the freight money or the expenses. It was held that they could not recover anything; that the inception of freight was breaking ground; and that the expenses incurred were to be reimbursed in the freight money or not at all.

The case of *Jones* v. *Holm*, L. R. 2 Exch. 335, was a different case. By a charter-party, a vessel was to go to a specified port and take a specified cargo and deliver it at Liverpool for a specified freight. She went to the port and was partly laden, when she was so damaged by fire that she was scuttled. The cargo was injured and sold, except a small part, not on board, which was forwarded to Liverpool by the master. The vessel was repaired and tendered to take the remainder of the cargo. The charterer refused to supply more cargo, and the vessel obtained a cargo and carried it to England at a less freight than she would have earned for a full freight under the charter-party. In a suit to recover damages for a breach of the charter-party, it was held the charterer was bound to complete the lading of the vessel.

The authority of the case of *Curling* v. *Long*, is recognized in *Bailey* v. *Damon*, 3 Gray, 94; *Burgess* v. *Gun*, 3 Harr. &

Johns. 225; *Clemson* v. *Davidson*, 5 Binn. 392; and in various text-books—3 Kent's Com. 223; 1 Parsons on Ship. & Adm. 220; Abbott on Shipping, 11th Lond. ed. 407; Maclachlan on Shipping, 2d ed. 458; Smith's Mercantile Law, 3d Am. ed. 400.

On principle, this case falls within the rule that where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed. The ship-owner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. Before that event occurred this vessel was substantially put out of existence by no fault of the shipper, and he had and could have no benefit from the contract. He had a right, therefore, to treat the contract as rescinded, so far as any liability for freight was concerned. In *Taylor* v. *Caldwell*, 3 Best & Smith, 826, it is laid down as a rule, that, "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." The reason given for the rule is, that without "any express stipulation that the destruction of the person or thing shall excuse the performance," "that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." The rule was there applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it. The principle was extended farther in *Appleby* v. *Myers*, L. R. 2 C. P. 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the con-

tract, and that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. See Benjamin on Sales, 3d Am. ed. § 570; *Wells* v. *Calnan*, 107 Mass. 514, and cases there cited.

These principles are so well established that it is only necessary to refer to one case in this court, *Jones* v. *United States*, 96 U. S. 24, which recognizes them, in which it is said:

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfil the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. . . . A contract may be so framed that the promises upon one side may be dependent on the promises upon the other, so that no action can be maintained, founded on the written contract, without showing that the plaintiff has performed, or at least has been ready, if allowed by the other party, to perform his own stipulations, which are a condition precedent to his right of action."

On a full consideration of the case, we are of opinion that the decree of the circuit court must be affirmed.

THE CONNEMARA.

SINCLAIR & Another *v.* COOPER & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Decided April 30th, 1883.

Salvage—Statutes.

1. A ship, towed by a steam tug down a river, came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been

set, a passenger on board of her was awakened by a smell of smoke arising from a fire, which had broken out in part of the cargo stowed in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug; and he and the officers, crew and passengers of the tug, working together, and by means of a steam pump and hose upon the tug, and unaided by the officers and crew of the ship, put out the fire in twenty minutes: *Held*, That this was a salvage service, and that the passenger on board the ship, as well as the owner, officers, crew and passengers of the tug, might share in the salvage.

2. Under the act of Congress of 16th February, 1875, c. 77, a decree of salvage by the circuit court is not to be altered by this court for excess in the amount awarded, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

In admiralty. Libel for salvage. Decree below for libellants, and appeal. The act of salvage was done on a voyage down the river Mississippi, the vessel being fully freighted for Liverpool. The salvors were a tugboat, the officers and crew of the vessel, and passengers on the vessel. The main contention was as to the amount of the salvage and as to the right of a passenger to participate.

Mr. P. Phillips and *Mr. W. Hallett Phillips* for appellants. —The tugboat and crew are not entitled to salvage: only to a liberal renumeration *pro opere et labore*. *The Clifton*, 3 Haggard Admr. 117, cited in Abbott on Shipping, marg'l p. 557. This court defines the elements of salvage service to be "danger to property, value, risk of life, skill, labor, and the duration of the service." *Post* v. *Jones*, 19 How. 150, at 161. It was long doubted whether a tug, while engaged in the service of a ship, could claim salvage. It is well settled that the fact of the service diminishes the quantum of reward. James' Salvage, 40; Dr. Lushington in *The Wm. Brandt*. The main ingredient, danger, being absent in ordinary services rendered by tugs, large amounts should not be awarded. *The Birdie*, 7 Blatchford, 238. Sailing vessels are liberally rewarded on account of the danger which they run. *The Blackwell*, 10 Wall. 1. In the present case the tug ran no danger whatever. The only possible ground to be urged in support of the decree is the *value*

of the ship and cargo ; but this should not constitute the main consideration of the case. Say the Privy Council: "The rule seems to be that, though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered." *The Amerique*, L. R. 6 P. C. Appeals, 468, 472. See also *The Henry*, 2 Eng. Law and Eq. 565: Parsons on Shipping, 283. The decree in allowing salvage to a passenger is sustainable on no principle. See 3 Kent. Com. marg. p. 246. In a case where an officer in the Royal Navy rendered assistance to the ship in distress, of which he was a passenger, the court said: "No case has been cited where such a claim by a passenger has been established. When there is a common danger it is the duty of every one on board to give all the assistance he can." *The Branston*, 2 Haggard, 3; *The Clarita*, 23 Wall. 1; *The Vrede*, 1 Lush. 322. In the latter case, Dr. Lushington is thus reported: "Services rendered by passengers must have occurred over and over again, yet, except the cases of the Branston and the Salacia, there is apparently no precedent on which a claim for salvage by a passenger has been prosecuted in this court." The exception to the general rule is again expressed in these terms: "If they assume extraordinary responsibility and devise original and unprecedented means by which the ship is saved after her officers have proved themselves powerless." The Great Eastern U. S. D. C. for N. G., per Shipman.

Mr. Richard De Gray, *Mr. J. R. Beckwith* and *Mr. Chas. W. Hornor* for appellees.

Mr. Justice Gray delivered the opinion of the court.

This is a libel in admiralty by the owner, master and crew of the steam towboat Joseph Cooper, Jr., for salvage on the ship Connemara and cargo. Louis Wurtz and Henry Holser, passengers on the towboat, and John Evers, a passenger on the ship, were permitted to file intervening libels. The value of the ship and cargo was agreed to be $236,637. The district court awarded as salvage eight per cent. on that value, or

$18,930.96; and the owners and claimants of the ship appealed to the circuit court.

The circuit court found the following facts: On the 15th of April, 1879, the ship Connemara, being in the port of New Orleans, with her cargo on board, consisting chiefly of pressed cotton, and bound on a voyage for Liverpool, England, engaged the towboat Joseph Cooper, Jr., to tow her to the mouth of the Mississippi River, and was by her towed about twenty-six miles down the river, and came to anchor about eight o'clock in the evening opposite the Belair plantation. About eleven o'clock at night, the ship, with the towboat lashed to her side, was lying with her bow to the current and her stern to the wind, which was blowing stiffly; no watch had been set; and the two mates and the boatswain of the ship were under the influence of liquor, and the captain and the rest of the crew were sober. Evers, a passenger on board the ship, being then asleep in the second mate's cabin, was awakened by a smoke of burning cotton, sprang from his berth, and gave the alarm to the officers and crews of the ship and of the towboat. The fire was not in the hold, but in the poop above the main deck, and near the door, which could be opened by raising the latch; and the fire, when discovered, was confined to three bales of cotton, a spare sail, and two coils of tarred rope. There were one hundred and twenty-seven bales of cotton stowed in the poop. The fire was not caused by the fault of the towboat, or by any defect in her equipment or management. The towboat had on her deck a pump worked by steam, and hose long enough to reach the fire on the ship. As soon as the alarm was given, and by the exertions of the towboat's officers and crew, of her two passengers and of Evers, the hose was laid from the pump to the deck of the ship, and by their use of this pump and hose the fire was put out in fifteen or twenty minutes, without any damage to ship or cargo, beyond the burning of the sail and the two coils of rope, the partial burning of the three bales of cotton, and the charring of a part of the upper deck or roof of the poop. In extinguishing the fire, there was no serious risk of loss or damage to the towboat, or of injury to life or limb of any of the salvors. No efficient

effort was made by the officers or the crew of the ship to extinguish the fire. The ship had on her deck, within fifteen feet of the fire, two tanks of water, holding four hundred gallons each, one of which was full and the other half full, with six buckets near the fire and seven above, and a pump by which water could have been pumped upon the upper deck. At the time of the fire, the steam tug Harry Wright was lying about a quarter of a mile off; and there was a telegraph station on the Belair plantation, from which a dispatch could have been sent to the city of New Orleans for aid to put out the fire, and efficient aid might have reached the ship from the city in two hours and a half after notice. The agreed value, as aforesaid, of the Connemara and cargo, and the names and monthly wages of each of the officers and crew of the Joseph Cooper, Jr., were also stated in the findings of fact.

From these facts the circuit court made and stated the following as conclusions of law: 1st. The services rendered by the towboat Joseph Cooper, Jr., her officers and crew, and the three passengers, Wurtz, Holser and Evers, in the extinguishment of the fire on board the ship Connemara, were a salvage service. 2d. A gross salvage on the ship and cargo of $14,198, or six per cent. on the value thereof, should be allowed. 3d. This salvage should be equally divided, half to the owner of the towboat and half to the salvors. 4th. The moiety allowed to the salvors should be distributed among them in proportion to their monthly wages, the passengers Wurtz and Evers to rank as pilots, and Holser as a steersman.

A decree was entered accordingly, and the claimants appealed to this court. A motion to dismiss the appeal for want of jurisdiction was made and overruled at October term, 1880. *The Connemara*, 103 U. S. 754.

The errors assigned are: First. That the facts found do not constitute a salvage service. Second. That if a salvage service, it is salvage of the lowest grade, and the amount allowed is exorbitant. Third. That the amount allowed to John Evers, he being a passenger on board the Connemara, is not warranted by law.

Opinion of the Court.

Neither of the grounds assigned will justify this court in reversing the decree.

If the fire, which had made such headway as to wholly consume the two coils of tarred rope and the spare sail, and to partly destroy three bales of the cotton stowed in the poop, had not been promptly discovered and extinguished, there was imminent danger that it would extend to the rest of that cotton, and, fanned by the stiff breeze which was blowing lengthwise of the ship, destroy or greatly damage the ship and the whole cargo. Saving a ship from imminent danger of destruction by fire is as much a salvage service as saving her from the perils of the seas. *The Blackwell*, 10 Wall. 1. The shortness of the time occupied in rescuing the ship from danger does not lessen the merit of the service. *The General Palmer*, 5 Notes of Cases, 159, note; *The Syrian*, 2 Marit. Law Cas. 387; *Sonderburg* v. *Ocean Towboat Company*, 3 Woods, 146. The danger being real and imminent, it is not necessary, in order to make out a salvage service, that escape by other means should be impossible. *Talbot* v. *Seeman*, 1 Cranch, 1, 42.

The fact that no serious risk was incurred on the part of the salvors does not change the nature of the service, although an important element in estimating its merit and the amount of the reward. As has been well said by Mr. Justice Curtis,

"The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature." *The Alphonso*, 1 Curtis, 376, 378.

The contract of the towboat and her officers and crew was to tow the ship, and did not include the rendering of any salvage service, by putting out fire or otherwise. Such a service, which, by the use of the steam pump and engine of the towboat, rescued the ship from an unforeseen and extraordinary peril, gave the owner as well as the officers and crew of the

towboat a right to salvage. *The William Brandt, Jr.*, 2 Note of Cases, Supplement, lxvii.; *The Saratoga*, Lush. 318; *The Minnehaha*, 15 Moore P. C. 133; *S. C.* Lush. 335; *The Annapolis*, Lush. 355, 361, 372. And no doubt is or could be raised as to the right of the passengers on the towboat, whose exertions contributed to putting out the fire, to share in the salvage awarded to her officers and crew. *The Cora*, 2 Pet. Adm. 361; *S. C.* 2 Wash. C. C. 80; *The Hope*, 3 Hagg. Adm. 423.

Evers, the passenger on the *Connemara*, was also entitled to share in the salvage. A passenger cannot indeed recover salvage for every service which would support a claim by one in no wise connected with the ship. In the case of a common danger, it is the duty of every one on board the ship to give every assistance he can, by the use of all ordinary means in working and pumping the ship, to avert the danger. Yet a passenger is not, as the officers and crew are, bound to stand by the ship to the last; he may leave her at any time and seek his own safety; and for extraordinary services, and the use of extraordinary means, not furnished by the equipment of the ship herself, by which she is saved from imminent danger, he may have salvage. *Newman* v. *Walters*, 3 B. & P. 612; *The Branston*, 2 Hagg. Adm. 3, note; *The Salacia*, 2 Hagg. Adm. 262, 269; *The Vrede*, Lush. 322; *The Pontiac*, 5 McLean, 359, 363; *The Great Eastern*, 2 Marit. Law Cas. 148; *S. C.* 11 Law Times (N. S.), 516; *The Stella Marie*, Young's Adm. 16; 3 Kent Com. 246. The services of Evers were of peculiar value, and involved the use of means outside the ship. His promptness and vigilance gave the alarm, which, by the supineness and neglect of the officers and crew of the ship, might not otherwise have been given in time to save her. This might not of itself have entitled him to reward; but beyond this he exerted himself, as if he had been one of the officers and crew of the towboat, in the use of the steam pump and hose on board of her, by which the fire on the ship was effectually subdued.

It may also be observed that this case comes before us on the appeal of the owners of the ship; and that there is no controversy, either between Evers and the other salvors, or between

the salvors who gave their personal exertions and the owners of the towboat whose machinery was used, as to the distribution of the salvage.

The services performed being salvage services, the amount of salvage to be awarded, although stated by the circuit court in the form of a conclusion of law, is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. *The Blaireau*, 2 Cranch, 240, 267; *The Adventure*, 8 Cranch, 221, 228; *The Emulous*, 1 Sumner, 207, 213; *The Cora*, above cited; *Post* v. *Jones*, 19 How. 150, 161.

In *The Sybil*, 4 Wheat. 98, Chief Justice Marshall said:

"It is almost impossible that different minds contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution."

And by the uniform course of decision in this court, during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the Judicial Committee of the Privy Council of England, exercising a like jurisdiction, the amount decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake or gross over-allowance. *Hobart* v. *Drogan*, 10 Pet. 108, 119; *The Comanche*, 8 Wall. 448, 479; *The Neptune*, 12 Moore P. C. 346; *The Carrier Dove*, 2 Moore P. C. (N. S.) 243; *S. C.* Brown. & Lush. 113; *The Fusilier*, 3 Moore P. C. (N. S.) 51; *S. C.* Brown. & Lush. 341.

By the act of Congress of 16th February, 1875, c. 77, the appellate power of this court is restricted within narrower bounds; its authority to revise any decree in admiralty of the circuit court is limited to questions of law; and the finding of facts by that court is equivalent to a special verdict, or to facts found by the court in an action at law when a trial by jury is waived. *The Abbottsford*, 98 U. S. 440; *The Francis Wright*, 105 U. S. 381; *Sun Insurance Company* v. *Ocean Insurance Company*, 107 U. S. 485.

The effect of this change may be illustrated by referring to

the revisory power of the courts in actions at law tried by a jury. The facts are decided by the jury in the first instance. If the jury return a general verdict, clearly against the weight of evidence, or assessing exorbitant damages, the court in which the trial is had may set aside the verdict and order a new trial. But a court of error, to which the case is brought by bill of exceptions or appeal on matter of law only, cannot set aside the verdict, unless there is no evidence from which the conclusion of fact can be legally inferred. *Parks* v. *Ross*, 11 How. 362; *Schuchardt* v. *Allens*, 1 Wall. 359.

Before the act of 1875, this court, upon an appeal in a case of salvage, gave the same weight, and no more, to the decree of the court below, that a court of common law would allow to the verdict of a jury; and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which should govern the subject was shown. *Post* v. *Jones*, 19 How. 150, 160. Since the act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

In the present case, a vessel and cargo of great value were rescued from imminent danger by the energetic efforts of the salvors; and the amount of salvage awarded is less than one-sixteenth of the value of the property saved. Although upon the circumstances of the case, so far as they can be brought before us by the summary of them in the findings of facts by the circuit court, we might have been better satisfied with an award of a smaller proportion, we cannot say that the amount awarded is so excessive as to violate any rule of law.

Decree affirmed.

Statement of Facts.

ADRIATIC FIRE INSURANCE COMPANY *v.* TREADWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Decided April 30th, 1883.

Contract.

Several insurance companies having policies on the same property agreed together to defend against claims for insurance, by a written instrument of which the following is the material part: the said companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defence of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees, and expenses of said suits and proceedings *pro rata;* that is to say, each company shall pay such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement. The management and conduct of said resistance to said claims and defence of said suits and proceedings shall be and is fully entrusted to and devolved upon a committee to be composed of W. H. Brazier and James R. Lott, of the city of New York, Charles W. Sproat, of the city of Boston, L. S. Jordan, of the city of Boston, which committee shall have full power and authority to employ counsel and attorneys to appear for said companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from such companies, from time to time, as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defence of said suits as said committee shall deem necessary and expedient; such assessment upon and payment by each of said companies to be *pro rata*, as above mentioned. The committee named in the agreement communicated it to the defendant in error, and employed him as counsel in resisting the suits. On a suit for professional service brought by him against the companies jointly: *Held*, That any contract there may have been between him and the companies was several not joint.

Action by defendant in error, who was plaintiff below, to recover $15,000 for professional services claimed to have been rendered to the plaintiffs in error jointly. The defence was that the contract was several. The agreement between the companies

on which the alleged joint contract was founded appears in the opinion of the court. The court below held the contract to be joint, and gave judgment for the plaintiff below for $8,000. The defendants below sued out their writ of error and brought the case here.

Mr. John E. Parsons for plaintiff in error.

Mr. Luther R. Marsh and *Mr. William G. Wilson* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This action was brought by the defendant in error to recover compensation for professional services as an attorney and counsellor at law, rendered, as alleged, at the instance and request of the defendants in error, and each of them, as well as of sundry other corporations not inhabitants of the Southern District of New York or of the State of New York, nor found therein, and, therefore, not joined, as defendants below, in and about the defence of certain suits brought against several of them in Massachusetts, but in which all had a common interest, and for which it is alleged these companies, including the plaintiffs in error, jointly and severally promised to pay what said services were actually worth.

The cause was tried by a jury, and resulted in a verdict and judgment for the plaintiff below, to reverse which, for errors of law alleged to have occurred in the rulings of the court during the trial and presented in a bill of exceptions, this writ of error is prosecuted.

The plaintiff below put in evidence an agreement in writing, signed by fifteen insurance companies, including the defendants, a copy of which is as follows:

"In re Taylor, Randall & Company
versus
The St. Paul Fire & Marine Insurance Company et als.

"The undersigned insurance companies, having policies outstanding issued to Taylor, Randall & Company, upon property at Central Wharf, Boston, upon which claims have been made against

said companies, do, in consideration of one dollar, by each paid to the other, and divers other good and valuable considerations, mutually covenant and agree to and with each other as follows, that is to say: the said companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defence of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees, and expenses of said suits and proceedings *pro rata;* that is to say, each company shall pay such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement. The management and conduct of said resistance to said claims and defence of said suits and proceedings shall be and is fully entrusted to and devolved upon a committee to be composed of W. H. Brazier and James R. Lott, of the city of New York, Charles W. Sproat, of the city of Boston, L. S. Jordan, of the city of Boston, which committee shall have full power and authority to employ counsel and attorneys to appear for said companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from such companies, from time to time, as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defence of said suits as said committee shall deem necessary and expedient; such assessment upon and payment by each of said companies to be *pro rata*, as above mentioned.

"Each and every of said companies shall fully and faithfully adhere to this agreement, and shall refrain from any act or proceeding in reference to such claims or suit, or the defence thereof, that can or may in anywise defeat, obstruct, or interfere with the acts or proceedings of said committee relative thereto, and shall at all times furnish to said committee any and all papers, information, and assistance in and about such management and conduct of such resistance and defence as may be in the possession or power of said companies respectively, and as may be desired by said committee.

"In witness whereof the said insurance companies have sub-

scribed this agreement, this twenty-fourth day of April, eighteen hundred and seventy-four."

Prior to the execution of this agreement, suits had been commenced against some of the companies, other than the plaintiffs in error, in Boston, in one of which the agreement itself is entitled; and the defendant in error had been employed to defend them. After the agreement had been signed, the committee named in it employed the defendant in error on behalf of all the companies parties to it. He testified that the agreement was shown to him, and that he accepted the invitation to become the attorney of the companies. The employment was general, no special terms being fixed, and it is not questioned that it was with full knowledge of the agreement between the companies, and according to the authority conferred by it upon the committee. The plaintiff below having proved the fact and value of the services rendered, rested his case, at the conclusion of which and afterwards again, after all the evidence had been put in, the defendants below requested the court to instruct the jury to find a verdict for the defendants, on the ground "that the agreement was not one under which any joint liability could be created; that the provisions of the agreement were specific, the parties to the agreement were only to pay severally and *pro rata* any amount that should become due under the agreement."

This instruction the court refused to give, and that refusal is now assigned for error.

The committee appointed by the agreement between the insurance companies, were special agents only for the purposes and within the limits declared in it. They had no authority to bind their principals beyond its import, and the limits of that authority were made known to the defendant in error when he accepted employment from them. Whatever authority to bind the companies in making that employment had been conferred upon them by the agreement, they in fact exerted. So that the question to be determined is, whether that agreement conferred upon the committee authority to bind the companies jointly, or jointly and severally, to pay the expenses of the liti-

gation; or, whether they became liable, severally only, each for its proper proportion.

The contract, it will be observed, is between the companies. No other person is a party. The promises are between them severally. Each binds itself to each of the others. There is no joint undertaking or promise, on the part of all, to any one else. They "mutually covenant and agree to and with each other." They do agree, indeed, that they "will unite in resisting the claim made upon said policies, and on each thereof, and in the defence of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies;" but, as to the obligation of payment on that account, its nature and extent, the agreement is, that they "will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees, and expenses of said suits and proceedings *pro rata;* that is to say, each company shall pay such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement." These expressions leave no doubt as to the intention of the parties in regard to the limit of their several liabilities as between themselves.

The management and conduct of this common defence was entrusted to and devolved upon a committee of named persons; and the powers and rights of that committee are expressly defined. They are given full power and authority to employ counsel and attorneys to appear for said companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto. They are thus constituted the agents, for the purposes named, of the parties to the contract, and whatever they do within the terms of that agency, which, of course, is not general, but special, binds the parties according to their agreement. The committee is not a party to the agreement, but derives its powers from it and has rights under it, chiefly the right of reimbursement for expenses and indemnity for obligations legitimately incurred. This right would be implied, if it were not expressed; but if the mode and measure of it are expressly declared, no impli-

cation can enlarge its limits. It is in fact expressly defined. The committee have, by the further provisions of the agreement, also, full power and authority "to assess upon and demand and receive from such companies, from time to time, as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defence of said suits as said committee shall deem necessary and expedient, such assessment upon and payment by each of said companies to be *pro rata*, as above mentioned." It is very clear, we think, from this language, that for any advances made by the committee for the expenses of the defence, or for any indemnity against any personal liability they may have incurred in conducting it, they could have no personal recourse upon the companies except by way of assessment upon them severally, each for its own proportion, according to the ratio fixed by the agreement. Such proportion could be enforced by action against each delinquent company. There is no ground on which the companies could be made jointly responsible, so that any one or more could be required to make good the default of any of the rest. The fund for the payment of all the obligations contemplated by the agreement is limited, in express terms, to be raised in the mode pointed out in it by a *pro rata* assessment upon each for its individual share.

Such being the relation between the several companies and the committee, those employed by the latter for the purposes of the agreement can have no greater rights than such as grow out of it. The agency being special, those who claim under it are bound by its limitations; and in the present case the defendant in error, it is admitted, had actual knowledge of them. So that, though the employment by the committee established a privity between him and the parties to the contract, giving him a right to treat the companies directly as his principals and employers, nevertheless it must be taken to be only to the extent of the authority of the committee under the agreement, and subject to the limitations imposed by it upon the liability of the companies. He must be considered as relying, if he did not stipulate for the individual liability of the members of the

committee, upon their power to raise the fund for the payment of his compensation by the assessment under the agreement; which, being made, he would have a right to enforce; or which, if denied to him wrongfully, would entitle him to his action, as if it had been made, or against the committee for not making it. But there is no ground on which he can claim that the employment of the committee imports a joint promise of compensation from the companies, in the face of the express restrictions upon the power of the committee to bind them otherwise than severally, each in proportion to its interest. The defendant in error is and can be in no better position by reason of the employment by the committee under the agreement between the companies, than the committee would have been if they had made the advances required, or than he would have been if he had been a direct party to that agreement, employed by the companies according to its terms. There is not only nothing in the agreement from which it could be inferred that the companies were to be sureties for each other, but that inference is expressly negatived by the declaration, according to which each is to be liable for its own separate and proportionate part.

Similar reasoning, leading to like conclusions upon analogous facts, is to be found in many reported cases. We select, as illustrations, the following: *Peckham* v. *North Parish in Haverhill*, 10 Pick. 274; *Ludlow* v. *McCrea*, 1 Wend. 228; *Ernst* v. *Bartle*, 1 Johns. Cas. 319; *Howe* v. *Handley*, 25 Maine, 116; *Gibson* v. *Lupton*, 9 Bing. 297; *Fell* v. *Goslin*, 21 Law J. Rep. N. S. Exch. 14.

In our opinion the court below should have instructed the jury, as requested by the plaintiffs in error, to render a verdict for the defendants below, on the ground that no joint liability had been proven; and its declining to do so was error, for which the judgment is reversed, with directions to grant a new trial.

And it is so ordered.

Statement of Facts.

SCRUGGS' Executor & Others *v.* MEMPHIS & CHARLESTON RAILROAD COMPANY & Others.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Decided April 30th, 1883.

Equity—Feme Covert—Lease—Marshalling of Assets—Mortgage.

A railroad company agreed with A that he might erect a building on property of the company, paying a ground rent therefor for a period terminable by notice, and that at the expiration or termination of the term the company would take the building at a valuation to be fixed by arbitration. A entered into possession, and constructed a valuable building, and then conveyed his interest in the term to his wife. A gave a note to B in which the wife joined as surety and the husband and wife executed a mortgage of the premises to B to secure payment of the note. A and his wife gave notice to terminate the term and called for an arbitration to fix the value of the improvements. Arbitration was had, and a price was fixed by the arbitrators as the sum to be paid for the improvements under the agreement and the date when the same was payable, and judgment was entered accordingly in a court of record. Pending these proceedings A died. At the time of the arbitration there was rent in arrear, and it was agreed that this should not enter into the arbitration, but should be subject to future adjustment. The company neglecting to pay the sum fixed by the arbitrators, the wife remained in possession after A's death, receiving the rents and profits, and attempted to enforce the judgment by an execution. On a bill in equity filed by the company to restrain the enforcement of the judgment and for an account, and a bill of interpleader making B a party for the protection of his rights, *Held*,

1. That the wife was entitled to interest on the judgment sum from the date fixed in the decree for the payment, and was bound to account for the rents and profits of the premises which were received, or might reasonably have been received by her after the date fixed by the arbitrators for the payment of the money from the railroad company.
2. That B's lien was valid under the laws of Mississippi, against the income of the property. And that, there being two funds in the possession of the court, one the decree and the other the interest upon the decree, a court of equity should so marshal the assets as to pay the lien of B from the interest on the decree.

On January 8th, 1872, a decree was rendered by the Chancery Court of Alcorn County, in the State of Mississippi, in favor of Narcissa Scruggs, one of the appellants, against the

Memphis and Charleston Railroad Company, for the sum of $31,666.66, and interest thereon from January 21st, 1871. This decree was, on December 14th, 1874, affirmed, on appeal, by the Supreme Court of Mississippi, and a decree rendered against the railroad company and the sureties on its appeal bond for the amount of the decree of the Chancery Court of Alcorn County, and interest thereon, and $1,583.33 damages, the whole to bear interest until paid.

The transactions which gave rise to the litigation which resulted in this decree were as follows: On July 7th, 1857, John W. Scruggs, the husband of said Narcissa, made a contract in writing with the railroad company, by which he agreed to erect on its land at Corinth, Mississippi, which was one of the stations on the company's road, a railroad hotel, and conduct it in a manner acceptable to the railroad company, and pay the company an annual ground rent of $250. It was provided that should the railroad company at any time become dissatisfied with the manner in which the hotel was carried on, the right was reserved to it to take possession thereof by paying Scruggs its value, and if Scruggs became dissatisfied with the schedule or management of the company, he reserved the right to surrender the improvements put by him on the land, and to require the company to pay their value at the time of surrender.

Scruggs erected a hotel building according to the contract, and kept therein a boarding house for the officers and employees of the railroad company, and a house of refreshment for travellers, until April 21st, 1871. About that time he conveyed the hotel building and other improvements by him put upon the land, and his leasehold in the land, to his wife, Narcissa. On the day just mentioned, Scruggs and his wife and the president of the railroad company agreed with each other that the lease should cease and determine, and the property should be surrendered to the railroad company. And as there was some dispute between the parties in reference to the construction of the contract of July 7th, 1857, they agreed to submit to arbitrators to decide upon the legal construction of said agreement, and the value of said improvements, and the amount which should be paid therefor by the railroad company to Mrs. Scruggs upon

the surrender of the premises. All other questions arising under said agreement, whether as to the rights of the party to recover damages or otherwise, were expressly reserved. It was further agreed that the award of the arbitrators should be entered as a decree of the Chancery Court of Alcorn County.

The arbitrators on April 21st, 1871, made their award as follows:

"The Memphis and Charleston Railroad Company shall pay to the said Narcissa Scruggs the sum of thirty-one thousand six hundred and sixty-six dollars and sixty-six cents, in full payment of all the improvements placed on the ground occupied by the Scruggs House on the grounds of said company, at Corinth, Mississippi, and on payment of said sum of money, the said Narcissa Scruggs shall deliver possession of said hotel to said railroad company.

"We do further decide and decree, that the true construction of the contract is, that by its terms J. W. Scruggs acquires a perpetual lease on the ground occupied by the said hotel on the payment of the sum of two hundred and fifty dollars per annum rent, and subject to be defeated by the Memphis and Charleston Railroad Company only on the condition that Scruggs failed to keep a first-rate eating house, and by the said J. W. Scruggs, on condition that said Memphis and Charleston railroad failed to use said hotel as an eating house.

"We do further determine, that from the evidence in the case and the articles of submission and contract, that the sum to be paid by the Memphis and Charleston Railroad Company to said Narcissa Scruggs, is, as heretofore mentioned, the value of the property surrendered to the Memphis and Charleston Railroad Company."

The railroad company refused to pay the award or to take possession of the property. Whereupon, on May 2d, 1871, Narcissa Scruggs filed her bill in the Chancery Court of Alcorn County to enforce the performance of the award. After the bringing of the bill, the counsel of the parties filed in the case an agreement in writing, as follows:

"In the above case it is agreed that the amount due to the de-

fendant as ground rent for the land upon which the Corinth Hotel is built, as specified in the lease to J. W. Scruggs, was not included in the award by the arbitration ; and it is agreed that the amount due for the same for said rent shall be deducted from whatever amount may be found to be due by the award of said arbitrators ; and that the said Scruggs shall be permitted to set off as against said rents, any amount due him by said railroad for board of employees, &c., the said amount to be adjusted by reference to the master of the chancery court."

The litigation commenced by this bill resulted in the decree of the Supreme Court of Mississippi above mentioned. In the meantime, to wit, on August 13th, 1871, John W. Scruggs had died.

On January 8th, 1875, upon an attempt by Mrs. Scruggs to enforce the payment of this decree by execution, the bill in the present case was filed by the railroad company in the Chancery Court of Alcorn County. The bill averred that the decree of the Alcorn Chancery Court above mentioned, which was affirmed by the Supreme Court of Mississippi, established a debt in favor of Mrs. Scruggs against the railroad company for $31,666.66, with interest from April 21st, 1871, and fixed that date for the surrender of the premises by Mrs. Scruggs to the railroad company, and gave her a lien on the premises for the payment of the decree, and upon failure of the railroad company to pay the same within thirty days ordered a sale of the property, and that the decree left Mrs. Scruggs as a mortgagee in possession until the sum above mentioned was paid. The bill further averred that the decree should be reduced by the ground rents due the railroad company up to April 21st, 1871, and for the use and occupancy, rents and profits of said premises, from that date up to the filing of the bill, which had been enjoyed and received by Mrs. Scruggs, amounting in all to the sum of $25,000. The bill averred that Mrs. Scruggs had caused an execution to be issued against the railroad company and the sureties on its appeal bond to enforce collection of the entire decree; that she was insolvent, and if allowed to collect the decree in full the credit to which the railroad company was

entitled would be a total loss. The prayer of the bill was for an injunction to restrain proceedings on the execution, and for a reference to a master to report the amount due the railroad company for ground rents up to April 21st, 1871, and the amount of rents of the premises received by Mrs. Scruggs from that date to the date of the master's report, and that the amount reported by the master as due the railroad company for ground and other rents might be credited on the decree.

An injunction was allowed as prayed for. Mrs. Scruggs answered the bill, admitting her retention of the possession of the property, but denied her liability for rents, and averred that she was not only entitled to the rents but also to the amount of the decree and the penalty adjudged by the Supreme Court, and interest on both, and set up said decree as *res judicata* and conclusive in her favor.

At this stage of the cause it was, on petition of the railroad company, removed to the District Court of the United States for the Northern District of Mississippi.

Upon motion made to the district court, the injunction allowed by the State court was modified so as to restrain the collection of only $20,000 of the decree, and Mrs. Scruggs was required to give, and did give, a refunding bond in the sum of $10,000, for the repayment of any sum which might on final hearing be decreed against her. An execution having issued to collect the residue of the decree, less the said $20,000, the railroad company paid the marshal $19,217.

On September 24th, 1875, the railroad company filed its amended bill and bill of interpleader, in which it averred that one J. H. Viser claimed to have a lien on the decree in favor of Mrs. Scruggs against the railroad company, and it brought into court the sum of $2,510, the residue of the decree not enjoined or not paid to the marshal, and made Viser and Mrs. Scruggs defendants, and prayed that the rights of all parties might be settled and determined.

On December 24th, 1875, the district court decreed as follows: That the railroad company is entitled to have credited on the amount awarded and decreed (by the supreme court of the State) "the reasonable rents which she," Mrs. Scruggs,

had "actually received or might have received by prudent management, or for any period she actually, by herself or agent, occupied the hotel and property at Corinth, from May 11th, 1871, forward to the date of the receivers taking possession under a former order of this court," and ordered a reference to a master to report the amount with which the decree should be credited by reason of the rents received, and the use and occupancy of said premises by Mrs. Scruggs.

On the next day the court decreed that Viser was entitled to $1,382 of the $2,510 paid in by the railroad company on filing its bill of interpleader, that being the amount of a judgment recovered by him against Mr. Scruggs, and for the payment of which the railroad company had been duly summoned as garnishee.

Upon the coming in of the master's report, the court refused to deduct from the decree in favor of Mrs. Scruggs, any sum for ground rents due the railroad company, and having reduced the amount of rent reported by the master as due from Mrs. Scruggs, applied the residue as a credit upon said decree, and as the result of such application found that there was due from Mrs. Scruggs to the railroad company on the refunding bond the sum of $179, for which it rendered a decree in favor of the railroad company against Mrs. Scruggs and the sureties on said bond, and also rendered a decree in favor of Viser against the same parties for $3,807.27.

From this decree Mrs. Scruggs, and E. R. Matthews and James Matthews, the sureties on the refunding bond, appealed to this court.

Mr. H. P. Branham for appellant.

Mr. William Y. C. Hume and *Mr. David H. Poston* for appellees.

Mr. Justice Woods delivered the opinion of the court.

Mrs. Scruggs now complains of the decree, so far as it concerns the railroad company, on the sole ground that it directed the value of the rents and occupancy of the hotel and improve-

ments to be credited upon the decree in her favor against the railroad company.

She also insists that the decree against her in favor of Viser was erroneous, for reasons which will be found stated hereafter.

Her contention is, that having obtained a decree for the value of the hotel and improvements built by John W. Scruggs upon the lands of the railroad company, with damages for the appeal, and interest, to be paid upon the surrender by her of the hotel and improvements to the railroad company, she was entitled to the payment of her decree with interest, and as long as the railroad company failed to pay the decree, was not chargeable with the rents or the value of the occupancy of the premises while she retained possession.

We cannot assent to this claim. It appears from the agreement to submit to arbitrators, that both parties, the railroad company on the one hand, and John W. Scruggs and Narcissa, his wife, to whom he had conveyed his leasehold and improvements, on the other, had agreed that the property should be surrendered to the railroad company, and that, in pursuance of the original contract between John W. Scruggs and the railroad company, the latter was to pay the value of the improvements. It was mainly to fix the value of these improvements that the reference to arbitrators was made, and it was agreed that on the payment of the sum so fixed Scruggs and his wife should surrender the property to the railroad company, and the amount so fixed should "be a lien on said property."

The arbitrators decided that on the payment of the sum awarded by them, Mrs. Scruggs should deliver the possession of the hotel to the railroad company.

In her bill filed to enforce this award, Mrs. Scruggs prays that the railroad company may be compelled to pay the award, and that "her lien for the same on said property may be enforced."

The court in which her bill was filed made a decree to the effect that Mrs. Scruggs had a lien on the property for the amount of said award, with interest thereon from January 21st, 1871, ordered its payment within thirty days, and in default of payment, directed that the property should be sold and the

proceeds applied to the payment of the amount due on the award. This decree was in all respects affirmed by the Supreme Court of Mississippi.

We think that upon these facts Mrs. Scruggs must in equity be treated as if she was a mortgagee in possession. All the parties and the chancery and supreme courts have treated the sum awarded Mrs. Scruggs as a lien upon the property, and it was decreed, and no one disputed, that she was entitled to retain possession until her lien was discharged.

Treating her as a mortgagee in possession, she is accountable for the net rents and profits of the estate. If her possession was by tenant, she is accountable for such net rents and profits as she could with reasonable diligence have received. *Moore* v. *De Graw*, 1 Halst. Ch. 346; *Benham* v. *Rowe*, 2 Cal. 387; *Kellogg* v. *Rockwell*, 19 Conn. 446; *Harrison* v. *Wyse*, 24 Conn. 1; *Reitenbaugh* v. *Ludwick*, 31 Penn. St. 131; *Breckenridge* v. *Brooks*, 2 A. K. Marsh, 335; *Tharp* v. *Feltz*, 6 B. Mon. 6; *Anthony* v. *Rogers*, 20 Missouri, 281.

There is no equity in the contention of Mrs. Scruggs, that she should receive interest on the debt secured by her lien, and not account for the rents and profits of the property on which her lien rested while it was in her possession.

She says that the railroad company might have had immediate possession by paying the amount of the award. So any mortgagee in possession might say the mortgagor could take possession on paying off the mortgage debt, but this does not excuse the mortgagee from accounting for the rents and profits of the mortgaged property received by him.

It appears that the railroad company had ground for refusing to pay the sum awarded by the arbitrators as the value of the property. The only question submitted to the arbitrators was the true construction of the contract between John W. Scruggs and the railroad company, and the value of the property, or rather, as the arbitrators understood it, the value of the improvements placed by John W. Scruggs on the land of the railroad company. They were not authorized to adjust and settle the accounts between the railroad company and Scruggs. When, therefore, Mrs. Scruggs filed her bill to en-

force the award, it was admitted by her counsel that the matter of the ground rent was not included in the award, and that the same ought to be deducted from the amount awarded by the arbitrators, and that she should be permitted to set off as against such rents any amount due by the railroad company for board of employees, the said amount to be adjusted by reference to the master of the court.

The award did not, therefore, settle the controversy between the parties. The railroad company was justified in refusing to pay the award until the deductions therefrom, to which it was admitted that it was entitled, should be ascertained, and in defending the suit brought by Mrs. Scruggs to enforce the payment of the entire award. While this litigation was pending, the rents and profits actually received in cash by her were $10,514, and she herself occupied the premises in person for two years.

The court below found that there was due the railroad company, by reason of rents incurred by Mrs. Scruggs and the occupancy of the premises by her, the sum of $17,414.50. The testimony in the record fully sustains this finding. As Mrs. Scruggs insisted that she should have interest on the amount decreed her by the Chancery and Supreme Courts of Mississippi, she was not entitled also to claim the rents of the premises.

The case, therefore, stands thus: The railroad company was indebted to Mrs. Scruggs in the sum of $31,666, which was a lien upon the premises, and Mrs. Scruggs was in possession. On the other hand, the amount of the decree and interest, it was admitted, were subject to be reduced by the ground rents due to the railroad company. Mrs. Scruggs, who was shown to be insolvent, was proceeding to collect by execution the full amount of her decree, with interest; the railroad company was compelled, in order to protect itself from loss, to file the bill in this case to have the decree credited with the amount due for the ground rents. While this litigation was pending, Mrs. Scruggs received in cash rents to the amount of $10,514, and occupied the premises herself two years.

She was clearly liable to account for the rents received by her, and for a reasonable rental while the premises were actually occupied by her. The court below did not charge her

with a dollar for which she was not accountable. So far, therefore, as the decree relates to the controversy between her and the railroad company, it is a just and proper decree.

It remains to consider that part of the decree by which the debt claimed by J. H. Viser was ordered to be paid out of the money due from the railroad company on the decree in favor of Mrs. Scruggs.

After the bill of interpleader, filed by the railroad company, Viser filed his cross-bill against the company and Mrs. Scruggs, in which he alleged that, on May 11th, 1869, John W. Scruggs and Narcissa, his wife, executed to him a mortgage upon the leasehold and improvements thereon, known as the Scruggs House, of which said Narcissa was then the owner, to secure a note dated the same day as the mortgage, made by them for the payment to him of $5,000 twelve months after date, and prayed that the railroad company might be compelled to pay to him, out of the moneys due from it to Mrs. Scruggs, the amount due him on said note and mortgage. This relief was resisted by Mrs. Scruggs on the ground that, at the date of the note and mortgage, she was a *feme covert* and incompetent, under the law of Mississippi, to encumber her property for her own or her husband's debts.

In the suit which Mrs. Scruggs brought in the Chancery Court of Alcorn County to enforce the award of the arbitrators, Viser, who had been made a party defendant, had filed his answer and cross-bill, setting up said note and insisting that the mortgage given to secure it was a lien on said property. Upon appeal to the Supreme Court of Mississippi, that court decided that the mortgage was a good lien on the income of the property covered thereby. *Viser* v. *Scruggs*, 49 Miss. 705.

The property covered by the mortgage was represented by the decree rendered in favor of Mrs. Scruggs against the railroad company for $31,666. The income of the decree represented by the interest was, as appears by the report of the master, ample to pay the demand of Viser.

There was no application of the income until the court made the final decree in this case. There were then two funds, the principal and the interest of the decree. Viser had a lien on

the interest, and the demand of the railroad company was payable out of either principal or interest. Following, therefore, the practice of courts of equity in marshalling securities, *Aldrich* v. *Cooper*, 8 Ves. 382, the court directed the payment of Viser's lien out of the interest. In doing this no injustice was suffered by Mrs. Scruggs. The method adopted for calculating the amount due on the decree was according to the established rules in such cases. The debt due Viser was clearly proven. It was payable out of a fund which in effect was in possession of the court, and the court was right in ordering it to be paid.

It is contended for Mrs. Scruggs that the debt of Viser could only be satisfied by laying hold of the corpus of the property by a receiver and through him collecting the income and applying it. But in this case there was no necessity for a receiver for the property, and its income was virtually in the hands of the court. The appointment of a receiver was, under the circumstances of the case, unnecessary and impracticable. The property was a decree of court, of which a receiver could not take possession.

Complaint is made by appellants because the decree of the circuit court for the payment of Viser's demand was rendered, not only against Mrs. Scruggs, but against the sureties on the refunding bond given by her. It is said that the bond was payable to the railroad company and the court was not justified in rendering a decree in favor of Viser against the sureties.

The bond took the place of $10,000 which was virtually in possession of the court to do with as justice and equity might require. The court disposed of the sum payable on the bond as if it had been so much money in the registry of the court. It is true the bond was payable to the railroad company. But the amount decreed to be paid to Viser was deducted from the sum due the railroad company on the refunding bond, and the appellants have no ground of complaint.

The decree of the circuit court was in all respects right, and it must therefore be affirmed.

Justices Field and Matthews did not sit in this case, and took no part in its decision.

Statement of Facts.

BOESE, Receiver, *v.* KING & Others.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Decided April 30th, 1883.

Assignment for the Benefit of Creditors—Bankruptcy—Conflict of Law.

1. A general assignment for the benefit of creditors, made without intent to hinder, delay, or defraud creditors, is valid for the purpose of securing an equal distribution of the estate of the assignor among his creditors, in proportion to their several demands, except as against proceedings instituted under the Bankrupt Act for the purpose of securing the administration of the property in a bankruptcy court.
2. A general assignment of a debtor's property made for the benefit of creditors, purporting to be made under a State Insolvent Law which had, at the time of the assignment, been suspended in whole or in part by a bankrupt act, may nevertheless be sustained as sufficient to pass a title to assignees in the absence of proceedings in bankruptcy impeaching it, or of appropriate steps by the assignor for its cancellation.
3. The assignees of a debtor under a general assignment for the ratable distribution of his property among his creditors, purporting to be made under a local insolvent law of the State in which the debtor resides, deposited for convenience the proceeds of the sales of the debtor's property in a bank in another State. In the latter State, creditors of the debtor obtained judgment and execution against him. The execution being returned unsatisfied, the judgment creditors, under a local law of the latter State, obtained the appointment of a receiver of the debtor's property within that State. The receiver, thereupon, brought suit against the assignees for the sum so deposited, claiming it as the property of the debtor : *Held*, That the receiver was not entitled by reason of any conflict between the local statute and the Bankrupt Act, or by force of the judgment and the proceedings thereunder, to the possession of the assigned property or of its proceeds, as against the assignees, or to a priority of claim for the benefit of the judgment creditors upon such proceeds.

Suit by a receiver appointed by a State court in New York on return of execution unsatisfied; brought in New York against assignees of the property of the judgment debtor under an assignment for the benefit of creditors, made in accordance with the laws of New Jersey (of which State the assignees and the debtor are citizens), and to recover proceeds of the debtor's property voluntarily brought within the State of New York by the assignees for distribution under the assignment.

Statement of Facts.

By deed of assignment executed and delivered September 25th, 1873, Wm. H. Locke, a citizen of New Jersey, transferred and conveyed to Wm. King, John M. Goetchius, and Edward E. Poor, and the survivor of them, and their and his heirs and assigns, all his property of every kind and description—except such as was exempt by law from execution—" in trust to take possession of and collect and to sell and dispose of the same at public or private sale in their discretion, and to distribute the proceeds to and among the creditors of the said Wm. H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and provided, and on the further trust to pay the surplus, if any there be, after fully satisfying and paying the said creditors and all proper costs and charges, to the said Wm. H. Locke."

The intention of Locke and the assignors was to have a distribution made among the creditors of the former in conformity with the requirements of an act of the legislature of New Jersey, passed April 16th, 1846, entitled " An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors."

That act provided, among other things, that every conveyance or assignment by a debtor of his estate, real or personal or both, in trust, to an assignee for the benefit of creditors, shall be made for their equal benefit in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution; and all preferences of one creditor over another, or whereby one shall be first paid or have a greater proportion in respect to his claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors (§ 1); further, that the debtor shall annex to his assignment an inventory, under oath or affirmation, of all of his property, together with a list of his creditors, and the amount of their respective claims, such inventory not, however, to be conclusive as to the quantity of the debtor's estate, and the assignee to be entitled to any other property belonging to the debtor at the time of the assignment, and comprehended within its general terms (§ 2). Other

sections provided for public notice by the assignee of the assignment; for the presentation of claims of creditors; for filing by the assignee under oath of a true inventory and valuation of the estate; for the execution by him of a bond in double the amount of such inventory or valuation; for the recording of such bond; for the filing with the clerk of the court of common pleas of the county of the debtor's residence, within three months after the date of the assignment, of a list of all such creditors as claim to be such, and the amount of their demands, first making it known by advertisement that all claims against the estate must be made as prescribed in the statute, or be forever barred from coming in for a dividend of said estate, otherwise than as provided; for the right of the assignee or any creditor or person interested to except to the allowance of any claim presented; for the adjudication of such exceptions; for fair and equal dividends from time to time among the creditors of the assets in proportion to their respective claims; and for a final accounting by the assignee in the orphans' court of the county—such settlement and adjudication to be conclusive on all parties, except for assets which may afterward come to hand, or for frauds or apparent error (§§ 3, 4, 5, 6 and 7).

The act further provided

"§ 11. If any creditor shall not exhibit his, her, or their claims within the term of three months as aforesaid, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom.

"§ 12. Whenever any assignee or assignees, as aforesaid, shall sell any real estate of such debtor or debtors as is conveyed in trust as aforesaid, he or they shall proceed to advertise and sell the same in manner as is now or may hereafter be prescribed in the case of an executor or administrator directed to sell lands by an order of the orphans' court for the payment of the debts of the testator or intestate.

"§ 13. Every assignee, as aforesaid, shall have as full power

and authority to dispose of all estate, real and personal, assigned, as the said debtor or debtors had at the time of the assignment, and to sue for and recover in the proper name of such assignee or assignees, everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound, and to agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to act and do whatever the said debtor or debtors might have lawfully done in the premises.

"§ 14. Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtors or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterward any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise."

The estate which came into the hands of the assignees was converted into money in New Jersey—the amount being nearly $200,000—and the proceeds, for the convenience of the assignees, were deposited in a bank in the city of New York. No proceedings in bankruptcy were ever taken against Locke.

On the 3d day of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment against Locke in the Supreme Court of the City and County of New York for $3,086.85. Upon that judgment execution was issued and returned unsatisfied. Subsequently, May 27th, 1876, in certain proceedings, before one of the judges of that court, supplementary to the return of execution, Thomas Boese, plaintiff in error, was appointed receiver of the property of Locke, and having executed a bond for the faithful discharge of the duties of his trust, he obtained an order from the same court giving him

authority, as receiver, to bring an action against the assignees of Locke. Thereupon, June 9th, 1876, he commenced this action. It proceeds upon these grounds: 1. That the indebtedness from Locke to Pickhardt and Kutroff arose in New York, where they reside, before the making of said assignment; 2. That the statute of New Jersey with reference to or under which said assignment was made was, by force of the Bankruptcy Act of 1867, suspended and of no effect; 3. That the assignment was fraudulent and void by the laws of New Jersey, in that it was made with the intent upon the part of Locke to hinder, delay, and defraud his creditors, and in that he had a large amount of money and other property which he fraudulently retained to his own use and did not surrender to the assignees.

The prayer of the complaint—the allegations of which were fully met by answer—was for judgment against the defendants; that the assignments be adjudged fraudulent and void; and that the defendants be required to account to plaintiff for all the property and money received or to which they are entitled under and by virtue of the assignment. It was conceded at the hearing that defendants had in their hands, of the proceeds of the sale of the assigned property, an amount sufficient to pay the judgment of Pickhardt and Kutroff.

The Supreme Court of New York, both in general and special terms, sustained the action and gave judgment against the assignees in favor of Boese, as receiver, for the amount of the demand of Pickhardt and Kutroff. But in the Court of Appeals that judgment was reversed, with directions to enter judgment for the defendants.

The receiver brought the suit here in error asking to have this decision reversed.

Mr. C. Bainbridge Smith for plaintiff in error.
Mr. A. P. Whitehead for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. After reciting the facts in the foregoing language he continued:

Opinion of the Court.

We are to consider in this case whether the final judgment of the Court of Appeals of New York has deprived the plaintiff in error of any right, title, or privilege under the Constitution or laws of the United States.

We dismiss from consideration all suggestions in the pleadings of actual fraud upon the part either of Locke or of his assignees. The court of original jurisdiction found as a fact—and upon that basis the case was considered by the Court of Appeals—that the assignment was executed and delivered by the former and accepted by the latter in good faith and without any purpose to hinder, delay, or defraud any creditor of Locke. It is further found as a fact that the assignment was made with the intent, *bona fide*, to make an equal distribution of the proceeds of the trust estate among creditors, in conformity with the local statute. The Supreme Court of New York ruled that the statute of New Jersey was, in its nature and effect, a bankrupt law, and the power conferred upon Congress to establish a uniform system of bankruptcy, having been exercised by the passage of the act of 1867, the latter act wholly suspended the operation of the local statute as to all cases within its purview; consequently, it was held, the assignment was not valid for any purpose. The Court of Appeals, recognizing the paramount nature of the Bankrupt Act of Congress, and assuming that the 14th section of the New Jersey statute, relating to the effect upon the claims of creditors who exhibit their demands for a dividend, was inconsistent with that act, and therefore inoperative, adjudged that other portions of the local statute providing for the equal distribution of the debtor's property among his creditors, and regulating the general conduct of the assignee, were not inconsistent with nor were they necessarily suspended by the act of 1867; further, that the New Jersey statute did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise; consequently, had the whole of the New Jersey statute been superseded, the right of a debtor to make a voluntary assignment would still have existed. The assignment, as a transfer

of the debtor's property, was, therefore, upheld as in harmony with the general object and purposes of the Bankrupt Act, unassailable by reason merely of the fact that some of the provisions of the local statute may have been suspended by the act of 1867.

In the view which we take of the case it is unnecessary to consider all of the questions covered by the opinion of the State court and discussed here by counsel. Especially it is not necessary to determine whether the Bankrupt Act of 1867 suspended or superseded all of the provisions of the New Jersey statute. Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and therefore independently of the bankruptcy court, constituted, itself, an act of bankruptcy, for which, upon the petition of a creditor filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. *In re Burt*, 1 Dillon, 439, 440; *In re Goldschmidt*, 3 Bank. Reg. 164; *In matter of Seymour T. Smith*, 4 Bank. Reg. 377. The claim of Pickhardt and Kutroff existed at the time of the assignment. The way was, therefore, open for them, by timely action, to secure the control and management of the assigned property by that court for the equal benefit of all the creditors of Locke. But they elected to lie by until after the expiration of the time within which the assignment could be attacked under the provisions of the Bankrupt Act; and now seek, by this suit in the name of the plaintiff in error, to secure an advantage or preference over all others; this, notwithstanding the assignment was made without any intent to hinder, delay, or defraud creditors. In order to obtain that advantage or preference, the plaintiff in error relies on the paramount force of the Bankrupt Act, the primary object of which, as this court has frequently announced, was to secure equality among

the creditors of a bankrupt. *Mayer* v. *Hellman*, 91 U. S. 496–501; *Reed* v. *McIntyre*, 98 U. S. 507–509; *Buchanan* v. *Smith*, 16 Wall. 277. It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke, in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or cancelled upon the ground of a mutual mistake in supposing that the local statute of 1846 was operative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which, it is claimed, were then in force. Had this suit been framed for the purpose of compelling the assignees to account to all the creditors for the proceeds of the sale of the property committed to their hands, without discrimination against those who did not recognize the assignment and exhibit their demands within the time and mode prescribed by the New Jersey statute, a wholly different question would have been presented for determination. It has been framed mainly upon the idea that by reason of the mistake of Locke and his assignees in supposing that the property could be administered under the provisions of the local statute of 1846, even while the Bankrupt Act was in force, the title did not pass for the benefit of creditors accord-

ing to their respective legal rights. In this view, as has been indicated, we do not concur.

We are of opinion that, except as against proceedings instituted under the Bankrupt Act for the purpose of securing the administration of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay, or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke, in proportion to their several demands, *Reed* v. *McIntyre*, 98 U. S. 507–509; and, consequently, we adjudge only that the plaintiff in error is not entitled, by reason of any conflict between the local statute and the Bankrupt Act of 1877, or by force of the before-mentioned judgment and the proceedings thereunder, to the possession of the assigned property or of its proceeds, as against the assignees, or to a priority of claim for the benefit of Pickhardt and Kutroff upon such proceeds.

The judgment is affirmed.

Mr. Justice Matthews (with whom concurred Miller, Gray, and Blatchford, JJ.), dissenting.

Mr. Justice Miller, Mr. Justice Gray, Mr. Justice Blatchford, and myself, are unable to agree with the opinion and judgment of the court in this case. The grounds of our dissent may be very generally and concisely stated as follows:

The New Jersey statute of April 16th, 1846, the validity and effect of which are in question, is an insolvent or bankrupt law, which provides for the administration of the assets of debtors who make assignments of all their assets to trustees for creditors, and for their discharge from liabilities to creditors sharing in the distribution. It was accordingly in conflict with the National Bankrupt Act of 1867 when the latter took effect, and from that time became suspended and without force until the repeal of the act of Congress. It is conceded that the 14th section, which provides for the discharge of the debtor, is void by reason of this conflict, and, in our opinion, this carries with it the entire statute. For the statute is an entirety, and, to take away the distinctive feature contained in the 14th section,

destroys the system. It is not an independent provision, but an inseparable part of the scheme contained in the law.

This being so, the assignment in the present case must be regarded as unlawful and void as to creditors. For it was made in view of this statute and to be administered under it. Such is the express recital of the instrument and the finding of the fact by the court. It is as if the provisions of the act had been embodied in it and it had declared expressly that it was executed with the proviso that no distribution should be made of any part of the debtor's estate to any creditor except upon condition of the release of the unpaid portion of his claim.

It is not possible, we think, to treat the assignment as though the law of the State in view of which it was made, and subject to the provisions of which it was intended to operate, had never existed, or had been repealed before its execution. Because there is no reason to believe that, in that state of the case, the debtor would have made an assignment on such terms. To do so is to construct for him a contract which he did not make and which there is no evidence that he intended to make. It must be regarded, then, as a proceeding under the statute of New Jersey, and as such, with that statute, made void, as to creditors, by the National Bankrupt Act of 1867. Otherwise that uniform rule as to bankruptcies, which it was the policy of the Constitution and of the act of Congress pursuant to it, to provide, would be defeated. No title under it, therefore, could pass to the defendants in error, and the judgment creditors who acquired a lien upon the fund in their hands were by law entitled to appropriate it, as the property of their debtor, to the payment of their claims.

For these reasons we are of opinion that the judgment of the Court of Appeals of New York should be reversed.

WARREN & Others *v.* KING & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Decided May 7th, 1883.

Preferred Stock—Railroads.

Certificates of preferred stock of the Ohio and Mississippi Railway Company were issued, containing the following language : "The preferred stock is to be and remain a first claim upon the property of the company after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock ; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share :" *Held*, That the preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one to a priority over the holders of common stock.

Bill to foreclose two railroad mortgages, and cross-bill by preferred stockholders to have their stock declared a lien on the property prior to one of the mortgages. On a demurrer the cross-bill was dismissed. The plaintiffs in that bill appealed.

Mr. G. P. Lowrey for the appellants.

Mr. E. M. Johnson, *Mr. Edward Colston* and *Mr. B. Harrison* for King and others, appellees.

Mr. Wheeler H. Peckham for Campbell, appellee.

Mr. Justice Blatchford delivered the opinion of the court.

In November, 1876, William King and others, holders of second mortgage bonds and of Springfield Division bonds of the Ohio and Mississippi Railway Company, filed a bill in the Circuit Court of the United States for the District of Indiana, to foreclose two mortgages on the property of the company,

subject to a first mortgage. In August, 1877, Allan Campbell, a defendant in that suit and trustee of one of the two mortgages, called the second mortgage, and also of the first mortgage, filed a bill and a cross-bill in the same court, to foreclose those two mortgages. In January, 1879, the two suits were consolidated. In December, 1879, George Henry Warren and others, as owners of preferred stock of the company, having been made parties defendant to the consolidated suit, filed a cross-bill. To this cross-bill a general demurrer for want of equity was interposed. The court sustained the demurrer, and entered a decree dismissing the cross-bill for want of equity. *King* v. *Ohio and Mississippi Railroad Company*, 2 Fed. Rep. 36. From this decree the plaintiffs in that bill have appealed to this court.

The sole question involved is whether the preferred stockholders are entitled to have their shares of stock declared to be a lien on the property of the company next after the first mortgage. As the question arises on demurrer, the allegations of the cross-bill are to be taken as true. The Ohio and Mississippi Railroad Company, having been incorporated by Indiana in February, 1848, was incorporated by Ohio in March, 1849, and by Illinois in February, 1851. Under a second mortgage made by it in January, 1854, all the property and franchises of the Illinois company were sold, on a foreclosure of that mortgage, in June, 1862, to the Ohio and Mississippi Railroad Company, an Illinois corporation created in February, 1861, for the purpose of purchasing the property and franchises of the Illinois corporation of February, 1851. The property and franchises of the Indiana and Ohio corporations were sold, under judicial decrees, in January, 1867, subject to certain mortgage debt recited in the decrees, to Allan Campbell and others, "trustees of creditors and stockholders of said Ohio and Mississippi Railroad Company (eastern division)." This trust was created by an instrument in writing dated December 15th, 1858, and known as the "trust agreement of creditors and stockholders of the Ohio and Mississippi Railroad Company of Indiana and Ohio." By it Allan Campbell and others were created trustees, for the purpose of providing for and protecting claims of

judgment creditors and other persons holding liens on the property and franchises of the company, and also certain holders of unliquidated demands against it, and also the interests of the stockholders of the company. Such interests of the creditors and stockholders became vested in the trustees from time to time, so that on the 14th of September, 1867, they were the owners, subject to the terms of the trust agreement, of the rights, claims and interests of all the creditors and stockholders of the company in its property and franchises, except those existing under a first mortgage made in May, 1853. The trustees issued, in exchange for the interests they so acquired, certificates in two classes, preferred and common. Under an amendment made in April, 1863, to the trust agreement, the trustees purchased, for the benefit of the trust and the persons interested therein under the agreement of December, 1858, all the stock and a portion of the bonds of the Illinois company of 1851, sometimes called the Western Division. On the 14th of September, 1867, the certificate holders, by an instrument known as "Amendments to the trust agreement of December, 1858," resolved that the trustees had made the purchase of January, 1867, for the benefit of those interested in the trust agreement of December, 1858, and had, in virtue of the amendment of April, 1863, purchased all the stock and a portion of the bonds of the Illinois company of 1851; that, by such purchases, the whole road from Cincinnati to St. Louis had become the property of the trust, subject only to outstanding mortgages; that it was the intention of all parties interested in the trust to form a new corporation, to which the entire property of the trust might be transferred, in accordance with the original agreement, such property to consist of all the rights and interests in the railroad in the three States; that the capital stock of the new corporation should consist of 35,000 shares of preferred stock and 200,000 shares of common stock, being in all $23,500,000 of stock, which should be issued and distributed to the owners of trustees' certificates registered on the books of the trust, as follows, namely, to owners of preferred certificates, preferred full-paid stock, for the amount of such preferred certificates, at the rate of one share of preferred stock

for every $100 of preferred certificates; that it should "be declared upon the face of said preferred stock that it is to be and remain a first claim upon property of the corporation after its indebtedness," that the holders thereof shall be entitled to receive from the net earnings of the company 7 per cent. per annum upon the amount of said stock, payable semi-annually, "and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock of said corporation, and that whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of 7 per cent. on the preferred stock in full, and 7 per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common stock equally, share by share;" that the common stock should be issued to holders of common certificates at the same rate; that the new corporation should be authorized to create a new mortgage on its entire property, consisting of 340 miles of railroad from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding $6,000,000, $4,000,000 whereof should be used exclusively to take up the then outstanding bonds issued under the mortgages theretofore created on said road; that, if a branch should be built to Louisville, the new corporation might increase the preferred stock at the rate of $10,000 for each mile in length of such branch, and the $6,000,000 mortgage to the amount of $15,000 for each mile of such branch; and that holders of the outstanding bonds of the old company, both eastern and western divisions, and holders of bonds to be issued by the new corporation, should be entitled to one vote for each $100 of bonds so held, at all stockholders' meetings, and on all affairs of the corporation.

Under statutes of Indiana and Ohio, Allan Campbell and others, as such trustees, became a corporation in those States by the name of the Ohio & Mississippi Railway Company. Its capital stock was fixed at 35,000 shares, of $100 each, of preferred stock, and 200,000 shares, of $100 each, of common

stock, and provision was made, in the certificate of incorporation, for increasing its preferred stock in an amount not exceeding $10,000 a mile for each mile of a branch to Louisville. In November, 1867, the Illinois company and the Indiana & Ohio company were consolidated under the name of the Ohio & Mississippi Railway Company, by articles of consolidation which provided for issuing preferred and common capital stock of the consolidated company to the extent above stated, and that the consolidated corporation should be authorized to create a new mortgage on the road for $6,000,000, of which $4,000,000 should be appropriated and used to take up the then existing mortgage bonds on the property, and should have—

"All such further powers and rights as are conferred and contemplated in certain amendments adopted by the certificate holders at a meeting held by them on the 14th day of September, A. D. 1867, of an agreement dated December 15th, A. D. 1858, of the creditors and stockholders of the Ohio & Mississippi Railroad Company of Indiana & Ohio, said agreement representing a trust which, at the date of said amendments, embodied the entire ownership of the property of both said companies so consolidated."

The consolidated company issued preferred stock to the amount of 35,000 shares, upon certificates in the following form:

"OHIO AND MISSISSIPPI RAILWAY COMPANY.

"Reorganized and consolidated 1867.

"*Preferred stock.*

"This is to certify that is entitled to shares of the preferred capital stock of the Ohio and Mississippi Railway Company, of one hundred dollars each, transferable only on the books of said company, in the city of New York, in person or by attorney, on the surrender of this certificate. The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend

upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share."

These preferred shares were issued in exchange for the trustees' preferred certificates, in pursuance of the resolutions of September 14th, 1867.

The cross-bill alleges that the certificate holders, by the resolutions of September 14th, 1867, intended and declared that the preferred stock to be issued should give to its holders not only a preference in respect to dividends over the common stock, but also the preference of a specific and continuing lien and security upon the property of the new corporation, next after the then existing mortgage indebtedness; that it was in accordance with and in execution of this intention that the certificate holders further resolved that it should be declared upon the face of the certificates of such preferred stock that it should be and remain a first claim upon the property of the corporation after its indebtedness; that the indebtedness referred to in the resolutions, and in the preferred stock certificates, was such indebtedness only as should arise under the $6,000,000 mortgage, that amount being designed to represent, and having been authorized for the purpose of taking up and cancelling the indebtedness existing at the time of the consolidation of the property of the two consolidating companies; and that the consolidated company, under the articles of consolidation, became bound to perform the provisions of the amendments of September, 1867, to the trust agreement, as to preferred stock, and the securing the same on the property of the consolidated company, to the full intent thereof.

Besides the preferred stock to the amount of $3,500,000, further preferred stock, in the above form, to the amount of

$800,000, was issued on the building of the Louisville branch. The plaintiffs in the cross-bill, as owners of shares of such preferred stock, aver that they, in common with the other preferred stockholders, had and have a lien and security and first claim upon all the property and franchises of the consolidated company which existed at the time of the original issue of such preferred stock, in or about the year 1867, next after and subject only to the indebtedness under the $6,000,000 mortgage, as authorized by said articles of consolidation, as representing and designed to cover and cancel the only indebtedness on either of the consolidated roads which was outstanding at the time of such consolidation, and are entitled to the payment of interest, as stipulated in the certificate, out of such net earnings of the company as may remain after payment of interest on first mortgage bonds, and in priority and preference to the payment of any interest or indebtedness under any mortgage subsequent in date to the first mortgage, that being a mortgage executed in December, 1867, under which bonds to the amount of about $6,800,000 have been issued; under the so-called second mortgage, issued in March, 1871, and sought to be foreclosed in the original suit, $4,000,000 of bonds have been issued. The other mortgage sought to be foreclosed in the original suit is called the Springfield Division mortgage, and was executed in January, 1875, to secure $3,000,000 of bonds.

The bill prays for a decree that such preferred stockholders are entitled, as such, to, and have always had, a specific and continuing lien and security and first claim upon and in all the property and franchises of the company, next after, and subject only to, the interest and security therein which is given under the first mortgage of December, 1867, and have been and are entitled to receive 7 per cent. interest upon their shares, out of the net earnings of the company remaining after the payment of interest to the holders of the first mortgage bonds. It also prays, that, in any decree of foreclosure of either of the mortgages so sought to be foreclosed, the rights of the preferred stockholders may be declared to be a lien and security on the property and franchises of the company next after that secured by the first mortgage of December, 1867;

that, in case of foreclosure of the first mortgage, all surplus, after the satisfaction of claims thereunder, be applied, first, to payment in full, or *pro rata*, of the par value of their shares, to the preferred stockholders; and that, in case of foreclosure of either the second mortgage or the Springfield Division mortgage, the decree therein shall provide that any sale, in either of such cases, shall be subject to not only the amount due under the first mortgage, but also, and next in order to the amount at par of the preferred stock, with all unpaid interest due thereon, at 7 per cent.

The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. That is exactly the same as the language of the written instruments which preceded the issuing of the certificates. The shares are shares of the capital stock of the company, though shares with different privileges from shares of the common stock. The certificate declares the quality of the preferred stock in two respects—(1) its relation to the property of the company; (2) its relation to the net earnings.

As to the property, it is declared that the preferred stock is to be and remain a first claim on the property of the company "after its indebtedness." But it is stock, and part of the capital stock, with the characteristics of capital stock. One of such characteristics is, that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock. Section 5 of the statute of Indiana of June 15th, 1852, "establishing provisions respecting corporations," 1 Davis' Statutes, 369, enacted as follows:

> "If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders before the payment of all the debts of the company, all the stockholders of such company shall be jointly and severally liable for the payment of such debts."

The railroad law of Indiana, of March 3d, 1865, 1 Davis' Statutes, 728, entitled "An Act to authorize, regulate, and

confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges, to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same," under which law this company was reorganized, provided, in section 5, that the corporation should have power to "make preferred stock, make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same, in such order and manner, and to such extent, as said corporation may deem expedient;" and section 20 of the general law of Indiana of May 11th, 1852, providing for the "incorporation of railroad companies," 1 Davis' Statutes, 706, provided that a corporation organized under it might issue "a preferred stock to an amount not exceeding one-half of the amount of its capital, with such priority over the remaining stock of such company, in the payment of dividends, as the directors of such company may determine and shall be approved by a majority of the stockholders." It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock, except a preference among classes of shares, or any preference of any class of shareholders over creditors. It is not to be supposed that those engaged in reorganizing this company intended to violate the law of Indiana, or the general principles of law applicable to private corporations. Nor is there anything to show that they did. The language of the certificate is entirely satisfied by referring it to a priority in rank of the preferred stock over the common stock, to a first claim of the preferred stock on the property of the corporation, after its indebtedness should be paid, when there should be moneys to be divided among stockholders, a claim which should be first as compared with the claim of other stock. Claims of stockholders, as such, on the corpus of the property of the company in which they are stockholders, do not arise until the debts of the company are paid. Until then the shares confer rights merely as regards profits and voting power.

It is urged, for the appellants, that the expression "after its indebtedness" means, next after the indebtedness then existing or then authorized; that the preferred stock was issued to the holders of preferred certificates, owners of the property, as a quasi purchase-money mortgage on its sale; and that they intended to preserve their position except as to the new $6,000,000 mortgage, because they authorized that and did not authorize any other. It is very certain that at best the words "after its indebtedness" are, by themselves, ambiguous on their face, and are as capable of being applied to future indebtedness as of being limited to then existing indebtedness. Under the general rules applicable to the position of the stockholders of a corporation, as regards its creditors, a claim of the kind here made should rest on clear and not doubtful language. But the provision which follows, as to the rights of the preferred stock in the net earnings of the company, leaves no doubt as to the meaning of the whole. There is a unity of right in the claim of the preferred stock on the property of the company, and in the title of its holder to receive a share of the net earnings of that property. His proprietorship in those earnings is a right to receive from them so much a year, if earned, before the common stock receives any dividend therefrom, and when the two classes of stock have each received the same specified amount out of the year's net earnings, he has the right to share equally in the surplus with the holder of common stock. Thus he can have no income on his stock unless there are net earnings. Those net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay. The holders of preferred stock have the same relation, by virtue of the certificate, to the corpus of the property, which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors. They are not preferred as to reimbursement of principal, or as to a right to net earnings, over any one but the holders of common stock. The interest to be paid to them is not to be paid absolutely, as to a creditor, but only out of net earnings, the same fund out of which the dividends on common stock are to be

paid. Though called "interest," it is really a dividend, because to be paid on stock and out of net profits. There was no restriction on the creation of future indebtedness, and, necessarily, the net earnings of future business would be ascertained in reference to such future indebtedness and the interest on it; and the words "its indebtedness," in the same sentence, naturally mean "its future indebtedness," in reference to which the net earnings subsequently treated of are to be ascertained. Creditors may resort to the body of their debtor's property for interest as well as principal. But these holders of preferred stock are limited, for any income or interest, to the net earnings. There is nothing in the certificate which clothes them with a single attribute of a creditor, while it specially gives them, as stockholders, an equal interest with the common stockholders in the excess of net earnings in each year after paying therefrom 7 per cent. on each share of stock, preferred and common.

Whatever position the holders of preferred certificates occupied before they accepted preferred stock, whatever special rights of lien they had, they became corporators, proprietors, shareholders, and abandoned the position of creditors, and took up toward existing and future creditors the same position which every stockholder in a corporation occupies toward existing and future creditors. His chance of gain, by the operations of the corporation, throws on him, as respects creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor, by virtue of his ownership of stock. In this case, all the parties holding trustees' certificates united to form the new corporation, and converted themselves into stockholders in it.

It seems very clear, that, if the trustees, representing the holders of trustees' certificates, had gone on and operated the road for them, not organizing a new company, any debts contracted by the trustees in the business would have had priority over the claims of the holders of such certificates. So, in becoming stockholders in the new company, with the right to vote as to its management and to share in its earnings, they

must have intended to allow, through the corporation, a priority of like debts over their claims as stockholders.

The same principles must govern the present case which were applied by this court in *St. John* v. *Erie Railway Company*, 22 Wall. 136, where creditors took preferred stock. It was held that they ceased to be creditors and could be regarded only as stockholders, with a chance for dividends out of net earnings and the power of voting, and a priority over holders of common stock, but not a priority over debts subsequently contracted.

Much stress is laid on the averment in the cross-bill, that the existence of the preferred stock and of the certificates therefor and of their contents was known to the trustees under the subsequent mortgages before those mortgages were made, and to the bondholders under those mortgages before they became such; and it is urged that the assent of the preferred stockholders to the creation of the subsequent mortgages should have been obtained. The answer to this view is, that the preferred stockholders had no rights which made their assent necessary to the validity, as against them, of the mortgages in question; and that, represented as they were by the corporation and its directors, the act of making the mortgages was a sufficient assent of the preferred stockholders, if assent were necessary, there being no allegation in the cross-bill inconsistent with the fact, that the issuing of the mortgages was known to and participated in and sanctioned by those who were holders of the preferred stock when the mortgages were created.

As to the claim that the appellants, if they have no priority over the second mortgage, have, at all events, as against the company, a lien next after the second mortgage, on the property not covered by the Springfield Division mortgage, and have, in any aspect of the case, a valid claim on the surplus assets of the company, after paying its debts, superior to the claim of the common stockholders, it is sufficient to say, that we do not deem it proper that those questions should be disposed of on a demurrer to this cross-bill, as they can be raised and decided under the answer which these appellants have filed as defendants in the consolidated suit.

The decree of the circuit court is affirmed.

DEVOE MANUFACTURING COMPANY, Petitioner.

ORIGINAL.

Decided May 7th, 1883.

Jurisdiction of District Courts—New Jersey—New York—State Boundaries.

1. The District Court of the United States for the District of New Jersey has jurisdiction of a suit in admiralty, *in personam*, against a New York corporation, where it acquires such jurisdiction by the seizure, under process of attachment, of a vessel belonging to such corporation, when such vessel is afloat in the Kill van Kull, between Staten Island and New Jersey, at the end of the dock at Bayonne, New Jersey, at a place at least 300 feet below high-water mark, and nearly the same distance below low-water mark, and is fastened to said dock by means of a line running from the vessel and attached to spiles on the dock.
2. A vessel so situated is within the territorial limits of the State of New Jersey and of the District of New Jersey, and is not within the territorial limits of the State of New York, or of the Eastern District of New York.
3. The subject-matter of the dispute as to boundary between New York and New Jersey explained, and the settlement as to the same made by the agreement of September 16th, 1833, between the two States, as set forth in, and consented to by, the act of Congress of June 28th, 1834 (chap. 126, 4 Stat. 708), interpreted.
4. When Congress enacts that a judicial district shall consist of a State, the boundaries of the district vary afterwards as those of the State vary.

Petition for writ of prohibition to the District Court of the United States for the District of New Jersey, proceeding as a court of admiralty. The sole question at issue was whether that court had jurisdiction in admiralty over a vessel afloat but fastened by a hawser to the end of a dock in the Kill van Kull, between Staten Island and New Jersey, at a place about three hundred feet distant in the stream from the line of ordinary low-water mark.

Mr. Henry J. Scudder for petitioner.—I. The office of the writ of prohibition is to prevent an unlawful assumption of jurisdiction.

The writ lies to a court of admiralty only when that court is acting in excess of its jurisdiction. *Ex parte Gordon*, 104 U. S. 515; *Ex parte Easton*, 95 U. S. 68.—II. The District

Court of New Jersey is proceeding here as a court of admiralty, but it gains jurisdiction of the respondent only by excess or abuse of power in attaching property outside the limits of its district and forcing respondent to appear in order to preserve its property. The respondent or petitioner here has no redress by appeal. If it appear, in order to try the merits of the action, it confesses jurisdiction; appearing specially to deny jurisdiction only, it is met by an order denying its motion for relief from the cognizance of the court, and has no appeal from that order. *Toland* v. *Sprague*, 12 Pet. 300.—III. In subdividing the State into districts by the Judiciary Act of 1789, the legislature intended to prescribe distinct and understood boundaries to each district. To give to the act any fluctuating power would introduce conflict and confusion where certainty was essential.—IV. In constituting the States of New Jersey and New York respectively districts, the legislature designed to conform these districts to then understood and recognized jurisdictional limits of the two States. Congress was sitting in 1789 in the city of New York, and possessed ample information as to what lines bounded these State jurisdictions when the districts were created. It cannot be urged that the "State of New York" was adopted in a loose sense, as, in popular expression, for a district, such district to be subject to the contingent result of a dispute between that State and New Jersey, in respect to boundary; such a course would have fallen short of the purpose of ordinary legislation, and cannot be presumed to have existed in a species of legislation that above all others addresses itself to precision. In the formation of districts, Congress was dealing with jurisdictional subjects, and these always involve clear definitions. If any matter may be left to contingent explanations or events, jurisdiction cannot; that must be "ascertained," and certain. In using the "State of New York" as a term, the legislature had considered and determined upon exact lines as containing that State. True, when the lines may have fallen upon a sea shore or a river subject to ebb and flow of tide, they might not be so geometrically accurate as upon courses and distances, but the logic of law would undergo no violation in that respect. Low-

water mark is a certain limit, and if the State of New York had that as one of its boundaries, it sufficed and answered every demand of preciseness.—V. The jurisdiction of the State of New York in 1789, extended to low-water mark along the Jersey shore, including the Kill van Kull, and the district of New York was co-extensive with such jurisdictional limits of the State. It seems clear that in the conveyance made by the Duke of York of the territory of East Jersey, he was governed by the contemporaneous understanding that the Kill van Kull was a part of the Hudson River, and that by such conveyance he limited the territory conveyed to the western side of said waters or the shore thereof. The grant by James must be treated as a royal grant, and nothing held by intendment against it or in favor of the grantee. *Martin* v. *Waddell*, 16 Pet. 367. Hudson River being thus understood to embrace Kill van Kull, and entirely excluded from the conveyances by James, remained the property of the latter, and so of the province of New York, and by conquest through the Revolution, of the State of New York. None of the States enlarged its territorial limits over those in its provincial character by the mere operation of independence from the sovereignty of the mother country, and the rule applied to New Jersey by the United States Circuit Court in *Corfield* v. *Coryell*, as to the Delaware bay and river, is applicable to the eastern shore of that State upon the waters of the Kill van Kull and Hudson River. *Corfield* v. *Coryell*, 4 Wash. C. C. R. 371; *Handly's Lessee* v. *Anthony*, 5 Wheat. 374. The limits of New Jersey as a province were recognized by the authorities of that State as the shore or low-water mark of the waters of the Hudson and New York Bay so-called, inclusive of the Kill van Kull, and continued so to be recognized until the beginning of the present century. Opinion of Judge Elmer, *State* v. *Babcock*, 1 Vroom, 29, 32.—VI. The jurisdiction of the State of New York, therefore, in 1789, covered the place of the seizure under consideration here, and the District of New York equally covered it, and unless some change has been effected by national legislation in the extent of that district it still embraces it, and the District Court of New Jersey has no jurisdiction over it.

Mr. Franklin A. Wilcox, opposing.

Mr. Justice Blatchford delivered the opinion of the court.

The question involved in this case is as to the territorial jurisdiction of the District Court of the United States for the District of New Jersey. In April, 1882, a libel in admiralty, *in personam*, for damages growing out of a collision, was filed in that court against the Devoe Manufacturing Company, a New York corporation. In October, 1882, process was issued by the court to the marshal, commanding him to cite the respondent if it should be found in the district, and, if it could not be there found, to attach its goods and chattels within the district. On this process the marshal seized a tug belonging to the corporation and made return that he had attached the tug, as its property. At the time of the seizure the tug was afloat in the Kill van Kull, between Staten Island and New Jersey, at the end of a dock at Bayonne, New Jersey, at a place at least 300 feet below high-water mark and nearly the same distance below low-water mark, and about half a mile from the entrance of the Kill into the bay of New York, and was fastened to the dock by means of a line or fastening running from the tug and attached to spiles on the dock, and was lying close up to the dock. The respondent, insisting that the tug, when seized, was within the exclusive jurisdiction of the Eastern District of New York, and not within the jurisdiction of the District of New Jersey, applied to the court to set aside the service of the process. The court denied the application, holding that the tug, being, when seized, fastened to a wharf or pier on the western side of the Kill van Kull, was within the exclusive jurisdiction of the district of New Jersey. The respondent now applies to this court to issue a writ of prohibition to the district court, restraining it from exercising the jurisdiction so asserted.

By section 2 of the act of September 24th, 1789, "to establish the judicial courts of the United States," chap. 20, 1 Stat. 73, the United States were divided "into thirteen districts, to be limited and called as follows: . . . one to consist of the State of New York, and to be called New York district; one

to consist of the State of New Jersey, and to be called New Jersey district," and, by section 3, a court called a district court was created in each of said districts, and, by section 9, exclusive original cognizance was given to such district courts, of all civil causes of admiralty and maritime jurisdiction, within their respective districts. By these provisions the territorial limits of the respective States of New York and New Jersey were made the territorial limits of the respective judicial districts of New York and New Jersey.

By section 1 of the act of April 9th, 1814, chap. 49, 3 Stat. 120, it was enacted that the State of New York "shall be and the same is hereby divided into two districts, in manner following, to wit: the counties of Rensselaer, Albany, Schenectady, Schoharie, and Delaware, together with all that part of the said State lying south of the said above mentioned counties, shall compose one district, to be called the Southern District of New York; and all the remaining part of the said State shall compose another district, to be called the Northern District of New York." By virtue of this act all that part of the State of New York which was bounded on the line between New York and New Jersey fell within the Southern District of New York. The boundary line between the States still formed the boundary line of jurisdiction between the districts.

By section 3 of the act of April 3d, 1818, chap. 32, 3 Stat. 414, the counties of Albany, Rensselaer, Schenectady, Schoharie, and Delaware were transferred from the Southern District of New York to the Northern District of New York, but the boundaries of the Southern District of New York were otherwise not altered.

A dispute existed for a long time between the States of New York and New Jersey respecting the boundary line between them as to property and jurisdiction. The history and circumstances of this dispute, some particulars of which are to be found in the reports of the cases of *State* v. *Babcock*, 1 Vroom, 29; *People* v. *Central Railroad Company of New Jersey*, 42 N. Y. 283; and *Hall* v. *Devoe Manufacturing Company*, 14 Fed. Rep. 183, are not material to the determination of this case, in the view we take of it, any further than to show what was the

subject-matter of the dispute. For the purpose of having it settled, the State of New Jersey filed a bill in equity in this court against the State of New York, in February, 1829. That bill sets forth the patent of March 12th, 1664, from Charles the Second to the Duke of York; the conveyance of lease and release by the Duke of York, of June 24th, 1664, to Lord Berkeley and Sir George Carteret, of land constituting the State of New Jersey; the division of the land, by various conveyances, into East New Jersey and West New Jersey, its settlement and the institution of proprietary governments therein, which continued until May, 1702, when the proprietors surrendered their right of government to Queen Anne; and the union of the two divisions into one province and government, under the Crown of England, which continued until July 4th, 1776. The bill sets forth that the Hudson River was, by the said grants, the dividing boundary between New Jersey and New York, and New Jersey was bounded on her eastern shores by the waters formed by the confluence of the Hudson and East rivers and also by the waters of Staten Island Sound or Kill van Kull or Arthur Kull, which sound is distinct from Hudson River or bay; that, soon after the grant to Berkeley and Carteret, the inhabitants of East New Jersey proceeded to use the waters of the Hudson and sound adjoining the New Jersey shore, for the purposes of fishing, navigation, wharfing and other purposes, and erected docks and piers at Jersey City and Hoboken, and on the shores of the Hudson, and far beyond low-water mark, without interruption from the inhabitants or public authorities of New York, and the citizens of New Jersey had always exercised full and absolute right and enjoyment over the river Hudson and the other adjoining waters to the midway or channel thereof, and also a common right of navigation and use over the whole of the river and dividing waters in common with the State of New York; that, by the fair construction of the said grants and by the principles of public law, New Jersey is entitled to the exclusive jurisdiction and property of and over the waters of the Hudson River from the 41st degree of latitude to the bay of New York, to the *filum aquæ*, or middle of the river, and to the midway or channel

of the bay of New York and the whole of Staten Island Sound, together with the land covered by the water of the river, bay and sound, in the like extent; that, while the said two States were colonies, New York became wrongfully possessed of Staten Island and the other small islands in the dividing waters between the two States; that the possession thus acquired by New York had been since acquiesced in, New York insisting that her possession of said islands had established her title; that New York has no other pretence of title to said islands but adverse possession; that, as such possession has been uniformly confined in its exercise to the fast land thereof, the title of New Jersey to the whole waters of the Staten Island Sound remains clear and absolute in New Jersey, according to the terms of said grants; that, though the people of the State of New York formerly recognized the rights and jurisdiction of New Jersey as so set forth, they had lately asserted an absolute and exclusive right of property, jurisdiction and sovereignty over all the waters of the Hudson River and bay and Staten Island Sound, and that quite up to high-water mark on the New Jersey shore, and, by late public statutes, had extended the west lines of her counties lying opposite to New Jersey, on the east side of the Hudson River, to the west bank of the river, and had enforced the said unjust pretension by enacting that penalties should be imposed on any person who should execute, or attempt to execute, civil or criminal process on any part of the dividing waters by virtue of any other authority than her own laws; that, under color of said statutes, her officers had occasionally executed process on the west side of Hudson River and on the wharves so erected on the west bank of the river, within the territory and jurisdiction of New Jersey; that New York pretends that all that part of said tract of country granted to the Duke of York, and which he did not convey to Berkeley and Carteret, remained in him, that no part of Hudson River was granted to Berkeley and Carteret, and that, when New York became an independent State, all the said domain of the Duke of York, with the Hudson River and the other dividing waters, vested in full propriety and sovereignty in New York, and that New York has always

claimed and possessed the same accordingly; that New Jersey insists, that, in the grants to Berkeley and Carteret, the equal use and property of the river Hudson and sound is expressly and in terms conveyed to them, and, accordingly, Berkeley and Carteret and their grantees and assigns before the Revolution, and New Jersey, as one of the United States, since the Revolution, had always claimed, exercised, occupied and enjoyed right, title and jurisdiction, as well over the territory as the waters of Hudson River and bay, equal in extent to those used and exercised by New York; that the citizens of New Jersey, both before and since the Revolution, under the authority, jurisdiction and control, as well of the colonial as of the State government of New Jersey, had, ever since the first settlement of the colony, used, occupied and enjoyed the territory and waters of the Hudson River and bay and Staten Island Sound, and all other dividing waters between the said States, by building and constructing docks and wharves thereon extending far below low-water mark on the westerly shores thereof, by locating and appropriating several fisheries therein, and exercising the rights of common fishery in other parts thereof, by locating and appropriating oyster grounds therein and planting them with oysters under rights derived from New Jersey, and by navigating the same with her ships and vessels, which would, at pleasure, lie at anchor in the Hudson River, bay and sound, and also by the docks and wharves so constructed under the authority and jurisdiction of New Jersey, without interruption, and by various other acts and uses; that, even though said grants may not have conveyed any right of property in said river, yet, inasmuch as no part of said river was ever granted to the colony of New York, it remained in the Duke of York until his accession to the throne of England, in 1685, when said river became re-annexed to the Crown by his accession thereto, and remained a royal river until the American Revolution, and, upon the independence of New York and New Jersey being achieved, this public navigable river became the common boundary of the two States, with a right of property and jurisdiction in each to the midway thereof; that, at the time of the said grants to the Duke of York and from him to Berkeley and

Carteret, and for many years after, the general understanding of all parties interested in the subject-matter of those grants was, that no part of the waters of the Hudson River belonged to New York, but said river, so far as respected the colony of New York, her counties and the city of New York especially, was the mere natural boundary of the said colony, in which no right of property existed or could exist; that all the ancient grants made by the Duke of York to individuals, while he remained a duke and after he became the king, or by the colonial government established by him in the State of New York, are limited to low-water mark on the east side of the Hudson River; that the first charter to the city of New York, made in 1686, gives the city boundary and assigns to it all Manhattan Island as far as low-water mark; that the colonial legislature of New York, by an act passed in 1691, revised the previous act or ordinance laying off several counties in New York, and the county boundaries fixed by the said Revised Statutes were prescribed and based upon the principle that New York had no claim to the waters on the New Jersey side of the Hudson, the city and county of New York and the counties of Westchester and Dutchess being expressly located on the east bank of the Hudson; and that New Jersey had uniformly resisted and opposed said encroachments and pretensions of New York from their first existence. The bill prays that the eastern boundary line between New Jersey and New York may be ascertained and established; that the rights of property, jurisdiction and sovereignty of New Jersey may be confirmed to the *filum aquæ* or middle of Hudson River, from the 41st degree of north latitude on said river through the whole line of the eastern shore of New Jersey, as far as said river washes and bounds New Jersey, down to the bay of New York and to the channel or midway of the said bay, and to all the waters and the land they cover lying between the New Jersey shore and Staten Island, and all other waters washing the southern shores of New Jersey within and above the Narrows; that New Jersey may be quieted in the full and free enjoyment of her property, jurisdiction and sovereignty in said waters; and that the right, title, jurisdiction and sovereignty

of New Jersey in and over the same, as part of her public domain, may be confirmed and established by a decree of this court.

The averments made by New Jersey in said bill show what claims she made, and what her understanding was as to the claims made by New York, and as to the assertion of claims theretofore by the respective States. It is alleged by the counsel for the applicant that in early colonial times the waters surrounding Staten Island were regarded as the waters of the Hudson River, and Staten Island was regarded as lying in the waters of the Hudson River; that, in the grant to Berkeley and Carteret, New Jersey was bounded on the east, partly by the main sea and partly by the Hudson River; that the same boundary was contained in the subsequent grant of East Jersey to Carteret; that, in 1682 and again in 1709, the legislature of East Jersey, by statute, bounded Bergen County, the site of the present dispute, on the bay and the Hudson River; that such legislation of New Jersey as to the boundary of Bergen County remained unchanged until 1807; that the Montgomerie charter to the city of New York, in 1730, expressed the jurisdiction of that city as extending "to low-water mark on the west side of the North River, or so far as the limits of our said province extend there;" and that the boundaries of New York were asserted by it, in its Revised Statutes of 1830, to embrace the waters of Kill van Kull to low-water mark on the New Jersey side.

The matters in dispute between the two States as to boundary being those thus set forth, the dispute was brought to a close by an agreement or compact entered into on the 16th of September, 1833, between commissioners appointed by the two States, which agreement was confirmed by the legislatures of the two States respectively. The consent of the Congress of the United States was given to said agreement, "and to each and every part and article thereof," by an act approved June 28th, 1834, ch. 126, 4 Stat. 708. That act sets forth the agreement at length. The first five articles of it, which are all that are important here, are as follows:

"Article First. The boundary line between the two States

of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

"ARTICLE SECOND. The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's Islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State.

"ARTICLE THIRD. The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson River lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low-water mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the State of New Jersey, that is to say:

"1. The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson River which lies between Manhattan Island and New Jersey.

"2. The State of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements, made and to be made on the shore of the said State; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New York, which now exist or which may hereafter be passed.

"3. The State of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

"ARTICLE FOURTH. The State of New York shall have exclusive jurisdiction of and over the waters of the Kill van Kull between Staten Island and New Jersey to the westernmost end

of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same; and the said State shall also have exclusive jurisdiction, for the like purposes, of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said State of New York.

"ARTICLE FIFTH. The State of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan Bay lying westward of a line drawn from the lighthouse at Prince's Bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the State of New York, that is to say:

"1. The State of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

"2. The State of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New Jersey, which now exist or which may hereafter be passed.

"3. The State of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: *Provided*, That the navigation of the said waters be not obstructed or hindered."

The act of June 28th, 1834, provides that nothing contained in said agreement "shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

It is apparent, from the terms of the various provisions of the agreement, that it is an agreement settling the territorial limits and jurisdiction of the two States in respect to the waters between them, from a point in the middle of the Hudson River,

in the 41st degree of north latitude, to the sea. The boundary line is declared to be the middle of the said river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, except as afterwards otherwise particularly mentioned. What may be the effect of the exception, whether it affects the boundary line itself, or only amounts to a concession of extraterritorial jurisdiction to the one State and the other, beyond the territorial boundary, is not necessary to be decided in the present case. For, in either view, it is clear that the waters in which the tug was lying when she was seized were in the boundaries of the State of New Jersey. The only jurisdiction given to the State of New York, beyond the boundary line specified in Article First, over the waters of the Kill van Kull, is that specified in Article Fourth, by which it is declared that "the State of New York shall have exclusive jurisdiction of and over the waters of the Kill van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island, in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same." The rest of that article relates to Staten Island sound west of Shooter's Island, and has no reference to this case. The jurisdiction thus conceded to New York is clearly a limited one, and cannot, in any view, be regarded as altering the general boundary line; and as the tug, when seized, was on the New Jersey side of that line, she was within the State of New Jersey, not because she was fastened to a dock on the shore of New Jersey, but because she was within that part of the waters between Staten Island and New Jersey which, by Article First of the agreement, is set apart to New Jersey.

Being thus within the State of New Jersey, was the tug within the District of New Jersey and within the territorial jurisdiction of the District Court of the United States for the District of New Jersey? We are all of the opinion that, when the act of Congress of 1789 declared that the New Jersey district should consist of the State of New Jersey, it intended that any territory, land or water, which should at any time,

with the express assent of Congress, form part of that State should form part of the District of New Jersey. By sections 530 and 531 of the Revised Statutes, the State of New Jersey constitutes a judicial district. The intention is, that the boundary of the district shall be coterminous with the boundary of the State. The same thing is true as to the Southern District of New York, and as to the district across the water at the *locus in quo*, which is the Eastern District of New York. That district was created by the act of February 25th, 1865, chap. 54, 13 Stat. 438, to consist of "the counties of Kings, Queens, Suffolk and Richmond, in the State of New York, with the waters thereof." By section 541 of the Revised Statutes, the Northern District of New York is defined as including the counties of Albany, Rensselaer, Schoharie, and Delaware, with all the counties north [and west] of them; the Eastern District as including "the counties of Richmond, Kings, Queens, and Suffolk, with the waters thereof;" and the Southern District as including "the residue of said State, with the waters thereof." It is consonant with the convenience and habits of the people, that, when any place is within the limits and jurisdiction of a State, it should not be joined to the whole or a part of another State, as to the jurisdiction of the courts of the federal government; and it is not to be presumed, in view of the terms of the statutes on the subject, and of the necessity for the consent of Congress to all compacts between the States, that such separation can be intended unless clearly expressed. Where Congress declares that such a judicial district shall consist of such a State, and afterwards the boundary of the State is so lawfully altered as to include or exclude a particular piece of territory, it is a reasonable construction to say, that the judicial district shall, *ipso facto*, without further legislation by Congress, expand or contract accordingly. When the State of Massachusetts ceded to the State of New York, in 1853, its sovereignty and jurisdiction over the district of Boston Corner, and the latter State accepted the same, and Congress consented to such cession and annexation, Act of January 3d, 1855, chap. 20, 10 Stat. 602, there was no special transfer by Congress of the annexed territory from the District of Massachusetts to the Southern District

of New York, but it fell within that district by becoming a part of Columbia County, in the State of New York.

The provision in the act of June 28th, 1834, that nothing in the agreement between New York and New Jersey shall impair "any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement," is well satisfied without construing it as applying to the then existing jurisdiction of any particular court of the United States. Article Second of the agreement provides that "the State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's Islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State." Other articles of the agreement provide for the exclusive jurisdiction of New York or New Jersey over specified waters. In giving consent to the agreement, and "each and every part and article thereof," Congress was consenting, apparently, as against any rights of jurisdiction which the United States then had, to the exclusive jurisdictions of New York and New Jersey, respectively, over the islands and waters referred to. Hence, for abundant caution, the clause in question was added. New York had, by an act passed February 15th, 1800, 1 R. L. 189, ceded to the United States jurisdiction over "all that certain island called Bedlow's Island, bounded on all sides by the waters of the Hudson River, all that certain island called Oyster Island" (known afterwards and now as Ellis's Island), "bounded on all sides by the waters of the Hudson River," and also Governor's Island, reserving to the State the right to serve and execute, on those islands respectively, civil or criminal process issuing under the authority of the State.

Reference is made to Article Six of the amendments of the Constitution, which provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law;" and it is suggested that the boundaries of a district could not be ascertained by law, if they were left to change with such local changes as coterminous

States might agree upon with each other as to their respective boundaries and limits. Article Six was one of ten articles proposed by the first Congress, as amendments to the Constitution, on the 25th of September, 1789, the day after the Judiciary Act was approved, providing that the New York district should consist of the State of New York, and the New Jersey district of the State of New Jersey, and defining and ascertaining by law all the other districts which it established, solely by naming the several States as districts. There were two disputes as to boundary existing at that time between Massachusetts and Rhode Island, both of them running back to colonial times, one respecting the northern boundary of Rhode Island, and the other respecting the eastern boundary of Rhode Island. The particulars of the first dispute appear in the record of a suit in equity brought in this court by Rhode Island against Massachusetts, in 1832, 12 Pet., 657, to settle such northern boundary. In December, 1845, by a decree of this court, the bill in the suit was dismissed on the merits, and the northern boundary of Rhode Island was established on the line claimed by Massachusetts. In 1854 Massachusetts filed a bill in equity in this court against Rhode Island, to settle said eastern boundary. A conventional boundary line, different from that claimed by either State, was agreed upon, and sanctioned by Congress, by an act approved February 9th, 1859, chap. 28, 11 Stat. 382, and established by a decree of this court made December 16th, 1861, to take effect March 1st, 1862. The act of Congress declared that the new line should "be taken and deemed to be, for all purposes affecting the jurisdiction of the United States, or of any department of the government thereof," the true line of boundary between Massachusetts and Rhode Island. In the latter case, as in the present one, the boundary between the two disputing States was settled on a line different from that claimed by either. The Judiciary Act defined the State as the district, not the State as either party to the dispute claimed it to be; and the effect of the change of State boundary in the present case, on the limits of judicial districts, must be held to be as potent as that in the case of Massachusetts and Rhode Island, notwithstanding the affirmative provision in the act in

the latter case, as to the jurisdiction of the United States and of the departments of its government. Congress has always left judicial districts to be confined within State limits. Of course, the district, as a place of trial, must be ascertained by law before the crime is committed, and a person charged with a crime cannot be tried for it in a district which did not include, when the crime was committed, the place where it was committed. Whether a change in the boundary of a State, and thus of a district, after the commission of a crime, and before a trial for it, would have the effect of preventing a trial in any district, is a question which must be decided when it shall arise. The mode adopted by Congress of ascertaining districts by law, in such manner that their boundaries shall change as the boundaries of the States change, is one at least sufficient and convenient for practical purposes in all cases except where a person charged with crime and placed on trial in a particular district, may be able to establish that his rights under Article 6 of the amendments of the Constitution are being violated.

Views not in harmony with those above set forth were expressed by the District Court for the Southern District of New York in the case of *The United States* v. *The Ship Julia Lawrence*, and the case of *The L. W. Eaton*, 9 Benedict, 289. The former case was decided by Judge Betts, in 1860, and from that time forward the District Court for the Southern District of New York exercised its jurisdiction on the view that that jurisdiction was not to be governed by the provisions of the agreement between New York and New Jersey. Our attention has not been called to any case before the present one where a federal court in New Jersey has passed on the question of the limits of the District of New Jersey, as affected by that agreement. There being thus a conflict of interpretation between the judicial authorities of the two districts as to the question of the territorial jurisdiction of those districts, it is important that the effect of the agreement between the two States on that jurisdiction should be clearly defined. This we have endeavored to do. The result is, that

The application for the writ of prohibition must be denied.

Statement of Facts.

POST *v.* PEARSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Decided May 7th, 1883.

Contract—Demurrer—Pleading.

An agreement in writing, between "W., superintendent of the Keets Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine (owned by the company) to be crushed and milled by P.; and signed by "W., Supt. Keets Mining Co.," and by P.; is the contract of the company.

An order sustaining a defendant's demurrer, and giving the plaintiff leave to amend, does not preclude the plaintiff from renewing, or the court from entertaining, the same question of law at the subsequent trial on an amended declaration.

This was an action brought in an inferior court of Dakota Territory by John B. Pearson against Alvin W. Whitney and Morton E. Post, copartners under the name of the Keets Mining Company.

Annexed to the complaint was a copy of a contract under seal, entitled "Memorandum of an agreement made and entered into this 16th day of July, 1877, at Central City, Dakota, by and between A. W. Whitney, superintendent of the Keets Mining Company, parties of the first part, and J. B. Pearson, party of the second part;" and by which "the said parties of the first part" agree to deliver at Pearson's mill in Central City gold-bearing ore from the Keets mine from time to time, in quantities sufficient to constantly supply the working capacity of the mill of about thirty tons daily; and also agree to pay the sum of nine dollars for each ton crushed and milled; and Pearson agrees to run his mill constantly upon that ore for a term of ninety days from the date of the contract; and which is signed and sealed as follows:

"A. W. Whitney, [Seal.]
"Sup. Keets Mining Co.
"John B. Pearson. [Seal.]"

Statement of Facts.

The complaint set forth the terms of the contract, and alleged the plaintiff's performance and readiness to perform, and the defendants' neglect and refusal to deliver ore as agreed, or to pay for crushing and milling what they did deliver.

The defendant Post demurred to the complaint, because he was not shown to be a party to the contract sued on, and because sufficient facts were not stated to constitute a cause of action against him. The inferior court sustained the demurrer, and gave the plaintiff leave to amend his complaint.

The plaintiff then filed an amended complaint, not alleging the contract to have been in writing, but setting forth its terms, and alleging the other facts substantially as in the original complaint. The defendants answered, Post denying all the allegations of the amended complaint, and Whitney admitting the making of the contract, and denying the other allegations.

At the trial, the written contract was admitted in evidence, without objection. It appeared that it was made by the parties thereto; and that Whitney, in making it, acted in behalf and for the benefit of the Keets Mining Company, of which he was the superintendent, and that he was understood by the plaintiff so to act; and that Whitney, as such superintendent, afterwards broke the contract, to the damage of the plaintiff.

The plaintiff, against the objection of Post, and for the purpose of showing that Post was one of the real parties in interest and a participant in the results of the contract, and that Whitney acted merely as the agent of himself and Post as principals, was permitted to introduce oral evidence that Post was an owner of the Keets Mine, and a copartner with Whitney, under the name of the Keets Mining Company, in the business of working the mine and having ore from it crushed, and as such copartner received a large portion of the proceeds of the contract, knowing whence they came.

The court also declined to rule and instruct the jury, as Post requested, that the order sustaining his demurrer to the original complaint prevented a recovery against him in this action.

Post alleged exceptions to both rulings, and the jury returned a verdict for the plaintiff, upon which judgment was rendered.

On appeal, that judgment was affirmed by the Supreme Court of the Territory. See 2 Dakota, 220. Post sued out this writ of error.

Mr. R. T. Merrick and *Mr. M. F. Morris* for the plaintiff in error.—I. The liability of Post can be sustained only upon proof that Whitney in the execution of the contract was authorized to bind him; and there was no such proof. Mr. Justice Story, in his Treatise on Agency, lays down the law upon this subject, as follows: "In order to bind the principal and to make it his contract, the instrument must *purport on its face* to be the contract of the principal; and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as the agent in the instrument; or at least the terms of the instrument should clearly show that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it." Story on Agency, sec. 147; Story on Contracts, sec. 222; *Stackpole* v. *Arnold*, 11 Mass. 27, 29; *Bedford, &c.*, v. *Covell*, 8 Met. 442. Nor does it make any difference that the person signing the contract signs as "agent," or with any other *descriptio personæ;* it is still his own contract, and not that of a principal whom he may have intended to bind. This is held universally by all the authorities. *Stone* v. *Wood*, 7 Cow. 453; *Bank* v. *Monteath*, 1 Den. 402; *Seaver* v. *Coburn*, 10 Cush. 324; *Jones* v. *Littledale*, 6 A. & E. 486; *Magee* v. *Atkinson*, 2 M. & W. 440; *Higgins* v. *Senior*, 8 M. & W. 834; *Appleton* v. *Binks*, 5 East, 148; *Duvall* v. *Craig*, 2 Wheat. 45; *Tippets* v. *Walker*, 4 Mass. 595; *Forster* v. *Fuller*, 6 Mass. 58; *White* v. *Skinner*, 13 Johns. 307; *Elwell* v. *Shaw*, 16 Mass. 42; *Smith* v. *Morse*, 6 Wall. 76, 83. It does not alter the fact that Whitney and Post were partners. One partner cannot bind his copartner by an instrument under seal, at least when the partners are not present and no assent is shown.—II. The second ground of complaint on behalf of the plaintiff in error is, that the matter in controversy between him and the defendant in error had been adjudicated in the territorial district court by the decision upon the demurrer interposed by Post to

Pearson's first complaint, that this demurrer went to the merits of the case; and that the judgment upon it should have been allowed as a bar to further proceedings upon the trial of the issue raised by the amended complaint. It matters not now whether the demurrer was good or bad, or whether the judgment upon it was right or wrong. There *was* judgment upon it; and the plaintiff in the suit acquiesced in that judgment; and the judgment became final. And the question now is, whether that judgment is not a bar to any further proceedings intended to enforce the contract involved in it. The claim of the plaintiff in error is that the court below erred in refusing to rule out that contract and to give effect to the judgment on the demurrer as a bar to the suit, supported as the suit was merely by the contract in question. That a decision upon demurrer, if it involves the merits of the case, is just as final as any other decision, is beyond question. It is also true that "a decision given in the progress of a case, whether right or wrong, is the law of the case in which it is given and binding upon the parties." *Rector* v. *Danley*, 14 Ark. 304; *Cole* v. *Clarke*, 3 Wisc. 292; *Deslonde* v. *Darrington*, 29 Ala. 92; *Thomas* v. *Doub*, 1 Md. 252; *Lucas* v. *San Francisco*, 28 Cal. 591. There is no difference in principle between a decision on demurrer in the same case as *res judicata* for all subsequent proceeding, and a similar decision rendered in a different case. The demurrer, if sustained, disposes of the subject-matter; and the pleading demurred to drops entirely out of the case, if the party thereafter amends.

Mr. J. W. Smith for defendant in error.

Mr. Justice Gray delivered the opinion of the court. After reciting the facts as above set forth, he said:

It is unnecessary to consider whether, if this were to be treated as a contract under seal, it could be held to be upon its face the contract of the Keets Mining Company, and not of Whitney only, or whether the oral testimony would have been admissible to charge Post; because, by the Civil Code of Dakota, "all distinctions between sealed and unsealed instruments

are abolished," and "any instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself." Civil Code of Dakota of 1877, §§ 925, 1373.

By the subject-matter of this contract, which is the delivery and milling of ore from the Keets Mine; by the description of Whitney, both in the body of the contract and in the signature, as superintendent of the Keets Mining Company; and by the use of the words "parties of the first part," which are applicable to a company and not to a single individual—the contract made by the hand of Whitney clearly appears upon its face to have been intended to bind, and therefore did bind, the company; and, upon proof that Post was a partner in the company, bound him. *Whitney* v. *Wyman*, 101 U. S. 392; *Hitchcock* v. *Buchanan*, 105 U. S. 416; *Goodenough* v. *Thayer*, 132 Mass. 152.

The order sustaining Post's demurrer to the original complaint gave the plaintiff leave to amend, and did not preclude the plaintiff from renewing, nor the court from entertaining, the same question of law upon a fuller development of the facts at the trial on the amended complaint. *Calder* v. *Haynes*, 7 Allen, 387.

Judgment affirmed.

HAWKINS & Another, Assignees, & Others *v.* BLAKE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Decided May 7th, 1883.

Assignees in Bankruptcy—Equity—Mandate—Parties—Practice.

On appeal from the decree of the court below executing the mandate of the court on the judgment entered in *Blake* v. *Hawkins*, 98 U. S. 315: *Held*,

1. That it was no error in the execution of the mandate to permit a new party to become party and set up rights under the decree, when it appears by the record that all parties consented.

2. That there was no error in charging the amount found due to the appellees as next of kin, upon the real estate conveyed to Devereux by his mother, and in the hands of his assignees in bankruptcy; and the assignees took the estate charged with the specific equity to which it was subject in the bankrupt's hands, and must hold and apply it to the purposes to which in equity it is devoted.

Appeal from the decree entered in the court below on the mandate of this court sent down with the judgment and opinion in *Blake* v. *Hawkins*, 98 U. S. 315.

Mr. Augustus S. Merrimon and *Mr. Thomas C. Fuller*, for appellants.

Mr. Solicitor-General and *Mr. John W. Hinsdale* for appellees.

Mr. Justice Matthews delivered the opinion of the court.

A former appeal in this cause was disposed of by this court by a decision reported in *Blake* v. *Hawkins*, 98 U. S. 315, to which reference is made for a full statement of the case as then presented. The final decree of the circuit court, there reviewed, was reversed, and the cause was remanded with directions to take further proceedings and enter a decree in accordance with the opinion of the court as then declared.

The subsequent proceedings and decree, upon the mandate of this court, are now brought here for review, on the ground that they do not, in several particulars, conform to that mandate.

A brief statement of the case will suffice to explain and adjust the remaining controversy.

The complainants below were the appellants from the first decree, and are now appellees. They are of the next of kin of Frances Devereux, entitled to a share of the residue of her personal estate undisposed of by her will. The object of the bill was to obtain an account of that estate from Thomas P. Devereux, as executor *de son tort*, including a fund, being part of a sum of $50,000 originally charged upon real estate conveyed to Thomas P. Devereux by Frances Devereux, in case she should appoint the same by will or otherwise, and which, it was claimed by the complainants, she had appointed by her will to her executors. The estate of Thomas P. Devereux

passed, by his bankruptcy, to assignees and trustees, including the lands on which the fund in question, alleged to have been the subject of the appointment, had been charged. These assignees and trustees were defendants below, and are now appellants.

The charge upon the lands conveyed to Thomas P. Devereux included an annuity, during the life of Frances Devereux, payable to herself, of $3,000, being six per cent. on the principal sum, and as to the principal sum the language of the deed was:

"That the said Thomas P. Devereux, his heirs or assigns, shall invest for, or pay to, the said Frances, at such times, in such proportions, and in such manner and form as she shall direct and require, to and for her own sole and separate use, and subject to her own disposal by will, deed, or writings in nature thereof, or otherwise, to all intents and purposes (notwithstanding her coverture) as if she were a *feme sole* and unmarried, the sum of $50,000; but if the said sum of money, or any part thereof, shall remain unpaid, or shall not be invested during her life, and if the said Frances shall not by deed or will or writing in nature thereof, or by some other act, give, grant, dispose, or direct any payment, investment, or application of the same, then the said sum of money, or so much thereof as shall remain not paid, given, granted, disposed, or directed to be invested, paid, or applied, shall be considered as lapsing and the charge thereof as extinguished for the benefit of the said Thomas."

In her will, among other bequests, was one of $7,500 to Thomas P. Devereux, in trust, to apply the income on the same annually to the payment of certain annuities and charities therein specified. There was no residuary clause.

Thomas P. Devereux, though named as executor in his mother's will, did not qualify as such; but, after her death, paid off the legacies mentioned and took possession of a large part of her personal estate, so as to become chargeable therefor as executor *de son tort.*

The estate of Frances Devereux is represented by an administrator *de bonis non* with the will annexed.

The decree of the circuit court in 1874, which was the subject of the former appeal, declared among other things:

1. That Frances Devereux did not by her last will appoint the fund of $50,000, charged upon the land, "to be part of her general personal estate in the hands of her executors; nor appoint the said fund at all, except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her personal assets, after payment of her debts and general expenses and the cost of administering her estate."

2. That the complainants were not entitled to any account of the fund of $50,000, except for the purpose of determining the amount in arrears of the annuity of $3,000 during the lifetime of Thomas Devereux, unexpended, of which unexpended balance, and of the remainder of her personal estate which came to the hands of Thomas P. Devereux, they are entitled to an account.

3. That in taking that account, the assignees in bankruptcy are entitled to be credited with the amounts which Thomas P. Devereux expended in purchasing the pecuniary legacies bequeathed by Frances Devereux.

A statement of that account was agreed upon, which showed that, at the date of his bankruptcy, May 31st, 1868, Thomas P. Devereux was chargeable with $41,633 of the general personal assets of his mother's estate, after payment of debts, funeral expenses, and costs of administration, including interest to that date; and that he was entitled to credit for $39,466.58, which included interest to the same date, for the amount expended by him in payment or purchase of the pecuniary legacies under the will, leaving a balance due from him of $2,166.42, of which the complainants were entitled to one-third, or $722.14, for which accordingly, a decree was entered in their favor.

In reversing this decree, this court said, 98 U. S. 328:

"Whether, if the fund which remained in the hands of Thomas P. Devereux at the death of the testatrix had exceeded the sum required to pay the legacies given by her will—that is to say, the

sum of $28,500—the will would have been a complete execution of the power, covering the whole fund, or only a partial appointment of so much as was needed to pay those legacies, it is unnecessary for us now to decide. In the view which we take of the other questions involved in the case, that fund had been reduced so far that there was not more than enough remaining subject to the power to pay the sums bequeathed by the will. The execution was therefore complete, and it appointed the whole fund to the executors of this will, who took it under the appointment as part of the personal estate of the appointor." . . .

There was, therefore, error in the decree of the circuit court, so far as it adjudged that the testatrix, Frances Devereux, did not appoint to her executors the fund over which she had the power of appointment, "except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her general assets after payment of her debts and funeral expenses and the costs of administering her estate."

After noticing and disposing of other assignments of error, not material now to be repeated, the judgment of the court concludes as follows:

"Our conclusion, therefore, is, after reviewing the whole case, that there has been no error committed, except the single one which we first noticed. For that, however, the decree of the circuit court must be reversed, and the case sent back with instructions to direct a new accounting, and to enter a decree in conformity with this opinion."

The mandate of this court was entered of record in the circuit court at the June term, 1879; and thereupon Louisa N. Taylor filed her petition praying to be made a party, for the purpose of asserting her right to receive the value of two annuities to which she claimed to be entitled, one of $50 per annum out of the fund of $7,500 bequeathed to Thomas P. Devereux in trust for herself and others; and one of $150 per annum, which by the will of Frances Devereux, was directed to be paid out of funds arising from the sale of certain slaves

and a house and lot in Chapel Hill, it being alleged in her petition that Thomas P. Devereux had sold the house and lot, received the proceeds, and converted the slaves to his own use.

Service of this petition was accepted, and it was agreed that it might be heard at the same term, if practicable. The assignees in bankruptcy filed their answer to it, pleading the statute of limitations, alleging that the fund of $7,500 had been raised, and that the lands of Thomas P. Devereux were discharged from its payment, denying that the $150 annuity was a charge on those lands, but upon the house and lot in Chapel Hill, which sold for only $45, and the slaves, which it is alleged were not sold by Thomas P. Devereux, but lost by the result of the war, &c.

It was thereupon agreed by the parties to waive the taking of the account ordered by the mandate of this court, and that "the balance charged on the land of Thomas P. Devereux, and which Mrs. Frances Devereux had not disposed of during her life, and which by her will she appointed to her executors, was on the third (3d) of June, 1849, the date of her death, the sum of ($21,527.67) twenty-one thousand five hundred and twenty-seven dollars and sixty-seven cents."

The facts in regard to the legacy of $7,500 to Thomas P. Devereux in trust, and the interest therein of Louisa N. Taylor, were also agreed upon.

It was further agreed that a certain account D, theretofore taken, of the general personal assets of Frances Devereux, filed at June term, 1874, was correct, except that the assignees in bankruptcy insisted on an exception, to the extent that Thomas P. Devereux is chargeable only with one-half the value of the slaves, being $9,995.50, with interest thereon to the amount of $9,823.57, instead of with the full amount charged; while the complainants insisted that the correctness of that account had been finally agreed to and settled at the June term, 1874, but that otherwise the account was in all respects correct.

At the November term, 1879, the final decree was made, from which the present appeal is taken. The first seven of the

declarations in that decree specifically follow the mandate of this court, and the agreement of the parties as to the state of the accounts, overruling the exception of the assignees in bankruptcy to the account D, which charged Thomas P. Devereux with the value of all the slaves which came to his hands after the death of Mrs. Devereux; and in this, we think, there is no error.

The decree then proceeds as follows:

"8. It is further declared that the said Thomas P. Devereux never raised and appropriated the $7,500.00 appointed to him in trust by the will of the said Frances out of his lands, conveyed to him by the aforesaid deed of July 3d, 1839, and that all the annuitants provided for by said appointment of $7,500.00 are dead or have abandoned their claims, except Louisa N. Taylor, who is still living; and that none of said annuities have been paid since the first day of January, 1863, except the annuity to the said Louisa N. Taylor, which was paid by said Thomas P. Devereux up to the 1st day of January, 1867; and the court doth declare that there is a resulting trust for one-third of said sum of $7,500.00, and interest thereon from the 1st day of January, 1863, to the plaintiffs, subject, however, to the said Louisa N. Taylor's claim for the value of her annuity of $50.00 per annum, one-third of which value falls upon the plaintiff's share of said resulting trust; which said claims of the said Louisa N. and the said plaintiffs are first liens upon the lands of the said Thomas P. Devereux or the proceeds thereof in the hands of the defendants, in the relative order in which said claims are last herein stated, and are to be first paid in full by the defendants with and out of the proceeds of said lands.

"9. It is further declared that the said Thomas P. Devereux, before November, 1852, purchased up all the other pecuniary legacies bequeathed by the will of the said Frances, and after said purchase, and before the day and date last aforesaid, converted to his own use all the general personal assets of the said Frances specified in section 7 of this decree as amounting, on the 31st day of May, 1868, to forty-one thousand six hundred and thirty-three dollars ($41,633.00), claiming the same to belong to him to satisfy the said pecuniary legacies and the aforementioned sum of $7,500.00; and the court doth declare that the annuity of $150.00

per annum bequeathed by the will of the said Frances to the said Louisa N. Taylor was and is a first lien on said sum of $41,633.00 of general assets, and ought to have been first paid thereout, and that the plaintiffs ought to have been paid one-third of said sum of general assets, subject to the burden of one-third of the annuity of $150.00 per annum to the said Louisa N. Taylor; and that the said pecuniary legacies purchased by the said Thomas P. Devereux as aforesaid, and the aforesaid sum of $7,500.00, ought to have been paid out of the fund charged and appointed by the last will and testament of the said Frances Devereux on and out of the lands of the said Thomas P. Devereux, and the money to satisfy the same ought to have been raised on and out of said lands, and that said lands were exonerated from said burden by the use by the said Thomas P. Devereux, of the general personal assets aforesaid, whereby the plaintiffs have become entitled to have their aforesaid one-third of said general personal assets, burdened as aforesaid, paid out of the proceeds of said lands in the hands of the defendants, and the said Louisa N. Taylor has become entitled to have the value of her aforesaid annuity of $150.00 per annum paid to her out of the said proceeds of the said lands, and in preference to the said claim of the plaintiffs; and it is declared by the court here that the last aforesaid claim of the said Louisa N. Taylor is a third lien upon the said proceeds of lands in the hands of the defendants, and the last aforesaid claim of the plaintiffs is a fourth lien on the same, and that both of said claims are to be paid by the defendants out of said proceeds in the relative order in which the same are next hereinbefore stated in full, if the said proceeds shall be sufficient to pay both of the same in full, and if not sufficient then the claim of the said Louisa N. is to be paid in full, and the claim of the plaintiffs shall be paid as far as said proceeds shall extend to satisfy the same.

"10. All the parties, plaintiff and defendant, having at June term, A. D. 1879, of this court filed an agreement in writing waiving any further account, and ascertaining the balance charged on the lands of Thomas P. Devereux for the benefit of Frances Devereux at the date of her decease, in the words and figures following, to wit:

"'In this cause the mandate from the Supreme Court of the U. S. is filed, and to avoid the expense and delay incident to taxing the account ordered and directed herein by the decision

and decree of said court, and because from the accounts already heretofore taken in this cause the parties are able to ascertain by agreement all the results necessary for the final determination of this cause, without the new accounting directed by said decree of supreme court, by consent of all the parties, plaintiff and defendant, herein, all further account herein is waived, and it is agreed that the balance charged on the land of Thomas P. Devereux, and which Mrs. F. Devereux had not disposed of during her life, and which, by her will, she appointed to her executors, was on the 3d day of June, 1849, the date of her death, the sum of twenty-one thousand five hundred and twenty-seven dollars and sixty-seven cents ($21,527.67).'

"11. And the said Louisa N. Taylor having, at June term, 1879, of this court filed a petition to be made a party to this cause and to assert her rights in the premises, and having at said term, by the consent of all the parties, plaintiff and defendant herein, been made a party hereto, and it appearing to the court that said Louisa N. Taylor, on the 26th of March, 1869, before the register in bankruptcy proved and filed her claim on account of the legacy hereinbefore named against the estate of said bankrupt, Thomas P. Devereux, as a debt secured by lien on the lands of the said Thomas P. Devereux, to the amount of $2,926.12, with interest, and the plaintiffs having here in open court assented to the payment of said claim in the manner specified and directed in this decree, the court doth declare that there is now due to the said Louisa N. Taylor upon the $50.00 annuity, the sum of $1,196.45, with interest on $726.53, from Nov. 24th, 1879, and upon the $150.00 annuity, the sum of $3,413.40, with interest on $2,179.59, from Nov. 24, 1879, charged as hereinbefore declared.

"And thereupon, it being obvious to the court that a new reference and further account in the premises is entirely useless and unnecessary, it is finally ordered, adjudged, and decreed that the said Louisa N. Taylor recover of the defendants, William J. Hawkins and Walter Clark, assignees in bankruptcy of the estate and effects of Thomas P. Devereux, deceased, a bankrupt, and of the said Walter Clark and the defendant, Jno. Devereux, substituted trustees for Thomas P. Devereux, deceased, under the deed for the Pollock land, of July 3d, 1839, the sum of ($1,196.45) eleven hundred and ninety-six dollars and forty-five cents, with interest on $726.53 thereof, from 24th November, 1879, until paid,

to be paid and satisfied out of the proceeds of the sales of the said Pollock lands, in their hands, respectively, first, and in preference to all other claims against said proceeds; and that the plaintiffs, Grinfill Blake and Elizabeth J., his wife, and Jno. Townsend and Georgiana P., his wife, do recover of the said defendants, Hawkins, Clark, and Devereux, assignees and trustees as aforesaid, the sum of ($4,569.73) forty-five hundred and sixty-nine dollars and seventy-three cents, with interest on $2,468.34 thereof from the 24th November, 1879, until paid, to be paid out of said proceeds of said sales of said Pollock lands in their hands, respectively, and next in order of preference.

"And that the said Louisa N. Taylor do recover of the said defendants, Hawkins, Clark, and Devereux, assignees and trustees as aforesaid, the sum of ($3,413.40) three thousand four hundred and thirteen dollars and forty cents, with interest on ($2,179.59) twenty-one hundred and seventy-nine dollars and fifty-nine cents thereof from the 24th November, 1879, until paid, to be paid and satisfied out of said proceeds of said sales of said Pollock lands in their hands, respectively, and next in order of preference.

"And that the plaintiffs, Grinfill Blake and Elizabeth J., his wife, and Jno. Townsend and Georgiana P., his wife, do recover of the said defendants, Hawkins, Clark, and Devereux, trustees and assignees as aforesaid, ($21,200.46) twenty-one thousand two hundred dollars and forty-six cents, with interest on $13,877.66 thereof from the 24th day of November, 1879, until paid, to be paid and satisfied out of the said proceeds of the said sales of the said Pollock lands in their hands, respectively, and in the event that said proceeds shall prove sufficient to pay and satisfy said last-mentioned sum in full, and if said proceeds shall not prove sufficient, then as far as said proceeds shall extend to satisfy the same.

"That the costs in this cause incurred, to be taxed by the clerk, be paid by the said defendants, assignees and trustees as aforesaid, with and out of said proceeds of said sales of said Pollock lands in full and without reference to the satisfaction of the four foregoing sums adjudged to be paid out of such proceeds."

It is now objected to this decree that it is not warranted by the mandate of this court, in execution of which only it could be properly made; and that if the matters decreed were open under the mandate, they were adjudged erroneously.

It is said, in the first place, that it was error to permit Louisa N. Taylor to become a party and set up rights not embraced in the former decree. The obvious answer to this objection is, that it was done by consent of all parties, as appears by the record. And there is no ground on which the decree in her favor can be impugned. Her annuity of $50 per annum was expressly payable out of the legacy to Thomas P. Devereux in trust, in respect to which his assignee cannot be heard to say that his land has been relieved of the charge by which the fund was to be raised, when, in point of fact, the fund never has been raised. As to the annuity of $150, although payable out of a fund expressly designated, it was a demonstrative legacy, payable, in default of that fund, out of general assets, and entitled, therefore, to the benefit of the fund of $50,000, converted by the appointment into general personal estate, and, as part of that, chargeable on the land as hereafter shown. 2 Williams on Executors, Pt. 3, Book 3, ch. 2, § 3, p. 1160, 6th Am. ed. 1252.

It is next objected that the circuit court below erred in charging the amount found due to the appellees, as next of kin, entitled to share the undisposed residue of the estate of Frances Devereux, from the estate of Thomas P. Devereux, upon his real estate conveyed to him by his mother. It is claimed that this part of the decree is not justified by the mandate, and is erroneous on principle.

But this view, in our opinion, cannot be sustained. The very point of our former decision was, that the appellees were entitled to an account of the fund of $50,000, or so much of it as remained, as part of the personal estate of Mrs. Frances Devereux, by virtue of her will, construed as an appointment. The language of the opinion was, 98 U. S. 328:

"We conclude, therefore, that Mrs. Devereux's will was an execution of the power and an appointment of the fund to her executors. It converted the fund into her own estate, at least to the extent of $28,500, if there was so much of it remaining."

It is conceded that the proper amount of this fund, according

to the agreement of the parties, has been brought into account, and that the balance decreed in favor of the appellees is the true amount due to them from the estate of Thomas P. Devereux. This is so, because the personal estate of Mrs. Frances Devereux has been increased, in the account, by the addition of the balance of this fund, according to the mandate of this court.

But that fund is still uncollected and is a lien on the lands of Thomas P. Devereux in the hands of his assignees and trustees. Why should not security go with the debt? The debt is the principal and the security an incident, which necessarily attends it. It certainly was not the intention of this court, in its former order, to separate them. And when it reversed the decree of the circuit court in order to award to the appellees the benefit of the fund appointed by the will of Mrs. Devereux to become part of her personal estate, it meant also to give them the benefit of any security for its collection and payment that appointment furnished.

And that such security existed, by way of lien and charge upon the land, in virtue of the appointment, and inures to the benefit of the appellees, as entitled to share in the general personal estate of the testatrix, is necessarily involved in the former judgment of this court. For that judgment did not proceed, as seems to be claimed, on the ground that the appointment of that fund by the will was merely to the legatees, or to the use of the legatees under the will, so that when their legacies were satisfied, no matter by what means, the land was discharged of its lien. On the contrary, that judgment proceeded on the ground that the will was an appointment of what remained of the fund of $50,000 as a charge upon the land, to the executor of the testatrix, so as to convert that fund into part of the general personal estate of the testatrix, thereby subjecting it, as part of that estate, to the claims of all persons entitled to share in its distribution, it being the intention of the testatrix, as expressly deduced by this court from the provisions of the will, to provide a fund in the hands of her executors, in addition to the personal estate in possession, adequate to redeem the legacies given by the will, so as to exonerate that

estate from their payment. That fund was not a trust merely in aid of the general assets, to enable the latter to meet the payment of the legacies. That was the error of the circuit court in its first decree, for which it was reversed. It was, on the other hand, as declared by this court, "an appointment of the whole fund to the executors of the will, who took it under the appointment as part of the personal estate." And that means, just what the decree now under review declares, that it is appointed to be raised by a sale of the land on which it is charged, to be paid into the estate of the testatrix, for the purpose of being distributed to the appellees, as being the parties entitled.

Not only was this fund charged upon the real estate of Thomas P. Devereux appointed to his executors, so as to become part of the general personal estate of Mrs. Frances Devereux, so that in law the whole, including the undisposed-of residue, became liable to distribution as one trust fund for creditors, legatees, and distributees, in the order of legal priority, but that order of priority was changed by the will as declared by this court, so as to make the fund charged on the land and appointed by the will the primary fund for the payment of the legacies, so as to authorize those entitled to the general personal estate, as in this case, the next of kin entitled to the undisposed-of residue, to require that, for the purpose of paying the legacies, the specific fund charged on the land and appointed by the will should be first exhausted before resorting to the general assets of the testatrix. This court expressly so declared in its judgment on the former appeal. It said, 98 U. S. 327:

"Turning now to the will we have before us, two things are evident. The first is that the testatrix did not intend that the pecuniary legacies given for charitable purposes and to pay annuities should be satisfied out of her own personal property."

After specifying the disposition made of her personal estate in possession, the opinion proceeds:

"Thus it appears that while she gave pecuniary legacies

amounting in the aggregate to more than $28,500, she carefully withdrew from any positive application to their payment the personal estate she owned in her own right."

Notwithstanding this, Thomas P. Devereux, acting, though wrongfully, as executor of this will, and chargeable as such, appropriates the general personal estate to his own use, to reimburse himself the amount which he had expended in paying or purchasing the legacies; and thus charges them upon the general assets, in violation of the intention of the will and the rights of the parties who by law were entitled to share in that estate. Why are not the next of kin now entitled to stand in the place of those legatees, in respect to the fund out of which they should have been paid? Upon the familiar principle of marshalling assets by means of subrogation, when a party, having a right to resort to two funds, to the detriment of another, entitled to be paid out of but one, has been satisfied out of the latter, the fund thus exonerated will in equity be subjected to the payment of the postponed claim. This is such a case. For it is immaterial that Thomas P. Devereux did not use the specific property received by him out of the estate of Frances Devereux for the purpose of paying or purchasing the legacies entitled to payment out of the fund charged on his land, because he had received credit, with the assent of the parties and by the decree of the court, in his account of the general assets of that estate, for the amount paid by him on account of the legacies. How can he say, after that, that his real estate has been discharged of the lien by his payment of the legacies? The deficiency in the general personal estate thus created by him for the purpose of exonerating his land, is, in equity, something more than a personal claim against him. It is entitled to be supplied out of the securities that attended the claims which it was created to satisfy, and these securities are in equity considered as subsisting for that purpose. As against Thomas P. Devereux himself, if he were in being and in his own right defending against this claim of the appellees, the case would be too clear for argument. What greater rights have his assignees in bankruptcy, representing his general

Syllabus.

creditors? They have come into possession of this real estate, but only with the title by which he held it, subject to the specific equity now asserted against it; and in their hands, as trustees, it must be held and applied to subserve the purposes to which in equity it is devoted. Those purposes, in our opinion, are correctly set forth in the decree of the circuit court; and

It is accordingly affirmed.

CLARK, General Treasurer of Rhode Island, *v.* BARNARD & Others, Assignees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Decided May 7th, 1883.

Bond—Constitutional Law—Corporations—Damages—Franchises—Penalty.

1. The B. H. & E. Railroad, a corporation created by the State of Connecticut, purchased the franchises and railroad of the H. P. & F. Railroad, a corporation created under the laws of Rhode Island and Connecticut. The legislature of Rhode Island ratified the sale, and authorized the B. H. & E. Company to exercise the rights, privileges, and powers of the H. P. & F. Company: *Held*, That the B. H. & E. Company thereby became the legal successor of the H. P. & F. Company in Rhode Island; and, in respect to its railroad in Rhode Island, a corporation of that State.
2. The State of Rhode Island authorized by an act of its legislature the B. H. & E. Company to extend within the limits of the State the road thus acquired. The act further contained the following proviso: "This act shall not go into effect unless the said B. H. & E. Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the governor of this State, in the sum of $100,000, that they will complete their said road before the first day of January, A. D. 1872." Within the time named the requisite bond was filed in the sum of $100,000 conditioned as follows: "Now, therefore, if said B. H. & E. Company shall complete their said railroad before the first day of January, A. D. 1872, then the aforewritten obligation shall be void; otherwise be and remain in full force and effect;" and as the requisite security for the payment of the bond, a loan certificate of the city of Boston for $100,000 was deposited with the State treasurer. The B. H. & E. Company became bankrupt.

Argument for Appellees.

The assignees in bankruptcy filed a bill in equity to restrain the treasurer of the State from collecting the certificate. The treasurer demurred, on the ground that the real party in interest was the State. In the course of the proceedings the money was paid into court on an interlocutory decree. The State then came in and claimed it: *Held*, (1.) That the voluntary appearance by the State disposed of the demurrer and conferred jurisdiction to adjudicate upon the rights of the State. The case distinguished from *Georgia* v. *Jesup*, 106 U. S. 458. (2.) That the sum named in the bond in question was not a penalty to secure the performance of a condition, which could be discharged on payment of such damages as might be proved to have arisen from non-performance; but that it was in the nature of a statutory penalty for the non-performance of a statutory duty, and that it was not necessary for the State to show any actual damage or injury from the breach, in order to be entitled to recover when the breach was proved. The law and cases on this subject considered and reviewed.

Bill in equity by the assignees in bankruptcy of the Boston, Hartford & Erie Railroad to restrain the treasurer of the State of Rhode Island from receiving $100,000 in the possession of the court, the proceeds of a loan certificate of the city of Boston, which was lodged with the State by the bankrupt as security for the performance of its bond for that amount given to the State in pursuance of law to secure the construction of an extension of its road in Rhode Island, the extension never having been made. The facts appear in detail in the opinion of the court. The main questions discussed in argument were: The power of the corporation to make the agreement with the State; the rights of the parties in the absence of the State; the effect of an appearance by the State for the purpose of claiming the fund after it had been paid into court; and the measure of damages on the breach of the condition of the bond.

Mr. Charles Hart and *Mr. William G. Roelker* for the appellants.

Mr. Robert R. Bishop and *Mr. John C. Gray* for the appellees.—I. In this suit the State is not a party to the record. Even if Clark had been described as treasurer, the suit would not have been against the State. Still less will it be so, when he is sued simply as an individual. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 857, 858; *Davis* v. *Gray*, 16

Wall. 203, 220; *The Arlington Case* (*United States* v. *Lee*), 106 U. S. 196; *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 122, 123. The plaintiffs could have recovered in this suit, even if the State of Rhode Island had not appeared. For the fact that it cannot be made a party defendant is sufficient reason for not making it a party defendant, and the bill cannot therefore be objected to for want of parties. *Attorney-General* v. *Baliol College*, 9 Mod. 409; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 846, 847; *Davis* v. *Gray*, 16 Wall. 203. But the State has appeared voluntarily and claimed the fund, and has thereby submitted itself to the jurisdiction of the court. *Brunswick* v. *Hanover*, 6 Beav. 1, 39. Interpleader will lie against the Crown, *Reed* v. *Stearn*, 1 L. T. (N. S.), 539; *S. C.* 6 Jur. 267; and the position of affairs in this case is like that which would arise in an interpleader suit. See *Lariviere* v. *Morgan*, L. R. 7 Ch. App. 550, 560. The State, having voluntarily appeared and claimed the fund in court, cannot take any objections to the want of jurisdiction over it, or to the form of the proceedings, or to the manner in which the fund has got into court, except so far as it has reserved the right to do this by inserting these words in its appearance and claim—"without prejudice to the demurrer of said general treasurer." The demurrer of the treasurer asked that he might be dismissed from the suit, because the suit was really against the State of Rhode Island. The treasurer is entitled to the judgment of this court on the soundness of that demurrer, notwithstanding the appearance of the State. The appearance and claim of the State is not to debar the treasurer of the right of taking the judgment of this court upon the soundness of his demurrer. That is the effect of the words "without prejudice to the demurrer of said general treasurer," and that is their only effect. The demurrer is clearly bad, for the ground that the whole transaction was *ultra vires* is taken on the bill; and *Osborn's Case* is conclusive that, if the delivery was without authority, the bill can be maintained against the treasurer.—II. The acceptance by the company of the act of Rhode Island is void as *ultra vires*. The Boston, Hartford & Erie Company was chartered by the State of Connecticut. The general rule of

law is clear: A corporation chartered in one State cannot do acts in another State which are not authorized by the charter, although they are permitted by such other State. The rules to be applied to the construction of corporate grants are well known. "A corporation created by statute can exercise no powers, and has no rights except such as are expressly given or necessarily implied." *Huntington* v. *Savings Bank*, 96 U. S. 388, 393. A corporation can make no contracts and do no acts, either within or without the State which creates it, except such as are authorized by its charter. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, 589; *Cleveland, &c., Railroad Company* v. *Speer*, 56 Penn. St. 325. See *Pierce* v. *Crompton*, Sup. Ct. R. I. Index Decisions, March T. 1881, p. 18. Indeed, unless authorized to do so expressly, or by necessary implication, it can do no acts at all outside of the incorporating State. *Bank of Augusta* v. *Earle*, 13 Pet. 589. The reason why acts done without authority outside of the incorporating State are *ultra vires* is precisely the same as the reason why acts done inside of the State without authority are *ultra vires;* namely, that the capital stock of a corporation is in the nature of a trust fund. *Upton* v. *Tribilcock*, 91 U. S. 45–48; *Great Eastern Railway Company* v. *Turner*, L. R. 8 Ch. App. 149, 152. The terms of the trust being that it shall be used for the purposes specified in the charter, and for no other purposes: (1) In the interest of the public, that the ability of the corporation to render to the public those benefits in consideration of which the corporate privileges were granted may not be impaired; *Pearce* v. *Madison, &c., Railroad Company*, 21 How. 441, 443; *East Anglian Railways Company* v. *Eastern Counties Railway Company*, 11 C. B. 775, 812; (2) In the interest of the creditors of the corporation, that the fund, to which alone they can look for the payment of their debts, shall not be wasted by being applied in any other manner than that authorized by the charter. *Upton* v. *Tribilcock*, *ubi sup.*; *Ashbury, R. C. & I. Company* v. *Riche*, L. R. 7 H. L. 653, 667, 678, 687, 691, per Lords Cairns, Chelmsford, Hatherley, and O'Hagan.—III. The State of Rhode Island can recover on the bond in question, if valid, only the damage it proves that it has really sustained

from the failure to build the road. The obligation imposed by a bond is a matter perfectly familiar not only to lawyers, but to every business man. It is that the obligor is bound for the damages caused by the breach of the condition, to an amount not exceeding the penal sum, and that the penal sum is not itself due on a breach. This is as well known as that a bill of exchange payable to order is negotiable. Equity construed a bond, according to the original intent, to be an obligation to perform the condition, and accordingly held that the obligee was entitled to a decree directing the obligor to specifically perform the act set forth in the condition. *Anonymous*, Mosely, 37; *Holtham* v. *Ryland*, 1 Eq. Cas. Abr. 18, pl. 8; *Parks* v. *Wilson*, 10 Mod. 515, 517, 518; *Hobson* v. *Trevor*, 2 P. Wms. 191. Counsel also cited *Tall* v. *Ryland*, 1 Ch. Cas. 183; *Benson* v. *Gibson*, 3 Atk. 395; *Hardy* v. *Martin*, 1 Cox, 26; *S. C.* 1 Bro. C. C. 419, note †; *Sloman* v. *Walter*, 1 Bro. C. C. 418; *Errington* v. *Aynesly*, 2 Bro. C. C. 341; *Bertie* v. *Falkland*, 3 Ch. Cas. 129, 131; *Reynolds* v. *Pitt*, 19 Ves. 134, 142; *Hill* v. *Barclay*, 16 Ves. 402, 404. There are no late cases in equity on bonds, because the doctrines of equity have been taken up into the common law by virtue of statutes, of which 8 & 9 Wm. III., c. 11, § 8, was the first. That statute was entitled "An Act for preventing frivolous and vexatious suits," and provided that in all actions on any bonds or on any penal sums for the non-performance of covenants, agreements, etc., the plaintiff might assign as many breaches as he pleased, and the jury should assess the damages caused by such breaches; that judgment should be given for the penal sum, but on payment of the damages assessed by the jury there should be a stay of execution, and the judgment should stand as security for future breaches. That statute was practically inoperative until 1790; for, until then, it was assumed that it was not compulsory, and that the plaintiff had the right to elect whether to proceed under the statute or not. But, in 1790 it was definitely settled that, the main object of the statute being to relieve obligors, *Savile* v. *Jackson*, 13 Price, 715, 719; *Smith* v. *Bond*, 10 Bing. 125, 131, it was to be constructed liberally and to be compulsory, *Hardy* v. *Bern*, 5 T.

R. 636; *Roles* v. *Rosewell*, ib. 538; and to include all bonds, except those against which courts of law could relieve under other statutes without the intervention of a jury. *Roberts* v. *Mariett*, 2 Wm's Saunders, Edition of 1845, p. 187, note 2; *Collins* v. *Collins*, 2 Burr. 820; *Welch* v. *Ireland*, 6 East, 613; *Smith* v. *Bond*, *ubi supra*; Leake's Digest of Law of Contracts, 144, 1083. The practical effect of this statute was to adopt the rule in equity, and was concisely stated by Baron Parke in *Beckham* v. *Drake*, 2 H. L. 579, 629: "That statute in effect makes the bond a security only for the damages really sustained." The exact effect of 8 & 9 W. III., c. 11, § 8, is to prescribe that, in every action brought in England on a bond conditioned for a collateral act, nothing should be recovered but the damages proved to have been really sustained by the failure to perform that collateral act. The several States, including Rhode Island, have passed statutes in substance like the English statute. It is unnecessary to consider them particularly, because the U. S. Rev. Stat. § 961, is explicit. "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And, when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." Accordingly, neither in England nor America, neither in equity nor under the statutes, has the penalty of a bond been considered as liquidated damages. In some cases where a bond has been given not to commit a crime, *e. g.*, not to defraud the revenue, equity has refused to interfere, not because the penalty is liquidated damages, but because the penalty is the punishment imposed for committing a crime. See *Benson* v. *Gibson*, 3 Atk. 395, 396; *Treasurer* v. *Patten*, 1 Root. 260; *United States* v. *Montell*, Taney Dec. 47. There are some cases in which the obligee of a bond has been allowed to recover a sum equal to the penalty; but this has not been because the *penalty* was liquidated damages, but because the *condition* provided that such

sum should be paid as liquidated damages. The contract was to pay the sum named in the condition, and the penalty stood as usual as security for this payment. *Fletcher* v. *Dyche*, 2 T. R. 32; *Mercer* v. *Irving*, E. B. & E. 562; *Cotheal* v. *Talmage*, 9 N. Y. 551; *Smith* v. *Smith*, 4 Wend. 468; *Bagley* v. *Peddie*, 16 N. Y. 469; *Chase* v. *Allen*, 13 Gray, 42; *Leary* v. *Laflin*, 101 Mass. 334; *Hodges* v. *King*, 7 Met. 583; *Gowen* v. *Gerrish*, 15 Maine, 273. In conclusion, therefore, it is clear that, from a period at least as early as the year 1650, down to the present time, bonds have constituted a distinct class of instruments, the effect of which is always the same, in the same sense that the effect of a conveyance to A and his heirs is always the same. Such is the rule of equity. Such was the effect of the statutes.

Mr. Justice Matthews delivered the opinion of the court.

The appellees, who were complainants below, filed their bill in equity, as assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, against Samuel Clark, general treasurer of the State of Rhode Island, and the city of Boston and Frederick U. Tracey, its treasurer. The bill alleged that the Boston, Hartford & Erie Railroad Company was a corporation created by the States of Connecticut and Massachusetts for the purpose of building, acquiring, and operating a railroad from Boston in Massachusetts to Willimantic in Connecticut, and from Providence in Rhode Island to Willimantic, and from Willimantic through Waterbury to the State line of Connecticut, and thence to Fishkill in New York; that the directors of the company, without authority from the corporation or by law, applied to the legislature of Rhode Island in 1869, and obtained the passage of an act entitled "An Act in addition to an act to ratify and confirm the sale of the Hartford, Providence & Fishkill Railroad to the Boston, Hartford & Erie Railroad Company," by which the company was authorized to locate and construct a railroad in extension of their line of railroad purchased of the Hartford, Providence & Fishkill Railroad Company, commencing at their depot in Providence, thence running to the easterly line of the State in or near the village

of Valley Falls, to meet and connect with a Massachusetts railroad extending through North Attleborough from Boston, so as to make a continuous line of railroad in a northerly and southerly direction between Providence and Boston; that this act contained a provision in the following terms:

"This act shall not go into effect unless the said Boston, Hartford & Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the governor of this State in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872."

That this condition was not complied with, and that the said act therefore never took effect and is wholly null and void; that, after the passage of the act, the directors and officers of the corporation, without authority and in abuse of their trust and duty, filed with one Samuel Parker, then the general treasurer of Rhode Island, a paper, purporting to be the bond of the corporation, but without sureties, and fraudulently took of the funds of the corporation the sum of $100,000 and deposited the same with the city treasurer of Boston in exchange for the obligation of that city, a copy of which is as follows:

"Temporary Loans, City of Boston.

"$100,000. No. 6.

"This certifies that, for value received, there will be due from the city of Boston, payable at the office of the city treasurer, on demand, after the first day of December next, to the general treasurer of the State of Rhode Island, or order, the sum of one hundred thousand dollars, with interest at the rate of seven per cent. per annum, in current funds.

"This loan being authorized by an order of the city council passed the ninth day of June, eighteen hundred and sixty-nine, to anticipate the income of the present financial year.

"Interest will not be allowed after this note is due.

"June 28, 1869. ALFRED T. TURNER, *Auditor.*

"FRED. U. TRACEY, *Treasurer.* NATH'L B. SHURTLEFF, *Mayor.*"

That the directors and officers of the company, without consideration and without authority, deposited this certificate and obligation with the said Parker, who received the same without warrant of law, and thereupon held the same to the use of the railroad company; that the corporation never accepted the act of the legislature recited; that the railroad authorized thereby has never been built, nor any work done thereon, nor has the State of Rhode Island, nor any citizen thereof, suffered any damage or loss by reason thereof; that the general assembly of Rhode Island considered that the filing of the certificate and obligation of the city of Boston was not a compliance with the act, and did not ratify the taking of the same till after the bankruptcy of the railroad company; that said bankruptcy was adjudicated on October 21st, 1870, and the complainants became assignees in bankruptcy of said company from that date, and entitled to the money represented by the said certificate; that Samuel Parker having died, the respondent Clark succeeded him as general treasurer of Rhode Island, and came into possession of the said certificate, which, it is alleged, however, he holds wrongfully, and in his individual and not his official capacity, and to the use of the complainants, but which, nevertheless, he threatens to collect and to withhold from them the proceeds thereof.

The prayer of the bill is, "that the said respondent Clark may be decreed to have no right, title or interest in or to the said paper writing A, or in or to the said money so deposited with the said respondent Tracey, or to any part thereof, and that he may be decreed to assign and deliver over the said paper A to your orators, and may be enjoined and restrained from presenting the same to the said respondent Tracey, or to the said city of Boston, or from receiving any money or payment whatsoever thereon or therefor, or any part thereof, or from receiving or holding the said sum of $100,000, or any part thereof, from the said respondent Tracey, or the said city of Boston, and that the said respondent Tracey and the said city of Boston may be decreed to pay over to your orators, as assignees as aforesaid, the said sum of $100,000, with interest thereon, and may be enjoined and restrained from paying the same, or any part thereof

or any money on account thereof, to the said respondent Samuel Clark, the general treasurer of the State of Rhode Island, and that your orators may have such other and further relief as to your honors shall seem meet, and as the nature and circumstances of the case shall require."

To this bill a demurrer was filed by Clark, for want of jurisdiction, on the ground that it was in substance a suit by citizens of one State against the State of Rhode Island. This demurrer was overruled. Clark then filed his answer, denying the material allegations of the bill, asserting that the transaction was with the State of Rhode Island, through the treasurer in his official capacity, and insisting upon the immunity of the State from suit by citizens of other States as a defence. The cause came on for hearing upon the pleadings and proofs, when an interlocutory decree was passed, April 15th, 1878, ordering the payment of the money due from the city of Boston upon the loan certificate into the registry of the court, with liberty to the defendant Clark to take and file evidence in support of any claim for damages by reason of the breach of the bond of the Boston, Hartford & Erie Railroad Company to the State of Rhode Island; and further ordering, that on final hearing, and upon filing in court the certificate of indebtedness, the general treasurer of the State of Rhode Island should have and recover of the said sum in the registry such portion or the whole thereof as should amount to the sum, if any, for which any surety might or for which the principal obligor in said bond would be liable, upon the evidence, either for any penalty or damages by reason of the non-performance and breach of the conditions of said bond.

On May 3d, 1878, the city of Boston paid into court the sum of $100,000, and, in addition, the interest accrued to December 1st, 1869, and subsequently, on February 25th, 1880, an additional amount for interest in full.

On March 17th, 1880, the following claim of the State of Rhode Island was filed by the allowance of the court as of April 15th, 1878, after the entry of the interlocutory decree of that date:

"And now comes the State of Rhode Island, by the undersigned, the same counsel who have appeared for the defendant Clark, general treasurer of said State, and without prejudice to the demurrer of said general treasurer, claims the fund in the registry of the court."

This was signed by counsel.

On final hearing the fund was awarded to the appellees; and from that decree Clark, general treasurer of the State of Rhode Island, and the State of Rhode Island appealed. The State itself is a party to the appeal bond, which recites that the State of Rhode Island was an intervenor and claimant of the fund in court, and that a decree was rendered against it as such.

The bond executed and delivered by the Boston, Hartford & Erie Railroad Company to the State of Rhode Island is as follows:

"Know all men by these presents that the Boston, Hartford and Erie Railroad Company, a corporation created by the general assembly of the State of Connecticut, is held and firmly bound to the State of Rhode Island and Providence Plantations in the sum of one hundred thousand dollars, to be paid to said State of Rhode Island and Providence Plantations; to which payment, well and truly to be made, the said corporation doth bind itself and its successors firmly by these presents.

"The condition of the aforewritten obligation is such, that whereas by an act of the general assembly of said State of Rhode Island, entitled 'An Act in addition to an act entitled An Act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company,' passed at the January session, 1869, said Boston, Hartford and Erie Railroad Company are authorized and empowered to locate, lay out, and construct a railroad, in extension of their line of railroad purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the State's prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line and crossing or running near to Leonard's Pond, and thence passing between the

villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad, thence continuing to the easterly line of the State, in or near the village of Valley Falls:

"Now, therefore, if said Boston, Hartford and Erie Railroad Company shall complete their said railroad before the first day of January, A. D. 1872, then the aforewritten obligation shall be void; otherwise be and remain in full force and effect.

"In testimony whereof, said Boston, Hartford and Erie Railroad Company have caused this instrument to be signed by John S. Eldridge, its president, and its corporate seal to be thereto affixed, this twenty-third day of June, 1869.

"[L. S.] BOSTON HARTFORD AND ERIE R. R. Co.,
"By JOHN S. ELDRIDGE, *President.*

"Executed in presence of—
"SAMUEL CURREY.
"H. S. BARRY."

The testimony taken in the cause pursuant to the interlocutory decree, it is admitted, failed to prove any damage or loss occasioned to the State of Rhode Island, or to any of its citizens or inhabitants, by reason of the failure of the railroad company to comply with the conditions of this bond.

The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and

citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of *Georgia* v. *Jesup*, 106 U. S. 458, where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. The circumstance that the appearance of the State was entered without prejudice to the demurrer of Clark, the general treasurer, does not affect the result. For that demurrer could not reach beyond the question of the right to sue Clark by reason of his official character, which became insignificant when the State made itself a party; and in point of fact, the bill was framed to avoid the objection, by charging Clark as a wrongdoer in his individual capacity. For the groundwork of the bill, whether it be regarded as directed against the officer or the State, is, that the transaction throughout was void, as *ultra vires* the corporation. And this presents the next question to be considered.

That question arises and is to be determined upon the following statement of facts.

The Boston, Hartford & Erie Railroad Company was originally created a corporation by the laws of Connecticut. Its charter conferred authority upon it in these terms:

"Said Boston, Hartford and Erie Railroad Company may purchase . . . the franchise, the whole or any part of the railway or railway property of any railroad company, located in whole or in part in this State, whose line, or a portion of whose line, of railway, constructed or chartered, now forms part of a railway line from the harbor of Boston, passing through Thompson to Willimantic, and from Providence through Willimantic to Hartford, Waterbury, and thence toward the North River, with

the purpose of reaching a point at or near Fishkill, in the State of New York; . . . and said Boston, Hartford and Erie Railroad Company may make any lawful contract with any other railway company with which the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad, or may lease their railway to, or may make joint stock with, any connecting railway company in the line of, and forming a necessary part of, and running in the same general direction as, their said route, and between its terminal points."

In pursuance of this authority, the Boston, Hartford & Erie Railroad Company purchased the franchises and railroad of the Hartford, Providence & Fishkill Railroad Company. This latter company was a consolidated corporation, deriving its existence and powers from the laws both of Connecticut and Rhode Island, whose road, as defined in the acts of incorporation, constituted a line within the general description contained in the section from the charter of the Boston, Hartford & Erie Railroad Company, already quoted. By a subsequent act of the legislature of Rhode Island, the sale and transfer of the Hartford, Providence & Fishkill Railroad, its property and franchises, to the Boston, Hartford & Erie Railroad Company was ratified and confirmed, so far as said railroad was situated in that State; and it was thereupon further enacted, that the "said Boston, Hartford & Erie Railroad Company, by that name, shall and may have, use, exercise and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence & Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State."

The Hartford, Providence & Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford & Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in its respect to its railroad in Rhode Island, a corporation in and of that State.

Thereafter, in January, 1869, the legislature of Rhode Island passed the act out of which the present litigation has grown, entitled "An Act in addition to an act entitled 'An Act to ratify and confirm the sale of the Hartford, Providence & Fishkill Railroad to the Boston, Hartford & Erie Railroad Company.'" In its first section it is enacted as follows:

"The Boston, Hartford and Erie Railroad Company, a corporation created by the general assembly of the State of Connecticut, are hereby authorized and empowered to locate, lay out, and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the State prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line, and crossing or running near to Leonard's Pond (so called), and then passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleborough, from the direction of Boston, authorized by the Commonwealth of Massachusetts."

The eighth section of the act is as follows:

"Said railroad, when the same shall have been constructed, shall be managed and protected in all respects according to the provisions of, and be subject to, an act entitled 'An Act to incorporate the Providence and Plainfield Railroad Company,' and the several acts in addition to and amendment thereof, and the general laws of the State."

The act thus referred to as the "act to incorporate the Providence & Plainfield Railroad Company," was the charter of the corporation by that name, in the State of Rhode Island, that, by consolidation with a Connecticut company, formed the Hartford, Providence & Fishkill Railroad Company.

The twelfth section of the act, recited in the complainant's bill, is as follows:

"This act shall not go into effect unless the said Boston, Hartford & Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the governor of this State, in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872."

This act of the legislature of Rhode Island was duly accepted by the stockholders of the Boston, Hartford & Erie Railroad Company; the bond required by the twelfth section, as already set out, was executed and delivered; and the certificate of indebtedness, in lieu of sureties, was given by the company and accepted by the State.

It is now argued by counsel for the appellees, that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford & Erie Railroad Company, in its character as a corporation of the State of Connecticut; that, as such, it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, everything done or attempted in that behalf was *ultra vires* and void.

But the Boston, Hartford & Erie Railroad Company was also a corporation of Rhode Island. As such, it owned and operated a railroad within that State, and had received and exercised franchises under its laws, to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence & Fishkill Railroad Company; and it was this corporation, dwelling and acting in Rhode Island, that the legislature, by the act in question, authorized to exercise the additional powers it conferred.

If it had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Connecticut corpora-

tion, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter, to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut; and, by accepting charters from both States, could well become a corporate body, by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital, or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize.

"Nor do we see any reason" [as was said by this court, Mr. Justice Swayne delivering its opinion, in *Railroad Company* v. *Harris*, 12 Wall. 65–82], "why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad* any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio and Mississippi Railroad Company* v. *Wheeler*, 1 Black, 297."

The same view was taken in *Railway Company* v. *Whitton*, 13 Wall. 270; in *Railroad Company* v. *Vance*, 96 U. S. 450; and in *Memphis and Charleston Railroad Company* v. *Alabama*, 107 U. S. 581. The question of the powers of the Boston, Hartford & Erie Railroad Company, as a corporation in Rhode Island and the legal effect of its acts and transactions performed in that State, is to be determined exclusively by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory. It results, therefore, that the doctrine of *ultra vires*, as here urged by the appellees, has no place in this controversy.

It is, however, urged on behalf of the appellees—and this was the ground on which the decree below proceeded—that the obligation required by the statute and given by the company, was a bond, in the penal sum of $100,000, conditioned that the company would completely build its road within the period limited, upon which no recovery can be had, except for such damages as may be shown to have resulted to the State of Rhode Island from the breach of its condition; that no damage on that account is proven, it being in fact admitted that none actually resulted; that the certificate of indebtedness and the fund which has arisen from its payment, were pledged merely, in lieu of sureties, as collateral security for the satisfaction of the bond; and that, consequently, the claim of the State of Rhode Island against it having thus failed, that fund reverts to the appellees.

The proposition of counsel for the appellees, as stated by them, is, that, "from a period at least as early as the year 1650 down to the present time, bonds have constituted a distinct class of instruments, the effect of which is always the same, in the same sense that the effect of a conveyance to A and his heirs is always the same. Such is the rule of equity. Such was the effect of the statutes. Consequently, if in a particular case, parties have expressed their obligation in the form of a bond, their liability is thereby determined to be an obligation to perform the condition or pay the damages actually sustained from non-performance thereof;" and as a statement of the rule, they cite the following passage, 2 Sedgwick Meas. Dam. (7th ed.) 259, note:

"Of course, in this class of agreements, as in all others, when the contract takes the ordinary form of a penal bond, the sum fixed will invariably be regarded as a penalty; and this might well be put, at the present day, on the ground of intention, as derived from the writing itself, for this form of instrument is in such common use that persons who resort to it must be held to have in view its legal consequences."

While this may be accepted as a sufficiently accurate statement of the general rule, as to bonds with conditions, designed

as an indemnity between private persons for non-performance of a collateral agreement, yet, in respect to such cases, it cannot be considered as universally true.

"It is often a doubtful question" [said the Supreme Judicial Court of Massachusetts in *Hodges* v. *King*, 7 Met. 583–587], "whether the sum stipulated to be paid on the non-performance of a condition is in the nature of a penalty, or is the amount settled by the parties for the purpose of making that certain which would be otherwise uncertain. . . . The bond has indeed a condition; but that is a matter of form and cannot turn that into a penalty which, but for the form, is an agreement to pay a precise sum under certain circumstances."

So that it cannot correctly be said to be true, in all such cases, that the intention to treat the sum named in the bond as a penalty to secure the performance of the condition, and to be discharged on payment of damages arising from non-performance, can be inferred as a rule of law, or a conclusive presumption, from the mere form of the obligation.

Originally, at law, in case of breach of the condition of a bond, the amount recoverable was that named in the obligation. So that, if the condition is impossible either in itself or in law, the obligation remains absolute. As "if a man be bound in an obligation, etc., with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible and the obligation standeth good." So, again, if the condition is against a maxim or rule in law, as, "if a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good." Co. Litt. 206 b. So, where the condition is possible at the date of the instrument and becomes impossible subsequently, the obligation does not become thereby discharged, unless the impossibility of performance was the act of God, or of the law, or of the obligee. Accordingly, it was held by this court in *Taylor* v. *Taintor*, 16 Wall. 366, that when a person arrested in one State on a criminal charge, and released under

his own and his bail's recognizance, that he will appear on a day fixed and abide the order and judgment of the court, goes into another State, and while there, is, on the requisition of the governor of a third State, for a crime committed in it, delivered up, and is convicted and imprisoned in such third State, the condition of the recognizance has not become impossible by act of law so as to discharge the bail; "the law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State when the obligation was assumed and obligatory in its effects upon her authorities."

The ground, nature, and limits of the jurisdiction of courts of equity to relieve against penalties in such instruments is well stated by Mr. Justice Story, in this language:

"In short, the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof or the damage really incurred by the non-performance. In every such case the true test generally, if not universally, by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus;* and when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages." Story's Eq. Jur. § 1314.

And Mr. Adams, in his Treatise on Equity, 6th Am. ed. 107, says, on the same subject:

"The equity for relief against enforcement of penalties originates in the rule which formerly prevailed at law, that, on breach of a contract secured by penalty, the full penalty might be enforced, without regard to the damage sustained. The court of

chancery, in treating contracts as matters for specific performance, was naturally led to the conclusion that the annexation of a penalty did not alter their character; and, in accordance with this view, would not, on the one hand, permit the contracting party to evade performance by paying the penalty; and, on the other hand, would restrain proceedings to enforce the penalty on a subsequent performance of the contract itself, viz., in the case of a debt, on payment of principal, interest, and costs; or in that of any other contract, on reimbursement of the actual damage sustained."

It has accordingly been uniformly held, in cases too numerous for citation, that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach; for, as was said by Lord Chancellor Macclesfield, in *Peachy* v. *Duke of Somerset*, 1 Strange, 447; *S. C.* Prec. Ch. 568, 2 Eq. Ca. Abr. 227, "it is the recompense that gives this court a handle to grant relief."

The application of this principle becomes more manifest in cases where a public interest or policy supervenes, as where, for non-compliance by stockholders in corporations engaged in undertakings of a public nature, with the terms of payment of instalments due on account of their shares, by which a forfeiture of the stock and of all previous payments thereon has been incurred and declared, the courts refuse to grant relief. *Sparks* v. *Proprietors of Liverpool Water Works*, 13 Ves. 428; *Prendergast* v. *Turton*, 1 You. & Col. Ch. 98; *Naylor* v. *South Devon Railway Company*, 1 DeG. & Sm. 32; *Sudlow* v. *The Dutch Rhenish Railway Company*, 21 Beav. 43.

In the case of *Sparks* v. *Proprietors of Liverpool Water Works*, 13 Ves. 433, Sir Wm. R. Grant, M. R., said:

"The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on." . . . "Why is not this equity open to contractors for gov-

ernment loans? Why may not they come here to be relieved when they have failed in making their deposit? And if they could have relief, how could government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made it ought not to be attempted."

Accordingly, where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will. Story's Eq. Jur. § 1326. Lord Chancellor Macclesfield said in *Peachy* v. *Duke of Somerset*, 1 Strange, 447–453:

"Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain."

In *Powell* v. *Redfield*, 4 Blatchford, 45, an application was made in equity to restrain suits upon a bond given in pursuance of the revenue laws of the United States, which was denied on the ground that a court of equity had no right to interfere and, by injunction or decree, to virtually repeal the express provisions of a positive statute, or defeat their operation in the particular case. In *Benson* v. *Gibson*, 3 Atk. 395, Lord Hardwick said:

"Nor is it like the case of bonds given as a security not to defraud the revenue, because there, where a person is guilty of a breach, it is considered in law as a crime, and this court will not relieve for that reason."

The case of *Treasurer* v. *Patten*, 1 Root, 260, was an action for the penalty of a bond given to oblige the defendant to observe the laws respecting excise, in which there was a verdict for the plaintiff and the £200 penalty. Defendant moved the court, says the report, to chancer said bond:

"By the court: There is no power short of the legislature can do it; for it is the sum prescribed by an act of the legislature."

So in *Keating* v. *Sparrow*, 1 Ball & Beatty, 367–373, the Lord Chancellor Manners said:

"It has been argued on the part of the plaintiff that this court leans against forfeiture, if the party can be compensated; and that he can in this case, where interest and septennial fines may be given to the landlord. That principle is applicable to cases of contract between the parties, but not to the provisions of an act of Parliament or conditions in law."

The fact that the obligation is in the form of a bond to the State does not make its penalty less a statutory forfeiture, and so outside the jurisdiction of a court of equity. In the case of *The United States* v. *Montell*, Taney, 47, it was held that the sum secured by a bond with sureties, under the act of Congress of December 31st, 1792, ch. 1, sec. 7, 1 Stat. 290, conditioned that the registry of a vessel should be used solely for the vessel for which it was granted, and should not be disposed of to any person whatsoever; and if the vessel be lost, or prevented by disaster from returning to the port, and the registry shall be preserved, or if the vessel be sold, that the registry shall be delivered up to the collector, is a penalty or forfeiture inflicted by the sovereign power for a breach of its laws, not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offence, and not the less so, because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated. Chief Justice Taney, in his opinion, said:

"Penalties and forfeitures imposed by statute are not usually provided for by bond and security given in advance. The sum recovered from Montell is recovered upon a contract; the action was brought upon a contract, and was not and could not have been brought in any of those forms which are usually necessary for the recovery of fines or forfeitures imposed by law. Yet this sum was, in truth, forfeited by Montell, by reason of his violation of a duty imposed by the act of Congress; it was a specific penalty upon the owner and master, for the commission of a particular offence against the policy of that law. And although the amount was secured by bond given for the performance of the

duty, yet this duty was a part of the same policy with other duties mentioned in the act and for which other penalties are inflicted. . . .

"It certainly is not to be regarded as a bond with a collateral condition, in which the jury are to assess the damages which the United States shall prove that they have sustained; for according to that construction, the amount of damages would not depend upon the amount of the penalty described in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only four hundred dollars, than in a case where the penalty was two thousand dollars. This, obviously, is not the intention of the law, and the United States are entitled to recover the whole sum for which the party is bound, if any one of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult, we think, by any course of proof or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties.

"The sum for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence. And it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated."

Recurring now to the particular circumstances of the present case, with a view to the application of these principles and decisions, we are satisfied that the proper solution of the question now under examination is to be found in two principal considerations.

The first of these is, that it was not intended by the parties, the State of Rhode Island on the one hand, and the Boston, Hartford & Erie Railroad Company on the other, that the ob-

ligation given and accepted should be for an indemnity against any loss or damage expected to be suffered by the State, in the event that the railroad company should fail to build the railroad as required. It is found as a fact that no such loss or damage has in fact ensued. It is equally plain that none could possibly have arisen. The security is not to be extended to any supposed damage to private interests legally affected by the process of constructing the work. All damage of this kind to private persons was carefully provided for in other parts of the act. As to the State itself, the real party to the arrangement and contract, it could gain nothing in its political and sovereign character by the construction of the road, it could lose nothing by the default. If it could be supposed as possible that the State had in view the public interests of commerce and trade in the construction of the proposed railroad, and meant to provide for loss and damage to them by reason of its failure, the obvious answer is that no computation and assessment of actual damages on that account would be practicable, leaving as the alternative that the State, in fixing the penalty of the bond in the statute, had established its own measure of the public loss. The question of damages and compensation was not, because it could not have been, in contemplation of the parties. There was no room for supposing that there could be any. To assume that the statute required this bond and security in this sense, in full view of the legal conclusion which it is said necessarily flows from its form, and that in the event contemplated, of the failure to build the road, all that remained to be done was that the State should hand back cancelled the obligation and security it had been at such pains to exact, is to put upon the transaction an interpretation altogether inadmissible. It would have been, upon such an assumption, a vain and senseless thing, and however private persons may be sometimes supposed to act improvidently, we are not to put such constructions, when it is legally possible to avoid them, upon the deliberate and solemn acts and transactions of a sovereign power, acting through the forms of legislation. The conclusion, in our opinion, cannot be resisted that the intention of the parties in the transaction in question was that, if the railroad should

not be built within the time limited, the corporation should pay to the State, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. The supposition is not open that the penalty was prescribed merely *in terrorem*, to secure punctuality in performance, with the reserved intention of permitting subsequent performance to condone the default, for a distinct section of the statute (sec. 9) declares that in case of failure to complete the road within the time limited, the act itself should be void and of no effect.

In the second place, we think, that the sum named in the statute is imposed by it as a statutory penalty for the non-performance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law, that they will complete their road as required by it. The language evidently means that, in case they fail to do so, they shall forfeit and pay the sum named; and in order to insure its payment, additional parties to the bond, as sureties, are required. It is admitted, that if it does not mean this, it does not mean anything, and we have already said that we are not at liberty to adopt that alternative. We must construe it, *ut res magis valeat quam pereat;* and the rule of strictness, in the construction of penal statutes, does not require an interpretation which defeats the very object of the law. The State of Rhode Island was dealing with one of its own corporations, and it had perfect right to act upon its own policy and prescribe its own terms, as conditions of powers and privileges sought from its authority.

For these reasons the decree of the circuit court is reversed, and the cause is remanded with instructions to enter a decree in favor of the State of Rhode Island for the sum of $100,000, payable out of the fund in court, with so much interest thereon, if any, as has accrued on that sum since the 1st day of January, 1872, which is the date when the amount became due.

And it is accordingly so ordered.

Statement of Facts.

MANNING & Another *v.* CAPE ANN ISINGLASS & GLUE COMPANY & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Decided May 7th, 1883.

Patent.

The facts in this case show a public use of the alleged invention for more than four years prior to the date of the patent.

This was a suit brought by the appellants, John J. Manning and Caleb J. Norwood, to restrain the infringement by the appellees of letters patent dated January 7th, 1873, issued to the appellants and W. N. Manning, as assignees of the inventor, James Manning. By the subsequent assignment of W. N. Manning the appellants became vested with the title to the entire patent.

It is well known that the swimming-bladders or sounds of certain fishes are largely composed of that variety of gelatin called isinglass. The sounds are usually found in the market in a dry and hard state. They are manufactured into isinglass by a mechanical operation which consists in passing the macerated sounds successively between several sets of rollers, the first set kneading the sounds into a homogeneous sheet, and the subsequent sets squeezing and elongating the sheets into the ribbons of isinglass known to commerce. The invention covered by the patent sued on was for "an improvement in the manufacture of isinglass from fish sounds."

The specification of the patent declared as follows:

"In the manufacture of ribbon isinglass from fish sounds it is customary to feed the softened and moist or macerated sounds to and between feed and compressing rollers, by which the viscid substance is compressed and joined and formed into a continuous sheet. Notwithstanding the constant application of cold water into the rolls, the substance adheres tenaciously to the roll and

accumulates thereupon, and has to be cut away therefrom, an operation which is very slow and laborious and productive of imperfect sheets.

"My invention is designed to obviate the return of the adhering gelatinous substance to the action of the rolls before it is stripped therefrom, and to so strip it that the rolls may work continuously or without stoppage, the ribbon, as it is stopped, being again fed or guided by the operator into and between the rolls until sufficiently reduced or elongated for removal or for the action of other rolls set nearer together to produce a thinner ribbon.

"To effect this result I place at the side of each roll a scraper extending the whole length of the roll, and having an edge set up to the roll, so that the roll shall run just clear of it, which scraper or cleaner strips from the whole surface of the roll the adhering gelatine in the form of a sheet.

"The invention consists in this method of passing the isinglass between hollow rolls, cooled by water thrown into the rolls, and then stripping the gelatinous matter from the rollers and returning it to the hopper to be again treated, the rollers being adjustable."

The claim was as follows:

"The herein described method of converting isinglass into sheets of any desired thickness by running it between hollow rolls into which cold water is thrown to cool the compressing surfaces, such rolls being preferably made adjustable to graduate the degree of compression, and the adhering sheets being removed from the rolls by stationary scrapers or clearers and returned to the hopper as required."

One of the defences set up in answer and relied on was that the improvement described in the patent had been in public use for more than two years before the patent was applied for.

The circuit court dismissed the bill on that ground. From its decree this appeal was prosecuted by the complainants.

Mr. Thomas William Clarke for appellants.
Mr. George L. Roberts for appellees.

Mr. Justice Woods delivered the opinion of the court.

We think that the defence, that the improvement described in the patent had been in public use for more than two years prior to the application therefor, is established by the testimony.

The appellants contend that the patent covers an improvement in the process of making isinglass. It is not contended that the patent covers the rolls between which the fish-sounds are passed, or the keeping of the rolls cool by making them hollow and injecting a stream of cold water into the cavity, nor the automatic scrapers, but in the use of automatic scrapers applied to such rolls to prevent the isinglass from being carried through the rolls a second time without aeration.

The testimony shows that, as early as the year 1860, James Manning, the inventor, was engaged in the manufacture of isinglass at Ipswich, Mass., in copartnership with his brother-in-law, Caleb Norwood, under the same of Norwood & Manning. In that year Oliver C. Smith, a machinist at Salem, constructed for the firm a machine containing adjustable hollow water-cooled rolls, with stationary scrapers, substantially such as are described in the patent, for converting isinglass into sheets in the manner therein set forth. The use of this machine was continued down to the year 1867, when the firm of Norwood & Manning was dissolved. In the division of the assets of the firm between the partners, the machine with the scraper, made by Smith, fell to Norwood. He took into the business with him as a partner his son, Caleb J. Norwood, and continued it in the same factory from 1867 to 1870, using the machine with the stationary scraper which had been made by Smith.

James Manning, after the dissolution of the firm of Norwood & Manning, established an isinglass factory at Rockport, Mass., and procured to be constructed two machines similar to that disclosed in the patent. With this factory and machinery he set up in business his two sons, John J. Manning and William N. Manning, and they carried on the business of manufacturing isinglass, under the name of J. J. Manning & Brother, from the year 1868 until the testimony in this case was taken in 1877, using the two machines with scrapers above mentioned. James Manning, the inventor, had no interest in the business carried

on by Norwood and his son after the dissolution of the firm of Norwood and Manning in 1867, nor in the business of J. J. Manning & Brother, carried on from 1868 until after the issue of the patent.

Some attempt is made to show that the use of the machines in the factory of Caleb Norwood, from 1867 to 1870, was a secret and not a public use. But we think the testimony shows a use open to the public generally. But whether this be so or not is immaterial, for Norwood and his son were allowed by the inventor the unrestricted use of the patent during the period mentioned, without injunction of secrecy or other condition. This is sufficient to constitute a public use. *Egbert* v. *Lippman*, 104 U. S. 333.

The decided weight of the evidence shows that there was also a public use of the invention in the factories of J. J. Manning & Brother for more than four years prior to the application for the patent, namely, from 1868 to 1873.

It is also made clear by the testimony, not only that the machinery, but the process used by Norwood & Manning from 1860 to 1867, by Norwood & Son from 1867 to 1870, and by J. J. Manning & Brother from 1868 to 1873, and after that year was substantially the same as that described in the patent. During all these years there was no material change, either in the machinery or the process. The use of the machinery and process was not, therefore, an experimental use. These conclusions of fact are fatal to the complainant's case.

It is the policy of the patent laws to forbid the issue of a patent for an invention which has been in public use before the application therefor. The statute of 1836, 5 Stat. 117, section 6, did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor; and the statute of 1870, 16 Stat. 201, section 24; Rev. Stat. § 4886, does not allow the issue, when the invention had been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor. Under either of these statutes the patent relied on in this case was improvidently issued, for there was a public use, with the con-

sent of the inventor, for more than two years prior to the application. The patent is threefore void. *McClurg* v. *Kingsland*, 1 How. 202; *Egbert* v. *Lippman*, *ubi supra*; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92; *Worley* v. *Tobacco Co.*, 104 U. S. 340.

The decree of the circuit court must be affirmed.

DOWNTON *v.* YEAGER MILLING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Decided May 7th, 1883.

Patent—Printed Publication.

1. The doctrine reaffirmed that the earlier printed and published description of a subject of a patent which is put in evidence to invalidate a patent must be in terms that would enable a person skilled in the art or science to which it appertains to make, construct and practise the invention as completely as he could do by the aid of information derived from a prior patent; and that unless it is sufficiently full to enable such person to comprehend it without assistance from the patent, or to make it or repeat the process claimed, it is insufficient to invalidate the patent.
2. Applying the doctrine to this case, the appellant's patent *held* to be void.

The appellant was the complainant in the circuit court. He filed his bill to restrain the infringement by the appellee of certain letters patent, for which he made an application on March 20th, 1875, and which were issued to him on April 20th following, for an "improvement in processes of manufacturing middlings flour."

The state of the art, and the purpose of the improvement which the patent was intended to cover, were set forth in the specification, as follows:

"This invention has for its aim the better working or manipulating of grain particles known as middlings, for their reduction into meal or flour.

"To fully set forth the advantages that this process possesses

over any of the various processes previously known and in use, it will be necessary to previously describe the manufacture as now practised.

"It is customary under the ordinary mode of milling to separate and purify the middlings by the action of air alone, or air and bolting-cloth combined; then to convey the purified product to millstones to be ground to a sufficient fineness to admit of the passage of the middlings flour through the meshes of the bolting-cloth, which is used as a finishing-preparer between the stones and the flour barrels or sacks receiving the finished product. In some cases the middlings that are not sufficiently reduced to go through the meshes of the cloth, pass through the ends of the flour-bolts, and are brought back into some of the various purifiers, and subjected to repurification. This process requires much careful manipulation, and even then the yellow germ and pellicle of the grain will be so torn and pulverized by the stones that loose portions of the same will pass through the meshes of the bolting-cloth, into the flour, with injurious effect. The reason why the germ and pellicle is so torn is that millstones are composed of two disks—one revolving, the other stationary—receiving the material to be ground at the eye or centre of the stones, and compelling it by centrifugal force to escape at the skirt or periphery of the stones, passing alternately over face and furrow until it reaches the periphery, where it is discharged. Such action comminutes the germs and forms specks that cannot be removed by the purifiers, and are, therefore, ground in with the flour.

"In the manufacture of middlings flour the action of stones on the middlings is not different from their action on grain, but in the wheat-stones the germ ends and bran are not sufficiently comminuted by one grinding to pass through the meshes of the cloth used for the flour known to the trade as 'first run.' I propose to arrest and remove such germ matter and bran particles by my improved process before they reach the second grind on the middlings-stones, by placing between the purifiers or separators and middlings-stones one or more sets of rolls, which will operate to reduce the large middlings by a bruising or crushing action, while they simply flatten out the intermixed germs and bran. Any of the various purifiers or separators in public use may be employed. A second important advantage or result of this improved process is the production of a large yield of high-grade

flour. The large middlings or glutinous particles of the grain require more grinding than do the finer and more starchy particles removed at the head or first part of the purifiers; and when ground together, as is generally the case with small mills, and frequently the case with large mills, the meal is considerably heated in the grinding, owing to the miller's requiring the middlings meal to be of uniform fineness. The disposition and fineness of the small middlings cause them to 'flour' quicker than the large middlings, therefore the grinding is unequal, as, in order for the large glutinous middlings to be ground enough, the small starch middlings must be ground too much. This impairs the quality of the flour by deadening it, as well as by reducing the germs and bran to such an extent as to cause them to pass through the cloth. Some mills, therefore, run the coarsest middlings to a lower grade of flour.

"It is plain that with an intermediate reduction, by the flattening-rolls working on the large middlings as above set forth, the comminution of the middlings under the stones is rendered more equal, and a larger percentage of high-grade flour can be made.

"I will now describe briefly my mode of milling, referring, for illustrations, to the accompanying drawing, in which—

"Fig. 1 is a general side view, partly in section, showing an apparatus, or a series of machines, comprising a section of my purifier A; and Fig. 2 is a like view of the same apparatus, in part, illustrating the employment of any other purifier, A^2.

"Naturally the germs and bran are kept with the large and valuable middlings or particles of grain by the bolting-cloth of the purifying machines or flour-bolts till they reach certain parts, where the middlings are subjected to strong currents of air to remove light bran-flakes and fuzzy matter. The partially-freed middlings are now passed from the purifier A, or A^2, between rolls or uniformly rotating surfaces, B, where the good middlings particles, being more brittle, are reduced to small granules, or to flour, while the germ and heavy bran matter, being of a soft, plastic nature, is flattened out, so that on passing it into a reciprocating or revolving bolt, C, clothed with suitable cloth, the flouring matter is thoroughly removed through the meshes of the cloth in a fit state of purity to pass to the stones D to be reground as usual, and the injurious germs and refuse matter are arrested, so as to be run off into suitable receptacles."

The claim was stated as follows:

"The following is claimed as new, namely:

"The herein-described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth."

The answer of defendant set up, among other things, as matter of defence, want of novelty, and vagueness and uncertainty in the specifications and drawings filed by the patentee to describe his invention.

The circuit court sustained both these defences and dismissed the bill. The complainant appealed.

Mr. Geo. Harding and *Mr. W. G. Rainey* for appellant.

Mr. F. W. Cotzhauser and *Mr. Robert H. Parkinson* for the appellee.

Mr. Justice Woods delivered the opinion of the court.

A grain of wheat may be described generally as follows: It consists of a pellicle or outside covering known as bran, an inner envelop consisting of cells and their contents of gluten and phosphates, the most nutritious portion of the berry, and an interior white mass composed mainly of starch and albuminoid matter, extending to the heart of the berry. At one end of the berry, under an irregularly-curved surface layer of bran, technically called the shield, is the embryo or germ. The germ is a yellow, waxy substance, and the bran is consistent and tough. It has always been the aim of good milling to separate as completely as possible the bran and germ from the other contents of the berry, because they not only gave color to the flour, but rendered it more liable to sour.

The main purpose of the improvement described in appellant's letters patent was to accomplish this result by removing the bran and germ from the coarse middlings, leaving only those parts of the grain from which pure white flour could be produced. The improvement consisted in a process, and did not cover the several devices by which the process was carried on.

The process was as follows: Coarse middlings, from which the fluffy matter had been eliminated by a well-known contrivance known as a purifier, were passed between one or more sets of rolls which reduced the large middlings to a greater degree of fineness, but flattened out the tough and waxy germs and bran. After the middlings, with the intermixed germs and bran particles, had been passed between the rolls, they were carried to a bolting-cloth. This allowed the comminuted middlings to pass through its meshes, whence they were carried to the stones "to be reground as usual," but the germs and bran particles having been flattened and their surfaces enlarged by the rolls, could not get through the bolting-cloth, and were carried to the end of the bolt, and then run off into suitable receptacles.

It will be observed that all the separate parts of this process are old. The use of purifiers on middlings to take out the fluffy particles, the use of rolls to comminute middlings, the use of bolting-cloths to separate the bran and germs from the flour, and the use of stones to regrind middlings, all long antedate the patent of the appellant.

The only field left for invention, therefore, was either a new order in which the different parts of the process were to be applied, or some new method of using some one or more of the devices by which the process was accomplished, or both these combined, so as to produce some new product, or some old product in a cheaper or otherwise more advantageous method. It is claimed for the appellant that his invention consists "in interjecting in the old modes, after the purifier, a pair of smooth rolls of equal diameter and running at equal speed, and then rebolting the product and regrinding the middlings" which pass through the bolting-cloth.

We are to inquire whether the defence relied on in this case, that the invention claimed as his own by the appellant, had been described in a printed publication before his invention thereof had been made out.

By section 24 of the act of 1870 it was provided that any person who had invented any new and useful art, machine, manufacture, or composition of matter not known or used by

others in this country, "and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof," might obtain a patent therefor.

In construing the words "described in any printed publication in this or any foreign country," as they were used in reference to the same subject in section 7 of the act of 1836, 5 Stat. 117, this court, in the case of *Seymour* v. *Osborn*, 11 Wall. 516, said (on page 555):

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent."

So in *Cohn* v. *United States Corset Company*, 93 U. S. 366, Mr. Justice Strong, speaking for the court, said (at page 370):

"It must be admitted that, unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent."

Applying strictly the rule thus laid down, we are of opinion that the defence of prior publication has been made out.

After a careful consideration of the evidence in the record, we are forced to the conclusion that the method of making flour set forth in the specification of appellant's patent was fully and clearly described in a printed publication before the invention thereof by the appellant, and that his patent therefor is consequently void. We refer to a German work put in evidence by the defendant, entitled Die Mehlfabrication, by Frederick Kick, published at Leipsic in 1871. We take the following extracts from a translation of this book.

"Part IV., Rough Grinding with Roll Mills:

"In the successive process of grit, or high milling, the grain is crushed in its first passage through between the stones, that is, broken into parts of different sizes—groats.

"In the disintegrating process which follows next, flour, dust, middlings, partings, and breakings are obtained. With each of these substances, classified according to size, particles of the hull of the same size are mixed, or still adhere to the particles of the grist. By this method of crushing with stones, a partial splitting up of the hull is unavoidable, and the flour obtained from such rough grinding is mixed with particles of bran, even from decorticated wheat, and is therefore discolored.

"If one were able wholly to prevent the disintegrating of the particles of the hull, the flour produced by rough grinding would be white.

"This, however, is never fully accomplished; but there is, on the one hand, a way to diminish the friability of the hull —by moistening; on the other hand many sorts of wheat, under similar treatment, exhibit this difficulty to a less extent, and therefore produce white flour, viz., soft wheat—or, finally, machines are employed which, in the process of rough grinding, break up the hull to a less degree, as is the case with roll mills.

"The roll mills operate partly by crushing and partly by grinding. They produce breakings, which then pass to the stones for grinding into flour. The surfaces of the rolls are smoother than those of the stones, and the hull is, therefore, less torn. Of course the disintegrating by means of rolls is not appropriate for every kind of wheat. If soft, mild wheat is passed through the rolls, it leaves the rolls in a flat, compressed condition, whereas, with the same treatment, hard (Hungarian), wheat is reduced to fragments, and so regularly broken.

"The action of the rolls evidently depends upon their relative position (their distance apart); it also depends on the condition of their surfaces (whether smooth or channelled); and then again on their relative motion, viz., whether both rolls have like or different velocities.

"If the rolls are so far apart that the wheat sustains only a moderate pressure, and if they are smooth, then only a breaking of the grain occurs in the direction of the crease. The berry is

thereby divided into two longitudinal halves, of which many still cohere at the back, thus resembling an open book.

"In case the rolls are closer together, then, with soft wheat a flattening takes place, and the middlings obtained therefrom are very clean or free from bran. Hard wheat is much more considerably reduced, and a proper breaking is effected. . . . Rolls with smooth surfaces operate more by compression—those with fluted surfaces more in a cracking or breaking manner. In order to give the rolls at the same time a triturating effect, they are made to revolve with different velocities.

"Two, three pairs of rolls may be arranged one above another. By the first pair 'coarse breakings' are produced; by the second 'first breakings,' etc. Hence, the application of three pairs of rolls permits a gradual disintegration during a single passage of the grain through the roll mill. . . . There are (as we shall explain hereafter) certain varieties of middlings in which the but partially broken germs constitute thirty or forty per cent. of the entire mass, and which being yellow granules, give to the entire mass of grist, with which they are intermixed, a yellowish appearance.

"Now, if this kind of middlings is passed through properly adjusted rolls the tough germs are only flattened, while the other granules are broken and can be easily separated by sifting. Instead of a pair of rolls, a single roll operating against an adjustable segment of stone or iron may be used. By this latter method the substance ground is much more subjected to trituration. The particles already reduced continue to rub against each other and against the working parts of the machine until they finally pass out, in consequence whereof the advantages above mentioned of the roll mills are greatly neutralized."

We have, in this publication, an accurate description of the process covered by appellant's patent.

We have the rolls used for the identical purpose therein set forth, namely, to reduce the middlings and to flatten out the germs, so that they can be separated by bolting or sifting, thus preparing the middlings to be again ground and reduced to middlings flour.

Appellant insists, however, that the process described by

Kick is not applied to purified middlings, and therefore differs from his.

But it appears, from the well-known state of the art, that ever since purifiers were invented, it has been the practice to purify middlings before reducing them, so that whenever the grinding of middlings is mentioned, graded and purified middlings are understood. The process of purifying, in case of gradual reduction, is as elementary as bolting, and follows every reduction of the material. When, therefore, Kick speaks of passing middlings through the rolls for another reduction, he must be understood to mean purified middlings. But the evidence in the record clearly shows that the action of the rolls, and their effect upon the product of the mill, would be the same whether purified or unpurified middlings, or even wheat, were used.

Appellant further insists that his process differs from that described by Kick, because the rolls mentioned by the latter run at unequal speed. This contention is founded on a misapprehension. The extract from Kick's work expressly says that "the action of the rolls evidently depends . . . on their relative motion, viz., whether both rolls have like or different velocities." Rolls, therefore, with the same or different velocities could be used in the process described by Kick. His method included both.

We are also of opinion that the process which appellant claims as his invention was also clearly described as early as the year 1847 in a publication called Anglo-American and Swiss Science Milling by Christian Wilhelm Fritzsch, published at Leipsic by Gustav Brauns. This description of the process of manufacturing flour is illustrated by drawings, which make it perfectly clear that the different parts of the process of the appellant were anticipated and publicly printed more than twenty-five years before the appellant, according to his own story, conceived the improvement described in his patent.

Fritzsch describes the process as follows:

"The advantages to be derived from the roll mill consist chiefly in this, that in operating them a considerable saving of power is

achieved as compared with stone mills. Furthermore, the flour produced is of excellent quality, both in whiteness and fineness.

"Inasmuch as the wheat is ground in a dry state, the flour produced is especially adapted with respect to durability for transportation and storing.

"The principle on which all said improvements turn, centres wholly and exclusively in a desire to effect the grinding of wheat, so that not only the largest possible quantity of good middlings flour is obtained, but also that this may be separated from the hull or bran in its original purity; or to express it in plainer words, to obtain the mealy interior substance without admixture of any part of the hull."

Then follows a description of the mill by which the reduction of the wheat to coarse middlings is effected:

"The rough-ground product discharged from the mill (in which, besides middlings, flour has been produced) is thereupon most conveniently carried into the upper stories of the mill building by means of an elevator, and is then first transferred to a flour cylinder for the purpose of separating the flour. The remainder then goes upon a grit cylinder, where the material is assorted and separated from the hull in four different grades of middlings. The middlings thus obtained are thereupon likewise cleaned in the manner already described, and prepared for flouring.

"The grinding of middlings takes place by a manipulation varying but little from the process of rough grinding, by means of a flouring mill, which, together with the crushing mill above mentioned, constitutes a set or run. We see this flouring mill upon our plate (fig. 8). Its construction is in the main like that of the other, only the difference that the upper pairs of rolls are not fluted, like those in figure 7, but have smooth turned surfaces, and consequently no under layers (wedges). This under layer (wedge), is only used with the under pair of rolls, which are finely fluted.

"The middlings ready for grinding are here also put into the hopper, as shown, and carried to the first, second, and third pairs of rolls, in the manner described. The upper two pairs of rolls crush and triturate the middlings to the utmost degree; there-

fore, it remains for the last lower pair of rolls to shake up the flour.

"This product, thus finely ground, is now transferred to the cylinder bolt for separating the flour. The bran-like surplus is carried with the hulls to a stone mill, to be very completely ground out.

"The grinding of middlings in the manner above described has many advantages in its favor—especially in this, that the hull particles still contained in the middlings are, by this process, not any longer decomposed or torn up, whereby the possibility of transfer of them into the flour is avoided."

In this description we have the purifying of the middlings by a purifier which is shown in the cut, then the passing of them between two pairs of smooth revolving rolls of equal diameter, which are in all respects like the rolls described in the specification of appellant's patent, and which necessarily perform the same function; then the disintegration, or shaking up as it is called, of the ribbons or sheets of the material which come from the second pair of rolls, by passing them through the third pair, which are fluted, but are not allowed to touch each other, and then their transfer to the bolting cylinder, by which the flour is separated from the bran and germs.

The only difference between this process and that described in appellant's patent, is that the last two sets of rolls but one, mentioned in the process described by Fritzsch, completely reduce the middlings to flour, while in the process under appellant's patent the middlings, after passing between the rolls and being separated from the germs and bran, are again ground between stones; but the great feature of appellant's process, the flattening of the germs and pellicle by passing the middlings between rolls, is found in the method described by Fritzsch.

The advantages from the process described by Fritzsch are identical with those claimed for the process described in appellant's patent, first, a saving of power; second, the hull of the wheat (and necessarily the germ), is not disintegrated and torn up in passing between the rolls as it would be between the ordinary millstones, and can therefore be eliminated by the bolt; and, third, the yield of high-grade flour is increased, and

the flour produced is of excellent quality, both in whiteness and fineness and fitness for transportation and storing.

The printed publications relied on to defeat the appellant's patent describe the process covered thereby so fully and clearly as to enable persons skilled in the art to which the invention relates, to carry on the process. In fact, the description of the process in the printed publications is, to say the least, quite as precise, clear, and intelligible as in the specification and claim of the patent.

The earliest date at which the appellant claims to have invented his improvement is stated by him as in 1872 or 1873. These publications, therefore, which antedate his invention, one by at least one year, and the other by twenty-five years, are fatal to the validity of the patent.

The decree of the circuit court which dismissed the bill must therefore be affirmed; and

It is so ordered.

GROSS *v.* UNITED STATES MORTGAGE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Decided May 7th, 1883.

Constitutional Law—Illinois—Mortgage—Practice—Statutes.

The question considered as to when the opinion of the highest court of a State may be examined for the purpose of ascertaining whether the judgment involves the denial of any asserted right under the Constitution, laws, or treaties of the United States.

In view of the statutory requirement that the justices of the Supreme Court of Illinois shall file and spread at large upon the records of the courts written opinions in all cases submitted to it, such opinions may be examined, in connection with other portions of the record, to ascertain whether the judgment or decree necessarily involves a federal question within the reviewing power of this court.

The act of the general assembly of Illinois, in force July 1st, 1875, validating loans or investments previously made in that State by corporations of other States or countries authorized by their respective charters to invest or loan money, is not in conflict with the contract clause of the federal Constitution, nor with that part of the Fourteenth Amendment forbidding a State from depriving any person of property without due process of law.

Statement of Facts.

Benjamin Lombard negotiated with the United States Mortgage Company—a corporation of the State of New York, having its principal office and place of business in the city of New York—a loan of $50,000 in gold coin, to be used in the erection of buildings upon certain unimproved lots in the city of Chicago, of which he was the owner in fee. To secure the payment of that sum, with interest, at the rate of nine per cent. per annum, payable semi-annually in gold coin, he executed—his wife joining him—to that company, August 22d, 1872, a mortgage upon the said premises, covenanting therein to pay the debt and interest; that the premises were clear of all encumbrances; that he would warrant and defend the same, suffering no impairment of the mortgage security; and that the mortgage should stand as security for any money paid for taxes or insurance. The mortgage provided that, if default was made in the payment of any interest instalment, or there was a failure to pay the taxes or assessments on the premises, or keep any other covenant contained in the mortgage, that the whole of the debt should become at once due at the option of the mortgage company, with the right in the latter to sell the property to the highest bidder after thirty days' advertisement in some paper published in Chicago. The mortgage also contained this clause:

"It is understood and agreed that this mortgage is to be subject to the right of the city to take so much of said lots as shall be necessary for the opening of and extension of Dearborn street, being thirty-six feet, more or less, off the west end of said premises; in which event any benefit which may accrue to the said party of the first part herein may be paid by the city to said party of the first part direct."

The mortgage, upon the day of its execution, was filed and recorded in the proper office.

On the 10th day of December, 1872, Lombard sold and conveyed with warranty the whole of the mortgaged premises—together with the buildings which had been erected thereon with the money borrowed from the United States Mortgage Company—to the National Life Insurance Company of Chicago, of which he was president and a principal stock-

holder. That conveyance was made expressly subject to the before-mentioned mortgage. The consideration was $100,173, a part of which was in the assumption of the debt due the United States Mortgage Company. In part payment also of the purchase money, the insurance company executed and delivered to Lombard its promissory note for $12,273 (drawn to its own order and by it indorsed in blank), payable three years after date, with interest payable semi-annually at the rate of ten per cent. per annum. To secure the payment of this note the insurance company, on the same day, executed and delivered to one J. L. Lombard, as trustee, a trust deed, conveying the whole of said premises, with covenants of warranty. That deed was duly recorded. Of that note and trust deed Gross subsequently became the owner, the note coming into his possession with the indorsement only of the insurance company.

On or about March 17th, 1873, by proper legal proceedings, thirty-five feet off the west end of said lots were condemned by the city for the purposes of a street. The sum of $10,952.73 was awarded as compensation for the ground so taken, and $15,897.84 were afterwards assessed as the value of the benefits to the remaining portion of the premises.

Benjamin Lombard made default in the payment of interest due, on and after October 1st, 1873, and failed to pay any taxes or assessments on the property after 1872. On the 1st day of January, 1874, the mortgage company elected to declare the whole debt due.

On or about June 1st, 1874, the insurance company was adjudged a bankrupt, and an assignee thereof was appointed. Lombard was also declared a bankrupt. Neither he nor the insurance company left any known assets to meet their obligations.

By an act of the general assembly of Illinois, in force July 1st, 1875, entitled "An Act to enable corporations in other States and countries to lend money in Illinois, and to enforce their securities and to acquire title to real estate as security," it was declared, among other things:

"That any corporation formed under the laws of any other

Statement of Facts.

State or country, and authorized by its charter to invest or loan money, may invest or loan money in this State. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree, or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases: *Provided, however*, That all real estate so purchased by any such corporation, in satisfaction of any such liability or indebtedness, shall be offered at public auction, at least once every year, at the door of the court-house of the county wherein the same may be situated, or on the premises so to be sold; . . . and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, cost, and other expenses: *And provided further*, That in case such corporation shall not, within such period of five years, sell such lands, either at public or private sale, as aforesaid, it shall be the duty of the State's attorney to proceed by information, in the name of the people of the State of Illinois, against such corporation, in the circuit court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules as the court shall establish," &c. Laws of Illinois 1875–6, Act of April 9.

For the purpose of settling several conflicting claims in reference to this property, the assignee in bankruptcy of the insurance company brought this suit in the Superior Court of Cook County, Illinois, making the United States Mortgage Company, Gross, and others defendants.

The principal questions in dispute between Gross and the mortgage company were: 1. Whether the latter acquired any valid interest or lien upon the premises as against Gross; and the court of original jurisdiction held that it did. 2. Whether Gross, as the owner and holder of the note for $12,273, was entitled to receive the sum awarded as damages for that part

of the property taken by the city, or whether the mortgage company was entitled to it by reason of the terms of the mortgage. That question was ruled in favor of Gross.

Upon appeal to the highest court of Illinois the judgment of the inferior State court was reversed and set aside, and the cause remanded "for such other and further proceedings as unto law and justice shall appertain, with directions to the Superior Court to enter a decree giving to appellants [the mortgage company] exclusively the amount found against the city as damages, and to Gross no part thereof." It was further adjudged that the mortgage company recover its costs. From that decree this writ of error has been prosecuted.

Mr. Thomas S. McClelland for plaintiff in error.—I. In the case at bar the Supreme Court of Illinois has decided that the United States Mortgage Company could not loan money in Illinois, and take real estate security, and that the mortgage made by Lombard to it, August 22d, 1872, was absolutely void and of no effect, both in law and equity. On that question this court will treat the ruling of the Illinois court as the law of this case, and no subsequent rulings of the Illinois court can be considered here. *Sibbald* v. *United States*, 12 Pet. 488; *Tyler* v. *Maguire*, 17 Wall. 253, and cases cited; *Roberts* v. *Cooper*, 20 How. 467–81; *Leese* v. *Clark et al.*, 20 Cal. 387; *Phelan* v. *San Francisco*, Ib. 39; *Chickering* v. *Failes*, 29 Ill. 294; *Rising* v. *Carr*, 70 Ill. 596; *Chicago & Alton Railroad Company* v. *People*, 72 Ill. 82; *Johnson* v. *Von Kettler*, 84 Ill. 315; *Clearklee* v. *Mundell*, 4 Harr. and John. 497. Irrespective of this rule of law, there is another, to wit, that this court, in passing on local questions peculiar to the several States, will adopt the rulings of such State courts as settled at and before the time the transaction occurred which is brought in review before this court, and subsequent decisions of the State court can have no force or effect upon such transactions. *Fairfield* v. *County of Gallatin*, 100 U. S. 47. It is reserved to the States, either by statute or general policy, to determine whether foreign corporations shall do business therein. *Newburg Petroleum Company* v. *Weare*, 27 Ohio St. 343; *The State ex rel.*

Drake v. *Doyle*, 40 Wis. 175; Warton on Conflict of Laws, § 286; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Runyan* v. *Coster*, 14 Pet. 122, 130; Story on Conflict of Laws, § 430; *Paul* v. *Virginia*, 8 Wall. 168; *County of San Matteo* v. *Southern Pacific Railroad Company*, 13 Fed. Rep. 722. Such corporations as defendant in error were prohibited in Illinois, at the time it took its security, by statute and general policy. Gen. Incorp. Law of Ill. of 1872, secs. 1 and 26. The contract of mortgage by Lombard to defendant in error, being prohibited by statute and against the manifest policy of the State, is a nullity. *Cincinnati Insurance Company* v. *Rosenthal*, 55 Ill. 85; *Carroll* v. *East St. Louis*, 67 Ill. 568; *Starkweather* v. *Bible Society*, 72 Ill. 50. The trust deed of Gross is a contract and cannot be postponed to another lien by the legislature. *Sinking Fund* v. *Northern Bank*, 1 Metcalfe (Ky.) 174; *Mundy* v. *Monroe*, 1 Manning (Mich.) 68.—II. The act of July 1, 1875, and the decision of the Supreme Court of Illinois, construing it as retroactive and giving it the effect of curing the mortgage of August 22d, 1872, from Lombard to defendant in error, and making that instrument valid as against the note for $12,273, dated December 10th, 1872, secured by trust deed and assigned to Gross before maturity, for a valuable consideration without notice, and before the act of 1875 was passed, are in conflict with article 1, section 10, and article 14, section 1 of Constitution of the United States. Constitution of the United States, art. 1, sec. 10; Ib., art. 14, sec. 1; Cooley's Const. Lim. 4th ed. 472; *Thompson* v. *Morgan*, 6 Minn. 292; *Alabama Life Insurance & Trust Company* v. *Boykin*, 38 Ala. 510; *Dale* v. *Metcalf*, 9 Penn. St. 109; *Orton* v. *Noonan*, 23 Wis. 102; *Brinton* v. *Seevers*, 12 Iowa, 389; *Russell* v. *Ramsey*, 35 Ill. 362; *Conway* v. *Cable*, 37 Ill. 82; *Deininger* v. *McConnell*, 41 Ill. 227; *Rogers* v. *Higgins*, 48 Ill. 211; *Bronson* v. *Kinzie*, 1 How. 311; *Edwards* v. *Kearzey*, 96 U. S. 595; *Brine* v. *Insurance Company*, 96 U. S. 627; *McCracken* v. *Hayward*, 2 How. 608; *Barings* v. *Dabney*, 19 Wall. 1; *Curran* v. *Arkansas*, 15 How. 304; *Meighen* v. *Strong*, 6 Minn. 177; *Shonk* v. *Brown*, 61 Penn. St. 320; *Pearce's Heirs* v. *Patton*, 7 B. Monroe, 162; *McCarty* v. *Hoffman*, 23 Penn. St. 507; *LeBois*

v. *Bramel*, 4 How. 449; *Rose et al.* v. *Sanderson*, 38 Ill. 247; *Hunter* v. *Hatch*, 45 Ill. 178; *Norman* v. *Heist*, 5 Watts & Serg. 171; *Wright* v. *Hawkins*, 28 Texas, 452; *Sherwood* v. *Fleming*, 25 Texas (supp.), 408; *Williamson* v. *New Jersey Railroad*, 2 Stewart (N. J.), 311; *Smith* v. *Morse*, 2 Cal. 524; *Garnet* v. *Stockton*, 7 Humph. 84; *Ballard* v. *Ward*, 89 Penn. St. 358; *Bolton* v. *Johns*, 5 Barr, 145. The law of the State where a contract is made is a part of the contract, and a subsequent act changing the law to the prejudice of either party is void. *Bronson* v. *Kinzie*, 1 How. 311; *Brine* v. *Insurance Company*, 96 U. S. 627; *Edwards* v. *Kearzey*, 96 U. S. 595; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *McCracken* v. *Hayward*, 2 How. 608; *Smoot* v. *Lafferty*, 7 Ill. 383. And the remedy on such a contract cannot be taken away or materially affected. *Edwards* v. *Kearzey*, 96 U. S. 595; *Bronson* v. *Kinzie*, 1 How. 311; *Mundy* v. *Monroe*, 1 Manning (Mich.) 68; *Williamson* v. *New Jersey Railroad*, 2 Stewart (N. J.), 311. As to construction of retrospective statutes: *Bruce* v. *Schuyler*, 9 Ill. 221; *Marsh* v. *Chestnut*, 14 Ill. 223; *Hatcher* v. *Toledo Railroad Company*, 62 Ill. 477; *In re Tuller*, 79 Ill. 99; *Thompson* v. *Alexander*, 11 Ill. 54; *Hopkins* v. *Jones*, 22 Ind. 310; *Hackley* v. *Sprague*, 10 Wend. 113; *Shonk* v. *Brown*, 61 Penn. St. 320; *Moore* v. *Phillips*, 7 M. and W. 536.—III. The assignee of a promissory note before maturity, secured by a trust deed, takes it relieved of any equities existing between the original mortgagor and third persons. *Carpenter* v. *Longan*, 16 Wall. 271; *Kennicott* v. *Supervisors*, Ib. 452; *New Orleans, &c., Company* v. *Montgomery*, 95 U. S. 16; *Sawyer* v. *Prickett*, 19 Wall. 146–166. The decision of the Supreme Court of Illinois, as to the nature of the right acquired by Gross to the security of the trust deed made by the insurance company, and as to whether it is such a right as could be impaired or destroyed by State legislation, is reviewable in this court; and this court will determine for itself, by reference to the general rules of law appertaining to the subject, as to the nature and extent of that right, and whether it is a right of property protected by the Constitution of the United States. *Delmas* v. *Insurance Company*, 14 Wall. 661; *University* v. *People*, 99 U. S. 309–321; *Jeffer-*

son Bank v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116.—IV. Subsequent to the execution of the mortgage from Lombard to the mortgage company, and before July 1, 1875, the date of the act under which the mortgage company could lend money in Illinois and take real estate securities, the city of Chicago condemned the west 35 feet of the property, and a judgment was rendered against it for $10,952 $\frac{73}{100}$, as the value of the 35 feet, which damages, by the terms of the mortgage, were to go to Lombard direct, but Lombard having sold the entire property—including this 35 feet—to the insurance company, and the insurance company having executed a trust deed on the entire property to secure the note bought by Gross, it follows that Gross acquired all of Lombard's interest in these damages. These rights were vested in Gross, and under section 10, article 1, and section 1, article 14 of the Constitution of the United States, could neither be affected by the act of July 1st, 1875, nor by the construction given it by the Illinois Supreme Court in this case.

Mr. Wirt Dexter for defendant in error.

Mr. Justice Harlan, after stating the foregoing facts, delivered the opinion of the court.

The first point to be considered relates to the jurisdiction of this court. The defendant in error insists that it does not appear from the record that the decision of the Supreme Court of Illinois was adverse to any asserted right under the Constitution, laws, or treaties of the United States, nor that the judgment or decree complained of could not have been passed without the determination of any such federal question. *Dugger* v. *Bocock*, 94 U. S. 603; *Murdock* v. *City of Memphis*, 20 Wall. 590. This proposition depends upon the inquiry whether the opinion of the State court, made part of the transcript, can be examined for the purpose of ascertaining the grounds upon which that court based its final decree.

In *Gibson* v. *Chouteau*, 8 Wall. 314; *Rector* v. *Ashley*, 6 Ib. 142, and *Williams* v. *Norris*, 12 Wheat. 117, it was ruled that

the opinion of the State court constituted no part of the record, for the purpose of determining whether this court will re-examine its final judgment or decree. And in *Parmelee* v. *Lawrence*, 11 Wall. 38—where the question arose as to the effect to be given to the certificate of the chief justice of the State court, showing that a federal question was raised and decided adversely to the party bringing the case here for review—it was said:

"If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the supreme court of the State can give the jurisdiction in every case where the question is made by counsel in argument."

To the same effect are *Lawler* v. *Walker*, 14 How. 149; and *Railroad* v. *Rock*, 4 Wall. 177. But in *Murdock* v. *City of Memphis*, 20 Wall. 590, the subject was again under consideration, by reason of the omission from the act of 1867 of that provision in the 25th section of the act of 1789 restricting this court, when reviewing the final judgment or decree of the highest court of a State, to the consideration of such errors as appeared "on the face of the record." It was there said, that, in determining whether a federal question was raised and decided in a State court:

"This court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.'" "What was the record of a case," the court observed, speaking by Mr. Justice Miller, "was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the States, and new modes of proceedings in those courts, have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. *Grand Gulf Railroad Company* v. *Marshall*, 12 How. 165; *Cousin* v. *Blanc's Executor*, 19 id. 202. And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, we see no

reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court, signed by its chief justice or presiding judge, on that point, though not as conclusive, and these opinions are quite as satisfactory, and may more properly be treated as part of the record than such certificates."

The opinion of the State court in the present case is properly authenticated, and there is, in addition, the certificate of its chief justice, showing that the present plaintiff in error not only claimed that the deed of trust by the National Life Insurance Company gave, when executed, a lien superior to that asserted by the United States Mortgage Company under Lombard's mortgage, but that the act of the legislature of Illinois, in force July 1st, 1875, in so far as it attempted to validate mortgages like the one taken by that company from Lombard, was in conflict, as well with the contract clause of the Constitution of the United States, as with that part of the 14th Amendment which prohibits a State from depriving a person of property without due process of law; further, that the latter claim was decided adversely to plaintiff in error.

We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title, or immunity, under the Constitution or laws of the United States and specially set up and claimed by the party bringing the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires, not only that the justices of the supreme court of the State shall deliver and file written opinions in cases submitted to it, but that "such opinions shall also be spread at large upon the records of the court." Rev. Stat. Ill. 1874, p. 329, ch. 37, § 16. This statutory provision would seem to bring the case within the rule which permits an examination of the opinions of

the Supreme Court of Louisiana to ascertain whether the case was determined upon any ground necessarily involving a federal question within the reviewing power of this court.

The opinion of the State court, 93 Ill. 483, in this case, shows that the decree is based upon these grounds: 1. That the laws of Illinois, in force when the mortgage of August 22d, 1872, was executed, as well as her public policy, as disclosed in legislative enactments for many years, prohibited the United States Mortgage Company from taking mortgages upon real property, in that State, to secure the repayment of money loaned; consequently, that no title passed to it under or by virtue of that mortgage. 2. That such mortgage was, however, validated by the act in force July 1st, 1875. This last proposition was, as the opinion shows, contested in the State court by the present plaintiff in error, upon grounds indicated in the certificate of its chief justice.

We are here met by the suggestion that the decree can be sustained, apart from the validating act of 1875, upon the ground that the mortgage of Lombard to the United States Mortgage Company was not inconsistent with the statutes of Illinois in force at the time of its execution, or with any public policy declared in the legislation of that State. This view is based upon *Stevens* v. *Pratt*, 101 Ill. 206, and *Commercial Union Assurance Company* v. *Scammon*, 102 Ill. 46, determined subsequently to the decree in this case. Those cases directly involved the validity of mortgages upon real estate taken from other parties by the United States Mortgage Company prior to the act of July 1st, 1875. The decision in each was that a loan made by a foreign corporation, prior to that act, to a citizen of Illinois, and secured by mortgage, was neither prohibited by any legislation of that State, nor contrary to its public policy, and that such mortgage could be foreclosed and the title to the mortgaged real estate thereby passed. So much of the opinion of the Supreme Court of Illinois in this case as held to the contrary was expressly declared in *Stevens* v. *Pratt* and *Commercial Union Assurance Company* v. *Scammon*, to be erroneous.

But it is contended, in behalf of plaintiff in error, that the decree below, in so far as it declares Lombard's mortgage to be

invalid, is an adjudication, as between the parties to this case, of a purely local question, of which, upon writ of error, we may not take cognizance; consequently, it is argued, this court, without reference to the later decisions of the State court, must determine the federal question here raised upon the basis established by that court in this case, viz., that Lombard's mortgage was, when given, inoperative, under the local law, to pass title to the United States Mortgage Company. Without expressing any opinion as to the soundness of this position, and assuming, for the purposes of this case only, that Lombard's mortgage was, for the reasons given by the State court, invalid under the local law, we proceed to inquire whether the act of 1875, in its application to that mortgage, is in conflict with any provision of the Constitution of the United States.

That the act in question is not repugnant to the Constitution, as impairing the obligation of a contract, is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in *Satterlee* v. *Matthewson*, 2 Pet. 380, and, in substance, in *Watson* v. *Mercer*, 8 Pet. 88, that "it is not easy to perceive how a law, which gives

validity to a void contract, can be said to impair the obligation of that contract." The doctrine of those cases was approved at the present term, in *Ewell* v. *Daggs*, *ante*, p. 43, where, speaking by Mr. Justice Matthews, it was said, touching legislation of this character,

"that the right of a defendant to avoid his contract is given by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability he intended to incur." *Ante*, p. 151.

But it is contended that, by his purchase, prior to the passage of the act of 1875, of the note secured by the deed of trust given by the National Life Insurance Company, the plaintiff in error acquired a vested right of property, of which he could not, under the Fourteenth Amendment of the Constitution, be deprived by subsequent legislation. We do not perceive that Gross was, by that act, deprived of any substantial right of property. If, as held by the court below, in this case, the title to the real estate did not pass from Lombard at the date and by virtue of his mortgage, and if, because of its invalidity under the laws and public policy of the State, he was at liberty to convey a complete title to the insurance company, we have seen that the latter took the title subject to the mortgage, and, in addition, expressly assumed to pay the amount of the debt due from Lombard to the mortgage company. Apart from the supposed inability of the mortgage company, resulting from the statutes and public policy of the State, to take title by mortgage to the premises, Lombard was personally liable to it for the money he had borrowed. He could not have escaped that personal liability upon the ground that the mortgage, in so far as it gave a lien upon the property, was invalid. The claim of the company against him for the money he obtained

from it was separable from, and wholly independent of, any lien upon the premises. And, as between Lombard and the insurance company, that personal liability of the former for the mortgage debt was protected by the very terms of the conveyance to the latter. If the acceptance of title, subject to the mortgage, did not, because of its invalidity, give a lien upon the premises, it is clear that Lombard, as against the insurance company, had, upon recognized principles of equity, a vendor's lien for so much of the purchase money as was equal to or was represented by the debt due from him to the mortgage company. Of the existence of that liability upon the part of Lombard, and of the agreement by the insurance company to protect him against it, Gross had notice from the deed of trust. He claims under the insurance company, and can assert no right inconsistent with its obligation to meet, as part of the purchase money, Lombard's debt to the mortgage company. Without the act of 1875, a court of equity, in enforcing a lien for the note held by Gross, could not have ignored the equitable lien which, as vendor, Lombard had for his protection against the mortgage debt, subject to which, as we have seen, he passed the title to the insurance company. The entire argument in behalf of Gross proceeds upon the erroneous ground that when he purchased the note in question there was no lien upon the property in favor of any one for any amount whatever, except that given by the deed of trust to secure the note for $12,273. The effect, then, of the act of 1875 was not to deprive Gross of any superior exclusive lien upon the premises. It only enabled the mortgage company to enforce the lien attempted to be given by the mortgage of 1872, rather than leave the property subject to a lien for a like amount in favor of Lombard, from whom the insurance company, under which Gross claims, purchased. This view, without presenting others leading to the same result, indicates that the act of 1875 was not inconsistent with that clause of the Constitution of the United States which inhibits a State from depriving any person of property without due process of law.

The federal question having been correctly determined, the decree is affirmed.

UNITED STATES *v.* FORTY-THREE GALLONS OF WHISKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Decided May 7th, 1883.

Indians—Internal Revenue—License—Spirituous Liquors—Treaties.

The payment of a special internal revenue tax for selling liquors in a collection district does not authorize the licensee to introduce or to attempt to introduce spirituous liquors or wines into Indian country in violation of the act of June 30th, 1834, 4 Stat. 729, as amended by the act of March 15th, 1864, 13 Stat. 29, when an Indian treaty, ceding lands embraced within the territory covered by the license, provides that the laws of the United States then in force, or which might thereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, should be in full force and effect throughout the country ceded, till otherwise ordered by Congress or the President.

Same case in 93 U. S. 188, referred to.

Information and libel in the court below of goods of one Lariviere, seized by an Indian agent of the United States for attempted violation of the laws forbidding the introduction and sale of spirituous liquor in the Indian country. The case was before the court at October term, 1876, 93 U. S. 188. The issues that have now come for settlement, and the facts necessary to their comprehension, are fully stated in the opinion of the court.

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

Mr. C. K. Davis for defendant in error.

Mr. Justice Field delivered the opinion of the court.

By the treaty between the Red Lake and Pembina bands of Chippewa Indians and the United States, concluded on the 2d of October, 1863, those Indians ceded to the United States their right, title, and interest to certain lands owned and claimed by them in the State of Minnesota, and the Territory of Dakota. 13 Stat. 667. The seventh article of the treaty

stipulated that the laws of the United States then in force or that might thereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, should be in full force and effect throughout the country thereby ceded until otherwise directed by Congress or the President of the United States. The 20th section of the act of June 30th, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier," 4 Stat. 729, as amended by the act of March 15th, 1864, 13 Stat. 29, was in force when this treaty was made; and it forbids any one, under certain penalties, to sell or dispose of any spirituous liquors or wine to an Indian under the charge of an Indian superintendent or agent; or to introduce or to attempt to introduce them into the Indian country, unless done by order of the War Department or of some authorized officer under it. And the section provides for the seizure and forfeiture of liquors thus introduced and the goods and property of the party violating the statute with which they are found. The following is the section as amended:

"SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper District or Circuit Court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than $300: *Provided, however*, That it shall be a sufficient defence to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, sub-agent, or commanding officer to cause the boats,

stores, packages, wagons, sleds, and other places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bonds put in suit. And it shall, moreover, be the duty for any person in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. And in all cases arising under this act Indians shall be competent witnesses."

Under this section the present libel of information was filed in the District Court of the District of Minnesota, to enforce the forfeiture of certain spirituous liquors, which are particularly described, and other merchandise found with them at the time of seizure. In one of its counts the libel sets forth that Bernard Lariviere, a white person, late of the village of Crookston, county of Polk, and State of Minnesota, did, on the 2d of February, 1874, unlawfully carry and introduce into the country ceded to the United States under the treaty mentioned—namely, into the county of Polk, which is a part of the ceded country—the spirituous liquors described; that such introduction was in violation of the provisions of the 20th section of the act of Congress above quoted; that he owned, and at the time had in his possession with the liquors, a quantity of goods, packages, and peltries, a list of which is contained in a schedule annexed to the libel; that an Indian agent, duly appointed, having reason to suspect, and having been informed, that spirituous liquors had been introduced by Lariviere, caused his stores, packages, and peltries to be searched, and there found the liquors mentioned, which he in consequence seized, together with the other goods. In another count the libel sets forth substantially the same matters, with the addition that the liquors were introduced into the country ceded with intent to

sell, dispose of, and distribute the same among the bands and tribes of Chippewa Indians then under charge of the Indian agent, and frequenting the county of Polk and village of Crookston, and living there or near the place.

To this libel Lariviere and one Clovis Guerin appeared as claimants of the goods seized, and demurred to the libel on the ground that the court had no jurisdiction; that the property was never introduced into the Indian territory, but, as appeared by the libel, was searched and seized in an organized county of the State of Minnesota, and hence that the seizure was without authority of law. The demurrer thus interposed was sustained by the district court, and judgment rendered against the United States, and this judgment was affirmed by the circuit court. The case was then brought to this court, where the judgment was reversed and the cause remanded, with directions to overrule the demurrer. Several important legal and constitutional questions were raised on the argument here, and it was held that Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the introduction and sale of spirituous liquors in the Indian country, but extend such prohibition to territory in proximity to that occupied by Indians; that it is competent for the United States, in the exercise of the treaty-making power, to stipulate in a treaty with an Indian tribe that within the territory thereby ceded the laws of the United States, then and thereafter enacted, prohibiting the introduction and sale of spirituous liquors in Indian country, shall be in full force and effect until otherwise directed by Congress or the President of the United States, and that a stipulation to that effect will operate *proprio vigore*, and be binding upon the courts, although the ceded territory is situated within an organized county of a State. These conclusions are stated in a very clear and able opinion by Mr. Justice Davis, *United States* v. 43 *Gallons of Whiskey*, 93 U. S. 108.

When the case went back to the district court for trial, and the demurrer was overruled, the claimant Lariviere filed an answer to the libel containing inconsistent defences. He first denied that he ever introduced into the ceded territory the liquors as

charged, and he claimed the property, except the liquors, as his; and as to those he disclaimed ownership. But, although denying their introduction, he averred that the acts charged against him were done under the authority of the War Department, and that the liquors were not introduced for the purpose of sale or in violation of any law or treaty. He subsequently amended this answer by adding an averment to the effect that the territory ceded under the treaty mentioned lay within the limits of a collection district under the United States internal revenue laws; that persons resident within it and within the county of Polk and at the village of Crookston, engaged in the business of retailing spirituous liquors, had been assessed and required to pay taxes upon their business, and were thereby licensed to carry on that business and sell spirituous liquors in that county; and that he also had been thus assessed, taxed, and licensed as a retail dealer, and that his license had never been revoked nor the tax paid for the same returned. The other claimant, Guerin, averred that the property seized, except the liquors, had been transferred to him as collateral security for a debt, and denied every traversable allegation in the information save the seizure by the Indian agent. On the trial evidence was introduced by the government tending to show that Lariviere introduced the liquors mentioned with the intent to sell them to Indians under the charge of the United States Indian agents, and also to show the circumstances of the seizure. Against the objection of the government Lariviere gave evidence of all the circumstances touching the assessment and collection of the internal revenue tax from him and other sellers of liquor by retail in the county of Polk. The court charged the jury that while the mere introduction of spirituous liquors in the ceded territory was *prima facie* evidence of an unlawful purpose, this evidence was neutralized by proof that the claimant held at the time a receipt of the collector of internal revenue for the special tax required to be paid by a retail liquor dealer, and hence that the burden of proof was shifted on the government to show that the liquors were introduced with the intent to sell them to the Indians. It also charged that "the uncontroverted facts found for the defence were a license to Lariviere to take liquor to

Crookston and gave him the right to do so, and that, for so doing, he was subject to no penalty under the national law." To this charge an exception was taken. There was a verdict for the claimant, and judgment was entered thereon that the libel be dismissed. The case was then taken to the circuit court and the judgment of the district court was there affirmed. To review that judgment the case is brought here.

The only question for our consideration, as thus seen, is whether Lariviere's payment of the special internal revenue tax for selling liquors in the collection district embraced by the ceded territory exempted him from the penalties of the act of 1864. We are clear that it did not. Congress never intended to interfere with the operation of the treaty, or to sanction the sale of liquors in any ceded territory where an express stipulation provides that they shall not be sold. The evils resulting from the use of spirituous liquors are so many and so appalling that the government has, from an early period of our history, labored to prevent their introduction among the Indians. In order more effectually to secure this result, laws prescribing severe penalties have been enacted, and authority has been vested in the Indian agents to arrest traffickers in the prohibited article, and to seize and confiscate their property found with it. It would require very clear expressions in any general legislation to authorize the inference that Congress purposed to depart from its long established policy in regard to a matter of so vital importance to the peace and to the material and moral well-being of these wards of the nation. There is also another consideration. The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.

The unauthorized introduction of liquors into the ceded territory constitutes the offence, although if they were not sold or given away, no injurious consequences would follow; but once allow their indiscriminate or general introduction and the law would be evaded without possibility of detection. The intro-

duction is, therefore, forbidden, unless permitted by the order of the War Department or of some officer authorized by it. The establishment of the collection district, embracing the ceded territory, whilst providing for the collection of taxes on certain kinds of business, did not authorize, nor was it intended to authorize, business which was otherwise specifically forbidden. The *License Tax Cases*, 5 Wall. 462, do not conflict with, but rather support this view. They merely decide that the licenses of the United States for selling liquors and dealing in lotteries exempted the party from the penalties of the revenue law to which he would otherwise be subjected. They gave no exemption from State laws or the taxes they imposed for the business carried on. They conferred no authority by themselves to carry on any business within a State. They were in the nature of taxes on the business which the State permitted. The court, speaking by Chief Justice Chase, said that if the licenses were to be regarded as giving authority to carry on the branches of business which they licensed it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. "But," he added, "it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits they give none and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and implying nothing except that the licensee shall be subject to no penalties under national law if he pays it." Though these cases are cited by the defendant, they affirm the doctrine that the licenses under the then existing law, being designed merely to secure the payment of taxes to the United States, did not interfere with other legitimate regulations of business nor sanction it where otherwise prohibited.

The case of the *Cherokee Tobacco Tax*, 11 Wall. 616, cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges

Statement of Facts.

of the court did not sit in it and two dissented from the judgment pronounced by the other four.

It follows from the views expressed that the judgment of the court below must be reversed and a new trial had; and

It is so ordered.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* LUCHS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided May 7th, 1883.

Fraud—Insurance.

A and B formed a partnership with a capital of $10,000, in which each was to contribute one-half the capital. A furnished B's moiety temporarily, and when after some time B failed to comply with his agreement, A, in May, 1869, applied for a policy on B's life for $5,000. One of the brothers of B had committed suicide. One of the questions asked A by the company was as to the number of brothers of B deceased, and causes of death; to this A made no answer. B, in the previous February, had applied to the same company for a policy, and in answer to the same question had replied: "Brothers dead, one; cause of death, accident." A policy was issued on A's application, by which the company agreed to insure the life of B for $5,000, and to pay the money "to the assured" within 90 days after notice of the death of B. B died in an insane asylum. *Held,*

1. That although by the terms of the policy the life of B was *in*sured, the person in whose favor it was *as*sured was A, and that the action on the policy was rightfully brought in his name.
2. That A had an insurable interest in B's life to the extent of the moiety of the capital which B should have contributed to the firm, without respect to the condition of the partnership accounts, unless his estimate of the interest at the time of the application was made in bad faith.
3. That the failure of A to answer the question as to the suicide of B's brother could not necessarily be imputed as a fraud; and that the concealment of the cause of the brother's death in B's application could not be imported into this suit and applied to defeat A's application.

Suit to recover the sum of $5,000 alleged to be assured to the plaintiff below, and defendant in error, Luchs, on the life of one Dillenberg. Pleas: 1st. Non debet; 2d. That the plaintiff had no insurable interest in Dillenberg's life; 3d. That the

policy was procured through fraudulent concealment of material facts, and by means of false representation. Luchs and Dillenberg entered into a copartnership, in which the capital was to be $10,000. Of this each to contribute one-half. Luchs actually contributed all; and when Dillenberg failed to contribute his half he applied to the defendant's agent in Washington for a policy of $5,000 on Dillenberg's life. Dillenberg had three months previously applied to the same agent for a policy on his own life, and in reply to a question propounded respecting his family had made the following answer:

Brothers living, one; ages, 48; health, good. Brothers dead, one; ages, 23; cause of death, accident.

Luchs to the same question replied:

Brothers living, one; ages, 48; health, good. Brothers dead, ; age, ; cause of death, .

On this application a policy was issued, of which the following is the material part:

"This policy of insurance witnesseth, that the Connecticut Mutual Life Insurance Company, in consideration of the declarations and representations made to them in the application for this insurance, and the sum of one hundred and twenty-five dollars and cents, to them in hand paid by Leopold Luchs, of Washington, D. C., and of the annual premium of one hundred and twenty-five dollars and cents, to be paid on or before the second day of June in every year during the continuance of this policy, to assure the life of Levi Dillenberg, of Washington, in the county of Washington, District of Columbia, in the amount of five thousand dollars, for the term of the whole continuance of his life.

"And the said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay, or cause to be paid, in the city of Hartford, the said sum insured to the said assured, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Levi Dillenberg, deducting therefrom all indebtedness of the party for loans made by the company on this policy."

Argument for Plaintiff in Error.

At the trial the court instructed the jury as follows:

"1. If the jury find from the evidence that in May, 1869, the plaintiff and Levi Dillenberg were in partnership, and that to that partnership the plaintiff contributed all the capital and both contributed their services, and that they shared the profits equally, and that the policy in suit was applied for by the plaintiff under an agreement between him and Levi Dillenberg, whereby the latter undertook to pay the premiums on the same, and that this agreement was made by said Dillenberg, because of an obligation which he agreed he was under to the plaintiff, growing out of the receipt, past or prospective, by Dillenberg of one-half of the partnership profits, and that said policy was taken out by the plaintiff in good faith and not for the purpose of speculating on said Dillenberg's life, then they will render a verdict for the plaintiff on defendant's second plea." . . .
"4. Since [in] the application upon which the policy in suit was issued, there is no answer to the questions, 'brothers dead; age; cause of death,' it follows that there is no warranty in respect of the information called for by said questions."

The defendants excepted. The jury rendered a verdict for the plaintiff for the full amount. The defendants brought the case here on error.

Mr. Enoch Totten for the plaintiff in error.—I. An action on this policy can be maintained under any circumstances, the most favorable to Luchs, only in the name of the administrator of Dillenberg. *Hollis* v. *Richardson*, 13 Gray, 392; *Burroughs* v. *Assurance Company*, 97 Mass. 359; *Gould* v. *Emerson*, 99 Mass. 154; *Campbell* v. *New England Insurance Company*, 98 Mass. 381; *Bailey* v. *Insurance Company*, 114 Mass. 177; *Exchange Bank* v. *Rice*, 107 Mass. 37.—II. If this policy was taken out by Luchs on the life of Dillenberg, for the benefit of the former, it was a wager policy, and is void, because at the date of the application he did not have an interest in the life of Dillenberg to the extent of $10,000; he had no insurable interest whatsoever in Dillenberg's life; on the contrary, he was actually indebted to Dillenberg; there is no pretence here that there was any interest held by Luchs, unless it existed by

reason of the copartnership business; and the testimony of the plaintiff's own expert witness, corroborated by his own books of account, establish the fact beyond controversy that at the date of the application for the insurance the firm was indebted to Dillenberg to the extent of over $4,000. A valid insurance cannot be effected by one man upon the life of another unless there is an indebtedness existing in favor of the person who takes out the policy, or the equivalent, and the indebtedness must be in proportion to the amount of the insurance. *Cammack* v. *Lewis*, 15 Wall. 643. It has been held that the near relationship of father and son does not constitute an insurable inserest in the son on the father's life, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. See also, *Guardian Life Insurance Company* v. *Hogan*, 80 Ill. 35; May on Insurance, sec. 107. *Cammack* v. *Lewis*, 15 Wall. 643; *Insurance Company* v. *Sturges*, 18 Kansas, 93; *Stevens* v. *Warren*, 101 Mass. 564; *Ruse* v. *Mutual Benefit Life Insurance Company*, 23 N. Y. 516; May on Insurance, 398; *Warnock* v. *Davis*, 104 U. S. 775. In *Lewis* v. *Phœnix Life Insurance Company*, 39 Conn. 100, it was held that the mere relationship of brother, without more, is not sufficient to support a life insurance policy.—III. The court instructed the jury in pursuance of a prayer of plaintiff's counsel that "since in the application upon which the policy in suit is issued, there is no answer to the questions, 'Brothers dead; age; cause of death,' it follows that there is no warranty in respect of the information called for by said questions." The court in this connection denied the prayer of defendant's counsel as to the right of the company to refer to and rely upon the former application to which its attention had been specially invited by the applicant in this case. This was error. For some purpose, inferable only from the extraordinary circumstances and evidence disclosed in this case, Dillenberg, with the help of Myers, procured a policy on his own life for $5,000 from this company on an application dated only about three months before this application, and written by Myers; in the first application the same interrogatory about the number

of brothers dead and the cause of death, is put to Dillenberg, and he answers that one of his brothers is dead and that the cause of his death was "accident." This answer Myers knew to be false at the time he wrote the application. In the last application this question remains unanswered, but the former application is twice referred to in the latter. The defendant proved at the trial that when the examining officer of the company noticed the omission he referred to the former application, and there found it stated that the cause of death of the brother was "accident;" upon this information the present policy was issued. The officers of the company had a right to presume that the information on this point was truly given in the former application in any case, and especially in view of the fact that they were twice referred to it for information. The reference in this application to the "former application" for information, makes that application a part of this one, and a false answer in that will be as fatal as if in this. *Rawls* v. *American Mutual Life Insurance Company*, 27 N. Y. 282; Bliss on Life Insurance, p. 78, 609, § 394 and § 57; *Hawkins* v. *United States*, 96 U. S. 689; *Clark* v. *Manufacturers' Insurance Company*, 2 W. & M. 472.

Mr. Justice Field delivered the opinion of the court.

This was an action by Leopold Luchs on a policy of insurance upon the life of Levi Dillenberg, issued by the Connecticut Life Insurance Company in June, 1869. Luchs and Dillenberg were partners at the time in the business of buying and selling tobacco in the city of Washington. Their partnership was formed in October, 1866, each agreeing to contribute his services and one-half of the capital. It was understood that the money of Dillenberg was then invested in mining stocks, and could not at once be obtained. Luchs accordingly furnished the entire capital, which was over $10,000. Dillenberg never contributed his portion, and about two years after the partnership was formed his failure in this respect caused dissatisfaction and complaint. It was thereupon suggested by one Myers, who was employed by an agent of the insurance company, and who had been called in as an accountant to examine the books

of the concern, that, as a means of "adjusting the dispute or misunderstanding between the partners," a policy of insurance should be obtained upon the life of Dillenberg for the benefit of Luchs, and that Dillenberg should retire from the firm within a year afterwards. Nothing, however, was then done upon this suggestion, but in the following year the policy in suit was procured.

1. The first question presented is as to the right of Luchs to sue upon it. It is plain from the parol evidence in the case, that it was the intention both of Luchs and Dillenberg that the policy should be procured for the benefit of Luchs.

The declaration, which is the application for the policy, begins with an averment that he, Luchs, is desirous of effecting an insurance upon the life of Dillenberg, and proceeds to state the latter's age, the condition of his health, the character of his habits, and that he, Luchs, has an interest in the life of Dillenberg to the amount of $10,000. The declaration is signed both by Luchs and Dillenberg, though it purports in every line to be the separate application of Luchs. It is accompanied by questions and answers, and to the first question, as to the name and residence of the person for whose benefit the insurance is proposed, the answer is: "Leopold Luchs, Washington, D. C." The answers also are signed both by Luchs and Dillenberg.

The policy was issued and delivered to Dillenberg, and retained by him until after the dissolution of the partnership, when he handed it to Luchs, stating that he gave it to him to show that he intended to do what was right and fair with him, and requested him to pay the premiums on it, promising to refund the money. The first two premiums were paid by Dillenberg, the others by Luchs.

The difficulty in the question presented arises from the language of the policy. Omitting words not essential on this point, it reads as follows:

"This policy witnesseth that the Connecticut Mutual Life Insurance Company, in consideration of the declarations and representations made to them in the application for this insurance, and the sum of $125 to them in hand paid *by Leopold Luchs*, . . .

do assure the life of Levi Dillenberg. . . . And the said company do hereby promise . . the said *assured* . . to pay . . . said sum *insured* to the said *assured*, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Levi Dillenberg.

"It is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the *assured* upon the express conditions that in case the *said person whose life is hereby insured* shall pass beyond the settled limits or the protection of the government of the United States, . . . this policy shall be null. It is also understood that if the proposal, answers, and declaration made by the said Leopold Luchs, *which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith and warranty of which this agreement is made*, shall be found in any respect untrue, this policy shall be null and void, or in case the said *assured* shall not pay the said annual premiums, . . . this policy shall cease.

"It is further agreed that this policy shall not take effect . . until the premium above named shall be actually paid . . . during the life of the *insured*."

The contention of the plaintiff is that the words "the assured" in the policy apply to the person for whose benefit the policy was effected, that is, Luchs, and not to the party whose life was insured.

There are undoubtedly instances where this distinction between the terms *assured* and *insured* is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy.

We are of opinion that, reading the policy here in connection with the declaration and the answers of Luchs, which form a part of it, and indicate the object of procuring it, the term assured must be held as applicable to him for whose benefit it was effected.

The policy considered in *Ætna Life Insurance Company* v. *France*, 94 U. S. 562, gives some support to this view. There the policy was effected by a brother for a sister's benefit, and

the term assured was held to apply to the sister, for she recovered in a suit brought in connection with her husband on the policy. The attention of the court does not appear, however, to have been directed to that term. It may be said, also, that there could be little doubt as to its proper application in that case, as it was followed by the words "and *her* executors, administrators, or assigns," thus limiting it to the sister. In other respects the language is substantially identical with that of the policy under consideration.

2. The second question presented for our determination is whether Luchs had an insurable interest in the life of Dillenberg. Upon this we have no doubt. Dillenberg was his partner and had not paid his promised proportion of the capital of the concern. At the time the policy was applied for he was still in default, and although it might have turned out that the actual amount due upon a settlement of accounts was less than the promised proportion, it was not a matter definitely ascertained at the time. Besides what was thus due to him, Luchs was interested in having Dillenberg continue in the partnership. He had such an interest, therefore, as took from the policy anything of a wagering character.

As this court said in *Warnock* v. *Davis*, 104 U. S. 779:

"It is not easy to define with precision what will, in all cases, constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated, generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: because he was his creditor and be-

cause he was his partner. The continuance of the partnership, and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed, and, of course, for the like expectation, was continued.

In *Morrell* v. *Trenton Mutual Life and Fire Insurance Company*, 10 Cushing, 282, a policy was taken out by the plaintiff upon the life of his brother, who was about going to California, on an agreement that the latter should pay to him one-fourth of his earnings for the following year. In an action on the policy it was contended that the plaintiff had no insurable interest upon the life of the insured, but the court, after deciding that he had such an interest from the fact that he held a promissory note signed by the firm of which the insured was a partner, also said that it was strongly inclined to the opinion that the plaintiff had another interest in the life of the person insured. "He had," said the court, "a subsisting contract with that person, made on a valuable consideration, by which he was to receive one quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings to an uncertain and indefinite amount."

In *Trenton Mutual Life and Fire Insurance Company* v. *Johnson*, 4 Zabriskie's Reports, 576, a policy was taken out by the plaintiff on the life of one Van Middlesworth for $1,000, one-half payable to the plaintiff and the other half to Van Middlesworth. They belonged to an association called the New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares of $600 each. The company consisted partly of shareholding members and partly of active members, the shareholders being each required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced $600 of capital and procured Van Middlesworth to go out as his sub-

stitute, which he did, and acted as his agent and substitute; and the assets of the company having been divided in California he received the plaintiff's share, and afterwards died, not having paid it over. By one of the articles of the association all treasures and all the proceeds of the labor of each member, and all profits, were to go into a general fund for the benefit of the association. To the action brought on the policy it was objected that the plaintiff had no insurable interest in the life of the deceased. On this question the court said:

"In the present case Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share, an interest fully equivalent to the interest of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the company had been virtually dissolved, he had an interest in him as his creditor to the extent of his share of the assets in his hands."

In *Bevin* v. *The Connecticut Mutual Life Insurance Company*, 23 Conn. 244, the plaintiff had obtained a policy of insurance for $1,000 on the life of one Barstow, to whom he had advanced $350, besides articles of personal property, to enable him to go to California and there labor for one year, on an agreement that he would account to the plaintiff for one-half of his gains. The court said that Barstow was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. "All the books," the court added, "hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy." And after referring to a policy

of insurance obtained by a sister on her brother's life, where no question seemed to have been made as to the amount, but only whether it was an interest which the law would recognize, the court said:

"So, in every case, where a person on his own account insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire what is? The impossibility of satisfactorily going into the question in most cases, and especially where there is nothing to guide the inquiry, and everything is uncertain, would lead us to hold that a policy like this is a valued policy as most consistent with the understanding of the parties and the principles of law."

3. The third question presented for determination relates to alleged breaches of the warranty of the policy. It is alleged that the policy was issued upon the faith of certain statements and answers of the plaintiff which were untrue. These statements were, first, that the plaintiff had an interest in the life of Dillenberg to the amount of $10,000, when, in fact, he had no interest in it; and, second, that the cause of the death of one of the brothers of Dillenberg was accident, when, in fact, he had committed suicide.

As to the alleged breach of the warranty of the interest of the plaintiff in the life of Dillenberg there is this answer: The statement of the plaintiff as to the amount of his interest was necessarily conjectural. No one can affirm with absolute certainty that he has an interest to a definite sum in the life of another, where the interest depends upon the result of an existing partnership or other business transactions not yet terminated. The value of his interest in such cases will always be more or less a matter of opinion. The statement, in that regard, must, of necessity, be taken as a mere estimate. If, therefore, the plaintiff had an interest in the life of Dillenberg and his estimate was made in good faith, the declaration cannot be deemed untrue so as to constitute a breach of the warranty. The extent of a man's interest in the life of another, depending upon a continuing partnership or the results of business transactions not yet completed, is, in the nature of things,

uncertain, and in such cases all that can be required is that he had an actual interest, and that his estimate was made in good faith, without any purpose to deceive. *Bevin* v. *Connecticut Mutual Life Insurance Company*, cited above.

Here the plaintiff valued his interest and took out a policy for only half of the sum estimated. He did not procure the policy for any purpose of speculating upon the duration of the life of Dillenberg. From the finding of the jury we must take as true, that his representation was made in good faith upon an honest opinion as to the value of his interest.

As to the alleged misstatement of the cause of the death of a brother of the deceased, it is sufficient to observe that there is no allegation on this subject in the answers of the plaintiff, and the point is taken simply because, in an answer to a previous application, that statement was made. Such previous answer cannot be incorporated into the present policy. The reference to the previous application is made for the answer to a different inquiry.

There may be, as stated by counsel for the company, some inconsistencies between the charges given at its request, and those given at the request of Luchs. The latter present all the disputed questions of fact to the jury, and if those granted at its request are erroneous, in so far as they differ, it is not for it to complain, as was well observed by counsel, that while the judge held Luchs within proper limits, itself was suffered to go beyond them.

Upon the whole record of the case we find no error sufficient to justify a reversal of the judgment.

Judgment affirmed.

Argument for Appellants.

WESTERN PACIFIC RAILROAD COMPANY & Another *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Practice—Public Lands.

In a suit brought by a District Attorney of the United States to set aside a patent conveying public lands, objection was taken in this court that it does not sufficiently appear that the suit was brought under authority from the Attorney-General: *Held*, That, the objection not having been taken below, the fact of such authority could be inquired into and shown here.

On the evidence it appeared that the lands in question were mineral lands, and were known to be such by the applicant for the patent, and agent for the railroad company, at the time of the application. The patent was set aside.

The bill was filed in the court below in February, 1877. Hearing was had on the evidence, and in June, 1878, a decree was rendered setting aside the letter patent as "issued by mistake and without authority of law." The bill did not disclose any authority from the attorney-general to bring the suit, nor was such authority shown in the court below, nor was any objection taken for the want of the averment or the proof of such authority. The controversy below, upon the facts, was in regard to the character of the lands, whether mineral or not; and, upon the law, in regard to the effect of the acts of the agents of the United States upon the patentee's title. The defendants below appealed from the decree.

Mr. Henry Beard for the appellants.—I. It does not appear in the pleadings or decree that the United States, by its attorney-general, authorized the filing of the bill in this cause. This should have been averred in the bill. *United States* v. *Throckmorton*, 98 U. S. 61.—II. The lands in question were not mineral lands within the meaning of that term as defined by acts of Congress. In the act of July 26th, 1866, 14 Stat. 251, c. 262, § 2, mineral lands are defined as "a vein or lode of quartz, or other rock in place, bearing gold, cinnabar, or copper," in the act of July 9th, 1870, 16 Stat. ch. 217, 235,

§ 12, they are described as "valuable mineral deposits in lands," and in Rev. Stat. § 2318, as "lands valuable for minerals." The lands in question were, in the regular administration of the land laws, surveyed and ascertained to be non-mineral lands, and patented as such. A second survey, after the United States has parted with the land, is inoperative to affect the patent.—III. The third point discusses the evidence.

Mr. Assistant Attorney-General Maury for the United States discussed the evidence, and presented the following letter from the attorney-general directing the commencement of suit.

"DEPARTMENT OF JUSTICE,
"WASHINGTON, *January* 17th, 1877.

"JOHN M. COGHLAN, U. S. Attorney, San Francisco, California.

"SIR,—I enclose a copy of a letter of the 16th instant, addressed to me by the Secretary of the Interior, and the enclosures therewith, to wit: A copy of the report to the Secretary by the Commissioner of the General Land Office, and a copy of a letter of March 14th, 1874, addressed by the then commissioner to the register and receiver at San Francisco.

"As requested by the Secretary, you will cause legal proceedings to be instituted to vacate the patent to the Western Pacific Company of California for the N. E. one-fourth of section 29, T. 1 N., R. 1 E., Mount Diabolo meridian.

"Very respectfully,
"ALPHONSO TAFT,
"*Attorney-General.*"

MR. JUSTICE MILLER delivered the opinion of the court.

John M. Coghlan, district attorney of the United States for the District of California, on behalf of the United States, brought the bill in this case in the circuit court of that district against the Western Pacific Railroad Company and Charles McLaughlin to set aside a patent of the United States conveying to the railroad company the northeast quarter of section 29, township one (1) north, range one (1) east, of Mount Diabolo meridian.

This patent was made under the acts of Congress granting

lands to the Union Pacific, Central Pacific, and Western Pacific Railroad Companies, to aid in building a road from the Missouri River to the Pacific Ocean.

The acts of Congress granted to each company the alternate sections within certain limits on each side of its road, and authorized the issue of patents for the same when the work was done and the sections ascertained. But they excepted out of this grant, among others, such sections or parts of sections as were mineral lands.

The bill in this case alleges, as the reason for vacating and setting aside the patent, that the quarter-section in question is mineral land, that it was so at the time of the grant, and was known to be so when the patent issued, which was so issued without authority of law by inadvertence and mistake.

The patent itself is not in the record as an exhibit, or as part of the evidence. The Western Pacific Railroad Company, to whom it was issued, though made defendant in the bill, was not served with the subpœna and did not appear. McLaughlin, the only defendant who did appear, defends as purchaser two degrees removed from the company. Instead of a general replication to McLaughlin's answer, the reply is an amendment to the original bill.

The whole record is so imperfect and the case so obscurely presented, that we feel tempted to dismiss it.

Waiving, however, these objections, there is enough to enable us to consider the two principal errors assigned by appellant.

The first of these is that there is no sufficient evidence that the suit was instituted under the authority of the Attorney-General, according to the principle established in the case of *United States* v. *Throckmorton*, 98 U. S. 61.

To this it may be answered that the objection was not raised in this case in the court below, as it was in that; that the case is argued in this court on behalf of the government by the Assistant Attorney-General, who files in the court a certified copy of the order of the Attorney-General directing the district attorney to bring the suit in the circuit court, as requested by the Secretary of the Interior.

We think the decree of that court, under these circumstances,

can hardly be reversed now, on this ground, taken here for the first time.

The other objection to the decree in favor of the United States is that the evidence does not establish as a fact that the land in controversy was mineral land when the patent issued.

An examination of the evidence on this subject convinces us that the circuit judge was right in holding that it was. It is satisfactorily proven, as we think, that cinnabar, the mineral which carries quicksilver, was found there as early as 1863, that a man named Powell resided on the land and mined this cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by defendant McLaughlin, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser. Concurring as we do with the circuit court in the result arising from the evidence, we do not deem it necessary to give in this opinion a detailed examination of it.

This being the first case of the kind in this court, a class of cases which may possibly be indefinitely multiplied, it is to be regretted that it was not more fully presented in the circuit court. Many interesting questions might arise in this class of cases not proper to be considered in this case. For instance, the nature and extent of mineral found in the land granted or patented which will bring it within the designation of *mineral land* in the various acts of Congress, in which it is excepted out of grants to railroad companies and forbidden to be sold or preempted as ordinary or agricultural lands are.

Suppose that when such land has been conveyed by the government it is afterwards discovered that it contains valuable deposits of the precious metals, unknown to the patentee or to the officers of the government at the time of the conveyance, will such subsequent discovery enable the government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee, and what limitations exist upon the exercise of the government's right? We can answer none of these questions here, and can only

Order that the decree below be affirmed.

VANCE & Another *v.* VANCE, Executrix.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Decided May 7th, 1883.

Constitutional Law—Limitations—Louisiana—Minors—Statutes.

The Civil Code of Louisiana provided, in respect of tutors of minors, as follows: "The property of the tutor is tacitly mortgaged in favor of the minor from the day of his appointment as tutor, as security for his administration, and for the responsibility which results from it." The Constitution of Louisiana subsequently adopted (in April, 1868), provided as follows: "No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the 1st January, 1870, unless duly recorded. The general assembly shall provide by law for the registration of all mortgages and privileges." The legislature of Louisiana, on the 8th March, 1869, enacted the necessary legislation to carry this provision of the State Constitution into effect: *Held*,

1. That these provisions of the Constitution and of the statute requiring owners of tacit mortgages to record them for the protection of innocent persons dealing with the tutor, and giving ample time and opportunity to do what was required, and what was eminently just to everybody, did not impair the obligation of contracts.
2. That these provisions are in the nature of statutes of limitations. Previous decisions of the court respecting limitations referred to and approved.
3. That the fact that the plaintiff was a minor when the law went into operation makes no difference. In the absence of a provision in the Constitution of the United States giving minors special rights, it is within the legislative competency of a State to make exceptions in their favor or not, and the act in question made no exception.

Mr. Charles W. Hornor for plaintiff in error.

Mr. E. M. Hudson for G. W. Sentell & Co., intervenors and defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Louisiana.

In a proceeding in the State court of Louisiana the plaintiff in error recovered a judgment against the defendant in error, as executrix of the succession of her husband, S. W. Vance, for the sum of about $75,000 due from him to plaintiff in error as

her natural tutor. The sum thus found due was the result of an accounting concerning this tutorship during the period between October 15th, 1859, and May 18th, 1877.

Article 354 of the Civil Code of Louisiana, in force when this tutorship began, says:

"The property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it."

The court of probate, which adjusted this account, decreed in favor of the plaintiff in error, that her mortgage privilege for the sums and interest found due her be recognized on all the lands owned by Samuel W. Vance, the deceased tutor, on and after the 15th day of October, 1859.

From this branch of the decree certain creditors of the deceased tutor, who had been permitted to intervene, appealed to the supreme court of the State, and that court reversed the decree of the probate court by deciding against the existence of this mortgage privilege.

The ground on which this privilege was denied is found in article 123 of the Constitution of the State of Louisiana adopted in April, 1868, which is as follows:

"The general assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the 1st January, 1870, unless duly recorded. The general assembly shall provide by law for the registration of all mortgages and privileges."

The legislature did pass the act of March 8th, 1869, No. 95:

"To carry into effect article 123 of the Constitution, and to provide for recording all mortgages and privileges."

Session Acts 1869, p. 114, section 11, reads:

Opinion of the Court.

"That it shall be the duty of the clerks of the district courts of the several parishes in this State to make out an abstract of the inventory of the property of all minors whose tutors have not been required by law to give bond for their tutorship, such abstract to describe the real property, and give the full amount of the appraisement of all the property, both real and personal, and rights and credits, and to deposit such abstracts with the recorders of the several parishes, whose duty it shall be to record the same as soon as received in the mortgage book of their parish; such abstracts to be made out and deposited with the recorders by the first day of December, 1869, and recorded by the first day of January, 1870. This section to apply only to tutorship granted before the passage of this act, and any failure of the clerks or recorders to perform the service required by this section shall subject them to any damages that such failure may cause any person, and shall further subject them to a fine of not less than one hundred nor more than one thousand dollars, for the benefit of the public school fund, to be recovered by the district attorney or district attorney *pro tem.* before any court of competent jurisdiction; such abstracts, when recorded in any parish in which the tutor owns mortgageable property shall constitute a mortgage on the said tutor's property until the final settlement and discharge of the tutor: the fees for making out and recording such abstracts shall be the same as the fees prescribed for the clerks and recorders for other similar services, and shall be paid on demand by the tutor, or, if the minors have arrived at the age of majority, by them; and if no responsible person can be found, then any property owned by the minors for whose benefit such services were performed shall be sold to pay the same; and if no person or property be found to pay the same, then the parish shall pay the same, and have recourse against the person or property of any person for whose benefit the services were performed."

The case comes to this court on the proposition, that, as thus construed, the Constitution and statute of Louisiana impair the obligation of her contract with her tutor concerning his duty to account for her estate in his hands, and also violates the provision of section 1, article XIV., of the amendments to the Constitution of the United States.

The view of the Supreme Court of Louisiana on this matter

is very clearly presented in the following extract from its opinion in the case:

"Waiving the question (which is certainly a debatable one), whether or not the obligations and mortgages existing against the natural tutor in favor of his ward arise or spring from contracts, we think the plaintiff's argument untenable, in that it assumes that article 123 destroyed or impaired plaintiff's mortgage obligation in the sense of the Constitution of the United States. Had the article simply declared the abolition and extinction *eo instanti* of all tacit mortgages, there would have been the case presented by plaintiff's argument. But it did nothing of the sort. It fixed a future day, reasonably distant, and declared that such mortgages would perempt, prescribe, or cease to exist as to third persons unless recorded by that date.

"It is in its nature a statute of limitations. The right of the State to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the State may establish, alter, lengthen, or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute." See Cooley's Constitutional Limitations, p. 376; Story on Constitution, 236, § 1385.

These observations seem to us eminently just. The strong current of modern legislation and judicial opinion is against the enforcement of secret liens on property. And in regard to real property, every State in the Union has enacted statutes holding them void against subsequent creditors and purchasers, unless they have actual notice of their existence, or such constructive notice as arises from registration.

The Constitution of Louisiana introduced this principle and did it with due regard to existing contracts. It did not change, defeat, or impair the obligation of the tutor to perform that contract. It did not take away or destroy the security which existed by way of lien on the tutor's property, nor as between

the tutor and the ward did it make any change whatever. But it said to the latter:

"You have a secret lien, hidden from persons who are dealing every day with the tutor on the faith of this property, and in ignorance of your rights. We provide you a way of making those rights known by a public registration of them which all persons may examine, and of which all must take notice at their peril. We make it the duty of officers having charge of the offices where the evidence of your claim exists to make this registration. We make it your duty also to have it done. We give you a reasonable time after this Constitution is passed and after the enabling statute is passed to have this registration made. If it is not done within that time your debt remains a valid debt, your mortgage remains a valid mortgage, but it binds no one who acquires rights after that in ignorance of your mortgage, because you have not given the notice which the law requires you to give."

We think that the law, in requiring of the owner of this tacit mortgage, for the protection of innocent persons dealing with the obligor, to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody.

The authorities in support of this view are ample.

Perhaps the case most directly in point is one in this court, namely, *Curtis* v. *Whitney*, 13 Wall. 68.

That was a case like this, arising out of a statutory contract, to which the legislature, by a law enacted after it was made, added, as in this, the duty of giving notice. Curtis purchased at a public sale for delinquent taxes a tract of land, and received from the proper officer a certificate, which by law authorized her to obtain a deed at the end of three years, if the land was not redeemed by paying the amount of the bid and interest.

After this sale, and before the end of the three years, the State passed an act that, where any person was found in the actual occupancy of the land, the deed should not issue unless

a written notice had been served on the owner of the land or on the occupant by the holder of the tax certificate at least three months prior thereto, and it was made applicable to past sales as well as future. Mrs. Curtis applied for and obtained her deed without giving this notice, and when she brought suit to quiet the title so acquired, the Supreme Court of Wisconsin decided her deed void for want of it.

The case was brought to this court on the ground that the statute of Wisconsin requiring this notice impaired the obligation of the contract evidenced by the certificate of sale, but this court held that it did not. That the case is very like the one before us is obvious. The court said:

"That the statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligations. It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by State and by national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal Constitution, so long as the obligation of performance remains in full force. In the case before us the right of the plaintiff is not taken away nor the time when she would be entitled to it postponed. . . . The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute."

In the case of *Louisiana* v. *New Orleans*, 102 U. S. 203; the supreme court of the State refused the relator a writ of mandamus to enforce a levy of taxes to pay a judgment against the city, on which an execution had been issued and a

return of *nulla bona* made. The supreme court denied the writ because the relator had not registered his judgment with the proper officer of the city, under a statute which required such registry in order that proper levy of taxes might be made and judgments paid in their proper order.

The case was brought to this court on the proposition that the statute, which was enacted after relator's contract was made, was an impairment of its obligation within the meaning of the Constitution of the United States.

But this court held that the registry of these judgments was "a convenient mode of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies."

In *Jackson* v. *Lamphire*, 3 Pet. 280, this court said:

"It is within the undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same, whether the deed is dated before or after the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitation, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned."

And this language is reproduced with approval in the case of *Curtis* v. *Whitney*, above referred to.

The decisions in regard to the statute of limitation are full to the same purpose, and as the Supreme Court of Louisiana says, this is a statute of limitation, giving a reasonable time within which the holder of one of these secret liens may make it public, otherwise it will be void against subsequent purchasers and creditors without notice.

The case of *Terry* v. *Anderson*, 95 U. S. 628, presents, in the terse language of the Chief Justice of this court, both the rule, the reason for it, and the limitation which the constitu-

tional provision implies. This court, he says, "has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the enforcement of the action before the bar takes effect."

He adds, in reference to the case then before the court, which was a South Carolina statute of limitation, passed since the civil war:

"The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon, or an abandonment claimed. That, as we think, has been done here, and no more."

And *Jackson* v. *Lamphire* is again cited with approval.

The same principle is asserted in the case of *Koshkoning* v. *Burton*, 104 U. S. 668. Other cases in this court are *Hawkins* v. *Barry's Lessee*, 5 Pet. 457; *Sabin* v. *Waterson*, 17 Wall. 596; *Sturges* v. *Crowninshield*, 4 Wheat. 122.

It is urged that because the plaintiff in error was a minor when this law went into operation, it cannot affect her rights. But the Constitution of the United States, to which appeal is made in this case, gives to minors no special rights beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the legislature has made it the duty of the proper officer of the court to act

for them. It was also the duty of the under tutor appointed in this case.

If the foregoing considerations be sound, they answer also effectually the suggestion in regard to the Fourteenth Amendment of the Constitution of the United States.

We see no error in the record of the case of which this court has jurisdiction, and

The decree of the Supreme Court of Louisiana is affirmed.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Decided May 7th, 1883.

District of Columbia.

The relation between the railroad company and the District respecting the maintenance and repair of the streets in the District through which the railroad passes considered and settled.

Mr. Enoch Totten for appellant.
Mr. A. G. Riddle for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing the bill of appellant.

The questions presented by the appeal arise out of the execution of the act of Congress of July 17th, 1876, "authorizing the repavement of Pennsylvania avenue."

That act created a commission, consisting of two officers of the engineer corps of the army and the architect of the capitol, whose duty it was to contract for and superintend the work and to decide upon the character of the material. It also declared in what proportion the expense of the work should be borne by the owners of property along the line of the avenue, namely, the United States, the District of Columbia, the private citizens, the Washington & Georgetown Railroad Company, whose track

ran through the centre of the avenue, and other railroad companies whose tracks crossed the street at several places. So much of this apportionment of expenses as relates to the appellant is in these words:

"SEC. 3. That the cost of laying down said pavement shall be paid for in the following proportions and manner: The Washington & Georgetown Railroad Company shall bear all of the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair; but the said railroad company, having conformed to the grade established by the commissioners, may use cobblestone or Belgian rock in paving their tracks, or the space between their tracks, as the commissioners shall direct." 19 Stat. 93.

This is in strict conformity to the charter of the company, passed in 1862, the fourth section of which enacts:

"That said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the cities of Georgetown and Washington."

The fifth section requires the company to conform their road to any change of the grade of the street; and the sixth, that the act may at any time be altered, amended or repealed by Congress. 12 Stat. 389.

The act of 1876, under which the work of repaving was done, in section four provides "that assessments shall be made by the commissioners of the District of Columbia upon the owners of said private property on said avenue and spaces and upon said railroad company respectively, provided in section three of this act," and for the collection of the same by the collector of the District of Columbia.

It is also enacted that, on failure of the railroad company or any private citizen to pay such assessment, the commissioners of the District shall issue certificates, bearing ten per cent. interest, payable within one year, which are made a lien on the

property, under which it may be sold at the end of the year, if not paid.

The railroad company was assessed by the commissioners of the District in the sum of $19,886.69, whereas they charge that they are only liable for $12,207.27; and as the commissioners were about to issue a certificate for the larger amount, the company paid or tendered the sum which they acknowledge to be due, and filed their bill in chancery to obtain an injunction as to the remainder.

This difference is owing to the fact that alongside of the exterior rails of the track the paving commissioners required a blue granite stone to be laid the whole length of the pavement, five inches in width and eight inches deep, and each stone about three feet long. This was charged wholly to the company, as well as the remainder of the two feet next adjoining said track on the outside of the rails.

As regards this remainder the company make no objection, but they insist that the entire cost of all the paving on each side of their track to the sidewalk should be computed together, and the charge against the company should be in the proportion which those two feet bear to the entire distance from each exterior rail to the sidewalk. As this string of stone paving is more costly than the Neufchatel and Trinidad material, which constitute the main body of the pavement, this would relieve the company of a part of the cost of the two feet adjacent to their track. As a matter of strict justice, no reason can be seen for this proposition, for it is quite clear that the requirement of this string or curb of blue granite is wholly due to the existence of the tracks of the railroad in the middle of the street, and is also mainly, if not wholly, for the protection of the track alongside of which it is laid.

Nothing can be more just, than that the company should pay for the work which its track alone makes necessary.

Nor is there any question that, if this stone was necessary in laying down this new pavement, for the security and durability of the track itself, or of the pavement near the track, the company was bound, by the fourth section of its charter, to pay the expense. That it was a judicious and proper thing to be

done is scarcely controverted, and if it were, the testimony shows very clearly that it was.

The only question, therefore, that remains, is whether Congress, in the distribution of the expense of this work of repaving the avenue, intended that this should be borne by the company.

The language of Congress, on that subject, would seem to admit of no other construction. The third section, already cited, says:

"The Washington and Georgetown Railroad Company shall bear *all* the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair."

So far from relieving the company of the duty which it accepted by its charter, the language reinforces that obligation and makes its application to the repavement clear. The statute goes on to prescribe what the United States shall pay, and what the District of Columbia shall pay, and what individual owners shall pay; and the proportions in which these parties are to be charged have no relation to the part to be paid for by the railroad company, which is, in no case, a proportionate part of the street along which it runs, but *all* the expense of the work inside its rails, and for two feet exterior to this on each side. There is no room for apportionment here, and if, for so much of this two feet as is of the same material as the main surface of the street, which is separated from it by no visible line, the easiest mode of ascertaining its cost is to calculate its relation to the remainder of the pavement, that is no reason why this extra and separable expense of blue stone should not be assessed, as the law requires, exclusively to the company.

But it is said that the paving commissioners adopted the rule of a general apportionment of all the expense, and reported to the commissioners of the District on that basis, as due from the company, the smaller sum of $12,207.27, and that their report is conclusive.

The report thus made is nowhere in the statute made their

special duty, nor are they anywhere authorized to make the final assessment.

The report was merely a suggestion of their views for the action of the District commissioners.

On the other hand, by the express language of the act, these latter commissioners are directed to make the assessment on which the parties are to pay, and on which, if they do not pay, a certificate shall be issued which becomes an interest-bearing lien on their property.

Another source of complaint is, that in making the necessary excavations for the new pavement, it became necessary to support the track of the company by underpinning, which cost $1,052.12, and was paid for by the paving commissioners. This work was wholly for the benefit of the railroad company. It was to prevent the track from falling or caving in while used during the progress of the work, and the city authorities might have left the company to take care of itself. But as this might have delayed the work or led to litigation, they wisely protected it while they worked. It seems to us a proper charge against the company alone, as they alone were benefited, and their track made it necessary.

There is no error in the record, and

The decree of the Supreme Court of the District is affirmed.

RUGGLES *v.* ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Decided May 7th, 1883.

Constitutional Law—Contracts—Illinois Railroads—Statutes.

An amendment was made to the charter of a railroad company in Illinois providing that "the said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business, and interest of the company: *Provided*, That the same be not repugnant to the Constitution and laws of the United States, or repugnant to

Statement of Facts.

this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company:" *Held*, That inasmuch as the power to establish rates was to be exercised through by-laws, and the power to make by-laws was restricted to such as should not be repugnant (among other things), to the laws of the State, the amendment did not release the company from restrictions upon the amount of rates contained in general and special statutes of the State.

Grants of immunity from legitimate governmental control are never to be presumed; unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interests may require.

When there is an ambiguity in the language of a statute it may be necessary to inquire into the objects of the legislature in its enactment; or, if it be a private act, the purposes of the beneficiaries in asking for it; but when the language is clear, and needs no interpretation, and leads to no absurd conclusion, this will not be done.

Complaint before a justice of the peace in Illinois against Ruggles for assault and battery upon one Lewis. Lewis came on board a train on the Chicago, Burlington and Quincy Railroad without a ticket. He tendered Ruggles, the conductor, fare at the rate of three cents a mile. Ruggles refused to receive it and demanded the established rate of the company, which was more. Lewis not paying this, Ruggles attempted at the next station, but without violence, to remove him from the train. This was the alleged assault. Ruggles was convicted. The case was appealed until it reached the Supreme Court of the State, when the judgment was affirmed. The case came up on a writ of error, with the following certificate of the chief justice of the Supreme Court of Illinois:

"This certifies that in the determination of this case there was necessarily drawn in question the construction of that clause of the Constitution of the United States which prohibits a State from passing laws impairing the obligation of contracts. The plaintiff in error or appellant claimed that he was justified in the act for which he was prosecuted in the court below by the charters of the Chicago, Burlington and Quincy Railroad Company, he being a conductor on the railroad of said company, and that said charters conceded to said company the right to fix the rates for the

transportation of persons and property over and upon said road, and that said charters constituted a contract substantially guaranteed and protected by the Constitution of the United States; and I certify that said claim was disallowed and decided adversely to the said appellant, by the said Supreme Court, upon the ground that by virtue of the provisions of a statute of the State of Illinois, passed subsequently to the granting of the charters of the said Chicago, Burlington and Quincy Railroad Company, a less rate of fare for transportation of persons and property upon said road had been established by State authority than the rate fixed by the company under the authority of its charter, and that said statute controlled the charter of the company in regard to the rates of transportation over and upon said road, and that the provisions of said charters granting to said company the right to fix the rates for the transportation of persons and property over its road did not constitute a contract protected by the Constitution of the United States, but was subject to alteration and modification by the legislature of Illinois, all of which is hereby duly certified, to the end that the said appellant may present the said question to the Supreme Court of the United States for adjudication."

Mr. Wirt Dexter and *Mr. Sidney Bartlett* for the plaintiff in error.

Mr. James K. Edsall and *Mr. James McCartney* for the defendants in error.

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

In the view we take of this case, the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations which, through agreements of consolidation, are now represented by the Chicago, Burlington, and Quincy Railroad Company, purports on its face to grant to the company the right to fix the rates of fare and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the State. If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether one legislature has the power to bind succeeding legislatures by a contract to that effect.

The provisions of the charter relied on to establish such a grant may be stated as follows:

On the 5th of November, 1849, an act was passed by the general assembly of Illinois "to provide for a general system of railroad incorporations." That act contained the following provisions:

"§ 12. The directors of such company shall have power to make by-laws for the management and disposition of stock, property, and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers, and servants that may be employed, for the appointment of all officers for carrying on all the business within the object and purposes of such company.

"§ 21. Every such corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the special powers following, that is to say:

* * * * * * *

"8. To take, transport, carry, and convey persons and property on their railroad, by the force and power of steam, of animals, or any mechanical powers, or by any combination of them, and receive tolls or compensation therefor.

* * * * * * *

"10. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided.

* * * * * * *

"§ 32. The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent. per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the Secretary of State, he shall ascertain that the net income divided by the com-

pany from all sources for the year then last past shall have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in."

On the 15th of February, 1851, another act was passed to incorporate the Central Military Tract Railroad Company, for the purpose of building and using a railroad between certain designated points. Section 3 of that act is as follows:

"§ 3. The said company is hereby created and incorporated for the purpose of organizing under an act entitled 'An Act to provide for a general system of railroad incorporations,' in force November 5th, 1849, and in all things shall be governed by the provisions thereof, and shall be entitled to have and exercise the powers and privileges and be subject to the liabilities therein enumerated: *Provided,* That the foregoing corporation may attach themselves to and form a part of the Northern Cross Railroad Company, in such manner or on such terms as said companies shall agree."

On the 19th of June, 1852, another act was passed "to amend an act entitled 'An Act to incorporate the Central Military Tract Railroad Company.'" The following are the parts of this amending act on which, in our opinion, the case depends:

"§ 5. All the corporate powers of said company shall be vested in and exercised by a board of directors, and such officers and agents as they shall appoint. * * * *

"§ 6. The said company shall have power to make, ordain, and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: *Provided,* That the same be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respect-

ing the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

It is contended on the part of the company that this amending act repeals clause 10 of section 21 as well as section 32 of the general railroad law, so far as they are applicable to the Central Military Tract Company, and that under section 6 of the amending act the directors have absolute control of rates of fare and freight free of legislative interference. We deem it unnecessary to determine the question of repeal, because on full consideration we are satisfied that section 6 does not have the effect that is claimed for it.

Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 547; "It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." This is an elementary principle.

In *Chicago, Burlington & Quincy Railroad Company* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & Northwestern Railway Company*, 94 U. S. 164; and *Winona & St. Peter Railroad Company* v. *Blake*, 94 U. S. 180, it was determined that "a State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter." The right to a reversal of the present judgment rests on the question whether this company has any such restraining contract, and that depends on the effect to be given the amending section 6.

The company by its original charter was authorized to transport passengers and property and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in *Munn* v. *Illinois*, 94 U. S. 113, and the several railroad cases decided at the same time, require the

company to carry at reasonable rates, and leave the legislature at liberty to fix the maximum of what would be reasonable. So that, laying aside the limitations of the old charter, the question here is whether the amending section relied on has the effect of taking away from the State this power of legislative regulation.

The amending section provides that the company "shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business and interest of the company: *Provided*, That the same be not repugnant to the Constitution and laws of the United States, or of this State, or repugnant to this act." By section 5, all the powers of the company were vested in and could be exercised by the directors. Clearly under this authority no by-law can be established by the directors that does not conform to the laws of the State, and this, whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the State. The corporate power was a continuing one and intended for the ordering of the affairs of the company as circumstances might from time to time require. The reserved control by the State was also continuing in its nature, and manifestly intended for the protection of the public whenever in the judgment of the legislative department of the government the necessity should arise.

Then follows the special provision on which the claim of a contract is predicated. It is as follows:

> "The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time *by their by-laws determine*, and to levy and collect the same for the use of the company."

This is the form in which the power to charge and collect compensation for the carriage of persons and property was

granted by the amended charter. The rates must be fixed by by-laws, and no by-law can be made that is at all repugnant to the laws of the State. The first paragraph of the section, with its proviso, prescribes generally what is necessary to the validity of a by-law, and the second allows the directors to fix rates by by-laws. It is undoubtedly true that the first paragraph neither adds to nor takes from the inherent power of a corporation to make by-laws for the regulation of its affairs, and that the proviso is nothing more than a legislative declaration of the principle of the common law that all by-laws must be reasonable, and not in conflict with the laws of the State. But the very fact that such a provision would have been implied, adds to the significance of its incorporation in express terms into the charter, and manifests a determination not to leave room for doubt as to the right of the State to use its legislative power if necessary for the regulation of the affairs of the corporation, at least by the enactment of general laws applicable to all corporations of a like character, and engaged in a like business. There is nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character from those regulating the other business of the company. When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the State, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the State. This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, for in the absence of a statute, or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that when a maximum is so established the rates fixed by the directors must conform to its

requirements, otherwise the by-laws will be repugnant to the laws.

It is argued, however, that this cannot be the meaning of the amending act, because, if the company had, under its old charter, the absolute right of fixing rates, subject only to a limit of three cents a mile on passengers, and the State had no power to interfere, except to keep the annual profits down to fifteen per cent. per annum on the paid-up capital, no one can believe it would have surrendered such a privilege and taken in lieu another so unfavorable as this. It is undoubtedly true, as was claimed in argument, and has been often said from the bench, that amendments to the charters of corporations are usually made at the solicitation of the corporations themselves, who cause the bills to be prepared and submitted to the legislatures for enactment, and that, if there is doubt as to the construction of what is enacted, this fact may be resorted to in aid of interpretation. But Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it." Vattel's Law of Nations, 244. Here the words are plain and interpret themselves. The directors may establish such by-laws as they please, provided they are not repugnant to the Constitution and laws, and they may by their by-laws regulate the rates of fare and freight. As their by-laws must conform to the laws of the State, so must their rates. If the State had not the legislative power to regulate the charges of carriers for hire, the case would be different. But that question has been settled, and the amended charter which this company secured from the legislature must be construed in the light of that established power.

Without, therefore, undertaking to determine what rights as to fares and freights were secured to the company under the old charter, nor whether more was gained by the other pro-

visions of the new charter than was lost by the acceptance of section six as it was enacted,

We affirm the judgment.

Mr. Justice Harlan concurring.

In *Munn* v. *Illinois*, 94 U. S. 113, this court held that there was nothing in the Constitution of the United States which prevented the legislature of Illinois from fixing, by statute, the maximum of charges for the storage of grain in warehouses at Chicago and other places in that State, where grain is stored in bulk, and in which the grain of different owners is mixed together, or in which the grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved.

Immediately following that case is *Chicago, Burlington & Quincy Railroad Company* v. *Iowa*, 94 U. S. 155, which involved the validity of a statute of Iowa establishing "reasonable maximum rates of charges for the transportation of freights and passengers" on the different railroads of that State. Touching that case it may be observed that the court conceded that a railroad corporation might be protected by its charter against absolute legislative control as to rates of fare and freight, but that the power of the corporation which there questioned the validity of the law of Iowa was, by its charter, made subject to such legislation as the legislature might, from time to time, establish.

"They [railroad corporations] are, therefore," said the court, "engaged in public employment affecting the public interest, and, under the decision in *Munn* v. *Illinois*, subject to legislative control, *unless protected by their charters.* The Burlington & Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington & Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being *subject, nevertheless, at all times, to such rules and regulations as the general assembly of Iowa might, from time to time, enact*

and provide. This is, in substance, its charter, and to that extent it is protected *as by a contract;* for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter, or in the laws or constitutions which govern it."

In *Peik* v. *Chicago & Northwestern Railway Company*, 94 U. S. 164, a similar statute of Wisconsin was sustained as within the power of its legislature to enact. The court said:

"In *Munn* v. *Illinois* and *Chicago, Burlington & Quincy Railroad Company* v. *Iowa*, we decided that the State may limit the amount of charges by railroad companies for fares and freight, *unless restrained by some contract*, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter"

It was also said in that case:

"When property has been clothed with a public interest, the legislature may fix a limit to that which shall, in law, be reasonable for its use. This limit binds the courts as well as the people."

The language last quoted, it must not be overlooked, was used in reference to a railroad charter granted under the Constitution of Wisconsin, which expressly provided that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage."

In *Winona & St. Peter Railroad Company* v. *Blake*, 94 U. S. 180, it was decided that, as there was nothing in the charter of the railroad company limiting the power of the State to regulate charges for freight and passengers, it was competent for the legislature to require the company to carry on equal and reasonable terms; this, because, as the court ruled, it was incident to the occupation in which the corporation was engaged,

and for which it was created a carrier, to collect only a reasonable compensation for carriage. The act was there held as adding nothing to, and taking nothing from the grant as contained in the original charter.

These cases establish, among others, these principles: 1. That the charter of a railroad corporation is a contract within the meaning of the contract clause of the federal Constitution. 2. That such corporation may be protected by its charter against absolute legislative control in the matter of rates for the carriage of passengers and freight. 3. That when the charter is granted subject to such regulations as the legislature from time to time may provide, or subject to the authority of the legislature to alter or repeal it, in either of such cases the legislature has the same power over rates or tolls that it had when the charter was granted. 4. In the absence of statutory regulations upon the subject, it is necessarily implied from the occupation of a railroad corporation that it shall exact only reasonable compensation for carriage.

How far these principles control the present case I proceed now to inquire.

The general railroad law of 1849 authorized railroad corporations created under it to regulate tolls and compensation for the transportation of passengers and property, subject to these restrictions: That compensation for a passenger and his ordinary baggage should not exceed three cents a mile, unless by special act of the legislature; further, that the legislature may, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such railroad, provided the same should not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent. per annum on the capital actually paid in, nor, unless on an examination of the amounts received and expended, to be made by the Secretary of State, he shall ascertain that the net income derived by the company from all sources for the year then last passed exceeded an annual income of fifteen per cent. upon the capital so actually paid in.

The act of February 15th, 1851, incorporating the Central Military Tract Railroad Company—one of the constituent cor-

porations which, by consolidation, make the Chicago, Burlington and Quincy Railroad Company, and to the benefit of whose charter the latter is entitled—declares that it is created for the purpose of organizing under the general law of 1849, "and in all things shall be governed by the provisions thereof, and shall be entitled to have and exercise the powers and privileges and be subject to the liabilities therein enumerated." The provisions of the act of 1849, enumerating the powers and privileges to be enjoyed by, and the liabilities imposed upon, corporations organized thereunder, thus became a part of the charter of the Central Military Tract Railroad Company.

If the determination of this case turned solely upon the question whether the act of 1871 establishing maximum charges for all railroads in Illinois, deprived this company of any contract right declared or given by the law of 1849, there would be no difficulty in affirming the judgment; for, in the first place, the amount tendered, in this case, to conductor Ruggles, and which he refused to accept as the entire compensation to be paid by Lewis, the passenger, was all that was allowed by the act of 1871, and all that the company, in the absence of a special act, was permitted by the law of 1849 to collect; further, there is no evidence in the record that the passenger rates as established by the act of 1871, will reduce the profits of the company below the aggregate amount which by its charter it was entitled to realize, and within which the legislature, by express reservation, could restrict it. But in behalf of appellant it is contended that by the sixth section of the act of June 19th, 1852, the corporation was invested with absolute control, through its directors, of the whole subject of rates; in other words, that the legislature, in that section, removed the restriction in the act of 1849 of three cents per mile for a passenger and his ordinary baggage, and, by necessary implication, surrendered its power to make even the reduction provided for in that statute.

In this view, as to the construction of the act of 1852, I do not concur. That act is not absolutely inconsistent, upon the subject of rates, with the general statute of 1849. They may stand together, and since repeals by implication are not favored,

they should be so construed as, if possible, to make them both operative. The statute of 1849 gave the corporation the general power, within a certain limit, of regulating tolls and compensation to be paid for the transportation of passengers and property. But it did not prescribe the particular mode by which the public should be informed as to the rates established. I incline to think that the purpose of the act of 1852 was to declare, as a condition precedent to power in the directors to levy and collect tolls, that the rates should not be determined at the mere discretion of the company's superintendent or agents charged with the management of its business, but—keeping within the limits prescribed by the law of 1849—should be fixed by the directors in the by-laws of the corporation. It should not be presumed that the legislature intended by the general language of the act of 1852 to abrogate the restrictions in the act of 1849, and to surrender, as to the Central Military Tract Railroad Company, the power, reserved in the general law, of keeping the profits of all railroad corporations created under it, as that one was, within fifteen per cent. upon the capital actually paid in.

But I do not concur in so much of the opinion of the court as seems to rest upon the ground that, apart from the law of 1849, the question of tolls to be charged by the Central Military Tract Railroad Company was, under the act of 1852, exclusively for legislative determination, and, in no case, of judicial cognizance. The court holds that, testing the right of the company entirely by the latter act—in other words, assuming that the sixth section of the act of 1852 superseded all in the act of 1849 upon the subject of rates—the judiciary may not inquire whether the rates established by the legislature are less than reasonable compensation for the carriage of persons and property; that is, that the legislative determination is conclusive. I concede that the sixth section of the act of 1852 does not place the subject of rates within the absolute control of the company, so as to authorize it to levy and collect tolls beyond what would afford proper remuneration for the services rendered; this, because, as already shown, the law implies, as incident to its business, that the company shall exact only

reasonable tolls. But the legislature, by the sixth section of the act of 1852, agreed that the *directors* might levy and collect such reasonable rates as *they* should, from time to time, establish by their by-laws. The introduction into that section of the special clause relating to rates, after and in connection with the general clause conferring power to make by-laws, rules and regulations, in reference to the affairs, business and interest of the company, not inconsistent with the laws of the State, was entirely unnecessary, and is meaningless, if not intended to assure those who put their means into the proposed road, that, as to the tolls to be levied and collected, they should be established by the directors within the limit of reasonableness, and not left to the uncontrolled discretion of the legislature. In other words, the company has—putting aside the general law of 1849—a contract with the State that it may, by its directors, establish, levy, and *collect* reasonable tolls. The court holds, erroneously, as I think, that no contract, in any view of the case, arises out of the act of 1852, and that, consistently with its provisions, the judiciary cannot inquire whether the rates established by the board of directors are or are not reasonable. Although the rates fixed by the legislature may be shown to be ruinously low, the judiciary cannot, according to the decision of the court, protect the company in the exercise of the power granted to it of establishing, levying, and collecting reasonable tolls.

I am of opinion that if the act of 1852 is to be regarded either alone or as superseding the law of 1849, it constitutes a contract between the State and the company, whereby the latter acquired an exemption from absolute legislative control as to rates, and secured, beyond the power of the legislature to withdraw, the right, through its directors, from time to time, within the limit of reasonableness, to establish rates of toll for the transportation of persons and property. If this be so, it results that all controversies involving rights under this contract must be adjusted, as in all other cases of contract, in the courts according to the established principles of law, and are not determinable by, or wholly dependent upon, the will of one of the parties. The company, or any one acting by its authority,

has the right to submit to the courts the question whether rates prescribed by any subsequent act of the legislature will give that reasonable compensation which the State agreed, in the act of 1852, might be exacted by the company under by-laws established by its board of directors.

The act of 1852 does not, I think, supersede the provisions of the general law of 1849 upon the subject of rates. But since the company (if we look alone to the act of 1852) has failed to show that the rates fixed in the act of 1871 are unreasonable, and since—if the thirty-second section of the act of 1849 is still in force—it does not appear that those rates would reduce the company's profits below the amount to which, by that section, they could be restricted by subsequent legislation, I concur in affirming the judgment.

FIELD, J.—I concur in the judgment in this case solely on the ground that no proof was made that the rate prescribed by the legislature was unreasonable. Under previous decisions of the court the legislative rate is to be taken as presumptively reasonable.

I do not give any weight to *Munn* v. *Illinois*. My objections to the decision in that case were expressed at the time it was rendered, and they have been strengthened by subsequent reflection. Besides, that case does not relate to corporations or to common carriers.

MR. JUSTICE BLATCHFORD did not sit in this case.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Decided May 7th, 1883.

Mr. John A. Campbell and *Mr. John N. Jewett* for plaintiff in error.

Mr. James McCartney, Attorney-General of Illinois, *Mr.*

James K. Edsall, and *Mr. John B. Hawley* for defendant in error.

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

The case follows in all respects *Ruggles* v. *Illinois*, *ante*.

This case, like that of *Ruggles* v. *Illinois*, just decided, presents the question whether the State of Illinois has entered into a contract with a railroad corporation not to exercise the legislative power to regulate charges for the carriage of persons and property upon the railroad of the corporation. It is not necessary in this case, any more than it was in the other, to inquire whether the power of legislative regulation, in this particular, is one that can be bargained away, because here, as there, we are of opinion that no such thing was intended. The provision of the charter of the Illinois Central Railroad Company relied on, as showing a contract, is almost identical with that of the Central Military Tract Company considered in the Ruggles case, and in the following words:

"Sec. 8. The said company shall have power to make, ordain, and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interests of the company; *Provided*, That the same be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time by their by-laws direct and determine, and to levy and collect the same for the use of said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and the other matters and things respecting the use of said road and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine. Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of common council of said city."

What was said in the other case as to the construction of section six of that charter is applicable to this, and, referring to the opinion in that case for the reasons,

We affirm this judgment.

FIELD, J.—I concur in the judgment in this case for the reason expressed for my concurrence in the decision of *Neal Ruggles* v. *The People of the State of Illinois.*

HARLAN, J.—For the reasons stated in my dissenting opinion in *Ruggles* v. *People of Illinois*, I dissent from the opinion of the court, but concur in affirming the judgment.

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

HAWLEY *v.* FAIRBANKS and Others.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Decided May 7th, 1883.

Appeal—Conflict of Law—Injunction—Jurisdiction—Mandamus—Municipal Bonds—Municipal Corporations—Statutes.

An act of the State of Illinois authorizing subscriptions by municipalities to the stock of a railroad company required the town clerks to transmit to county clerks transcripts of votes authorizing subscriptions, and the amount voted and the rate of interest to be paid, and after issue of bonds, certificates of the amount of bonds issued, the rate of interest thereon, and the number of each bond. It also required the county clerk, after the execution and delivery of the bonds, to annually compute and assess upon the township enough to pay the accruing interest and cost of collection, and a fund for redemption. A subsequent statute authorized holders of such bonds to register them with the State auditor of public accounts, and made it the duty of the auditor to estimate the amount of assessment necessary to meet the interest, &c., and to inform the county clerk: *Held,*

That the object of each act was to provide a mode for information to reach the county clerk as to the amount of money necessary to be raised for these purposes, and that certified copies of judgments recovered in the Circuit Court of the United States by such bondholders upon their bonds lodged with the county clerk, had the same force and effect as information derived

in the modes provided by law, and made it the duty of the clerk to proceed with the computation and assessment of the tax.

Where a State court enjoined a municipal officer from enforcing a tax to pay a municipal obligation, and subsequently to the injunction a judgment for payment of the interest which it was agreed should be made by the assessment and collection of the tax was recovered in a circuit court of the United States, the injunction cannot stand in the way of the enforcement of the tax by the circuit court, to carry its judgment into execution.

When distinct causes of action are united in one suit for convenience, and to save expense, and the sum at issue in some of the causes is insufficient to give jurisdiction, and in others is sufficient to give it, those cases in which it is insufficient will be dismissed for want of jurisdiction, and those in which it is sufficient will be retained for adjudication.

Petition for mandamus to a county clerk, to compel the assessment of a tax to pay judgments recovered upon municipal bonds issued to pay subscriptions to stock in a railroad corporation.

Mr. James K. Edsall and *Mr. John B. Hawley* for plaintiff in error.

Mr. George A. Sanders for Fairbanks, defendant in error.

Mr. T. C. Mather for Skinner, Thomas and Wetmore, defendants in error.

Mr. Thomas S. McClelland for all defendants in error.

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

On the 5th of April, 1872, the town of Amboy, Lee County, Illinois, issued a series of bonds in payment of a subscription voted by the voters of the town to the capital stock of the Chicago & Rock River Railroad Company. Both the subscription and bonds were authorized by the charter of the railroad company, approved March 24th, 1869.

Sections 12 and 13 of this charter, which alone need be considered, are as follows:

"§ 12. It shall be the duty of the clerk of any such city, town or township, in which a vote shall be given in favor of subscription, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid: *Provided,* That when elections shall be held and bonds

issued, as aforesaid, it shall be the duty of the clerk of such town or township to file with the county clerk of their respective counties, within ten days after the issuing of said bonds, certificates of the amount of bonds issued, and the rate of interest payable thereon, and number of each bond.

"§ 13. It shall be the duty of the county clerk of said county, annually, after the execution and delivering of such bonds aforesaid, to compute and assess upon all the taxable property returned by the assessor of such city, town, or township, a sum sufficient to pay the interest and costs of collection and disbursements upon all bonds so issued by the respective cities, towns or townships; which tax shall be extended upon the collector's books as other taxes are, and, when collected, shall be paid to the treasurer of the county; and such city, town or township shall, when providing for the levying and collecting of other taxes, also assess upon the property of such city, town or township, any rate not exceeding three per cent. in any one year upon the assessment, to provide a fund for the redemption of the principal and interest of such bonds as or when they become due—said taxes to be levied and collected as other taxes are; but no tax shall be computed, assessed or collected, or any interest paid, to be applied upon said bonds, unless such bonds have been executed and delivered."

By an act of the general assembly of Illinois "to fund and provide for paying the railroad debts of counties, townships, cities and towns," passed and in force April 16th, 1869, the holders of that class of securities were authorized to register them in the office of the auditor of public accounts of the State. Sections 4 and 5 of that act are as follows:

"§ 4. When the bonds of any county, township, city or town shall be so registered, the State auditor shall annually ascertain the amount of interest for the current year due and accrued and to accrue upon such bonds, and from the amount so ascertained he shall deduct the amount in the State treasury placed to the credit of such county, township, city or town, as herein provided and directed; and from the basis of the certificate of valuation of property heretofore provided to be transmitted to him, or, in case no such certificate shall be filed in his office, then upon the basis of the total assessment of such county, township, city or

town, for the year next preceding, he shall estimate and determine the rate per centum on the valuation of property within such county, township, city, or town, requisite to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the State of collection and disbursement of the same, to be estimated by the auditor and treasurer, and shall make and transmit to the county clerk of such county, or to the proper officer or authority whose duty it is or shall be to prepare the estimates and books for the collection of State taxes in such county, township, city or town, a certificate stating such estimated requisite per centum for such purpose, to be filed in his office, and the same per centum shall thereupon be deemed added to and a part of the per centum which is or may be levied or provided by law for purposes of State revenue, and shall be so treated by such clerk, officer or authority, in making such estimates and books for the collection of taxes; and the said tax shall be collected with the State revenue, and all laws relating to the State revenue shall apply thereto, except as herein otherwise provided.

"§ 5. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, township, city or town, and shall not be deemed in any manner liable on account of any such bonds; but the tax and fund so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied."

When the bonds of the town of Amboy were issued, the town clerk did not transmit to the county clerk the statement required by sec. 12 of the charter of the railroad company, but the president of the company caused them to be registered in the office of the auditor of public accounts in accordance with the provisions of the act of 1869. During the years 1872 and 1873 the auditor made the proper certificate under the registry law for the taxes to meet the interest for those years, and the taxes were extended by the county clerk in due form on the tax-collector's books, but before the collections were made certain tax-payers of the town obtained from the Circuit Court of Lee County an injunction against the county clerk, the county collector, and the town collector, restraining them from col-

lecting the taxes that had already been assessed, and also restraining the same parties and the auditor of public accounts of the State from taking any steps for the levy or collection of any other taxes to pay either the principal or the interest of the bonds.

After this injunction was obtained the relators, Fairbanks, Skinner, Thomas and Wetmore, being severally holders and owners of certain of the bonds and coupons of the town, began separate suits against the town in the Circuit Court of the United States for the Northern District of Illinois, to recover the amounts due them, respectively, on their coupons. These suits resulted in a judgment on the 13th of March, 1878, in favor of Fairbanks for $2,449 damages and $36.12 costs; another, on the 24th of January, 1878, in favor of Skinner, for $2,018.50 damages and $47.10 costs; another, on the 29th of November, 1875, in favor of Thomas, for $866 damages and $43.90 costs; and two others in favor of Wetmore, one on the 17th of December, 1875, for $3,836.14 damages and $50.40 costs, and the other, on the 20th of June, 1876, for $1,058.33 damages and $31.50 costs.

These several judgments remain unpaid, and have all been duly audited and allowed by the auditing board of the town, but the town clerk, whose duty it is to certify to the county clerk, on or before the second Tuesday in August in each year, the amount of taxes to be levied and collected to pay the charges against the town for the current year, refused to certify the judgments and kept himself concealed so as to avoid the process of the courts. The several plaintiffs then presented their respective judgments to the county clerk, and demanded that he "compute and assess upon all the taxable property in said town of Amboy a sum sufficient to pay said judgments, and each and every of them, and interest on the same to the date of payment, and costs of suit in each case, together with the costs of collecting and disbursing such taxes, and to extend such taxes upon the collector's books of said town of Amboy for the year 1879." This the county clerk refused to do, and thereupon the several judgment plaintiffs united as relators in an application to the Circuit Court of

the United States for a mandamus requiring him to comply with their demands.

To this application the county clerk answered, setting up defences, as follows:

1. That the town clerk had never transmitted to the county clerk the statement required by section 12 of the charter of the railroad company.

2. That the town clerk had never certified to the county clerk the allowance of the judgments by the board of auditors of the town.

3. That all taxes to pay principal and interest on the bonds covered by the several judgments of the relators, certified by the auditor of public accounts under the registry law, had been duly extended on the tax-collector's books, and their collection enjoined by the circuit court of the county; and—

4. That he had himself been enjoined by the circuit court of the county from extending any taxes whatever on the tax-books to pay the principal or interest of the bonds held by the relators.

Upon demurrer to this answer, judgment was given in the court below awarding a writ of mandamus directed to the county clerk and commanding him to extend upon the tax-collector's books of the town, for the year 1879, a sum sufficient to pay each of the several judgments held by the relators, particularly describing the judgments separately. To reverse that judgment this writ of error was brought.

We are met at the outset with a motion of the defendants in error to dismiss the writ in this case on the ground that the several judgments proceeded upon below cannot be united to give us jurisdiction, and the amount due on any one of them does not exceed $5,000. The rule is settled, as stated more than once at the present term, that when distinct causes of action, in favor of distinct parties, are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments cannot be joined to give us jurisdiction. *Ex parte Baltimore and Ohio Railroad Company*, 106 U. S. 5; *Farmers' Loan and Trust Company* v. *Waterman*, 106 U. S. 265; *Adams* v. *Crittenden*, 106 U. S. 576; *Schwed* v.

Smith, 106 U. S. 188. In the present case distinct causes of action, in favor of distinct parties, were united, for convenience and to save expense, in one suit, and distinct orders were made in favor of each one of the several judgment creditors. The proceeding was analogous to a creditors' bill brought by distinct creditors upon distinct judgments to reach the property of their common debtor. That was the case of *Schwed* v. *Smith*, *supra*, in which we held, following *Seaver* v. *Bigelows*, 5 Wall. 208, that the amount due the several creditors could not be joined to give jurisdiction on an appeal by the defendants. In the present case the amount due the relators Fairbanks, Skinner, and Thomas, respectively, does not exceed $5,000. As to them, consequently, the writ must be dismissed. But as to the relator Wetmore the case is different. She has two judgments, and the aggregate amount due her, including interest to the time the mandamus was awarded, exceeds $5,000. The matter in dispute with her, therefore, is sufficient for our jurisdiction, and the cause must be retained for adjudication in respect to her rights. This was the form of proceeding adopted in *Farmers' Loan and Trust Company* v. *Waterman*, *supra*.

Proceeding, then, to the consideration of the case on its merits, we will take up the defences relied on by the county clerk in the order in which they have been stated.

1. As to the omission of the town clerk to certify the statement required by the 12th section of the charter.

By the judgment of the circuit court, for the enforcement of which the mandamus is asked, the fact of the issue of the bonds and the liability of the town for the payment of the coupons held by the judgment creditor was judicially determined. Section 13 of the charter of the railroad company made it the duty of the county clerk annually, after the issue of the bonds, to compute and assess on the taxable property in the town a sum sufficient to meet the interest as it matured, and provide a sum for the redemption of the principal. The statement of the town clerk under section 12 was not a condition precedent to the computation and assessment of the tax by the county clerk. It was one way of informing the county

clerk of his duty, but not necessarily the only way. The law obliged him to make the assessment in due course of business after the bonds were put out, and until they were paid in full. When, therefore, the judgments of the Circuit Court of the United States were presented to him, he was officially informed that the liability of the town for the payment of the coupons sued for had been judicially established, and it became his duty, under section 13, to compute the tax necessary to pay them, and put it in the way of collection. No further certificate from any town officer was necessary. The issue of the bonds, under which the judgment creditor claimed the right to a tax, was conclusively proven, and that was enough. There is nothing in *Springfield and Illinois Southeastern Railway Company* v. *County Clerk of Wayne County*, 74 Ill. 27, to the contrary of this. In that case the vote was for a donation by the town to be paid by a tax, and there was no other evidence of the obligation to levy the tax than the vote of the electors. Under such circumstances there was reason for holding that the only legitimate evidence that could be produced to the county clerk of the fact of the vote was the certificate, which had been specially provided for in the act authorizing the donation to be made. Here, however, the bond carried on its face the declaration of the town that the holder was entitled to have the tax assessed and collected for its payment, and whatever was legitimate evidence of the issue of the bond was legitimate evidence of the duty of the clerk to act. The fact of the issue having been conclusively established by the judgment, the presentation of the exemplification of judgment to the county clerk was all that was in law necessary to make it his duty to proceed.

2. As to the certificate of the town clerk that the judgments had been audited and allowed by the town auditors.

What has already been said is equally applicable to this branch of the case. The judgment established the legal right of the judgment creditor to have the tax specially provided for by section 13 of the charter of the company computed and assessed by the county clerk without any further action of the town officers. After the issue of the bonds it became the positive duty of the county clerk to compute and assess, in the

regular course of business, to the extent that was necessary, the tax that had been contracted for to meet the liability thus incurred. It became, in legal effect, a part of the contract of the town that this should be done, and the judgment of the court establishing the contract was equivalent to a judicial determination that the tax must be levied by the county clerk, unless the judgment was otherwise provided for. Whenever, therefore, it was made to appear to the county clerk in any way that no other provision had been made, it was his duty under the law to proceed with the computation and assessment of the tax. The certificate of the town clerk, that the judgment had been allowed by the board of auditors for payment through the means of the annual taxation would have been one way, and, perhaps, the most appropriate way, of furnishing the information which the county clerk needed, but it has nowhere been made the only lawful way. When, therefore, the town clerk refused to make and forward such a certificate, there was no legal impediment to the employment of some other means to give the county clerk notice of what his duty required of him in the premises. The certificate of the town clerk was not in this case any more a condition precedent to the action of the county clerk than it was under the requirements of section 12.

3. As to the certificate of the auditor of public accounts.

This, like the certificate of the town clerk, is only one way of informing the county clerk of what his duty under section 13 requires. It is not, any more than the certificate of the town clerk, an indispensable prerequisite to the action of the county clerk.

4. As to the injunction.

The relator was not a party to the suit in which the injunction was obtained, and, consequently, is not bound by it. Having established her right to the tax by the judgment of the circuit court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment into execution, notwithstanding what the tax-payers may have caused to be done in some proceed-

ing to which the relator was not a party. The right to the computation and assessment, as well as the collection of the tax, followed as a matter of law from the establishment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax. An injunction against the officers before the judgment against the town was rendered cannot stand in the way of the enforcement of the tax by the circuit court to carry its judgment into execution.

The writ of error is dismissed as to the relators Fairbanks, Skinner, and Thomas, and the judgment of the circuit court awarding the mandamus in favor of Caroline C. Wetmore is affirmed.

The cause is remanded with leave to modify the judgment in such a way as to adapt the command of the writ of mandamus to the circumstances consequent on the delay caused by the pendency of the writ of error in this court.

EX PARTE HUNG HANG.

ORIGINAL.

Decided May 7th, 1883.

Habeas Corpus—Jurisdiction.

Except in cases affecting ambassadors, other public ministers, or consuls, or those in which a State is a party, the supreme court can only issue a writ of habeas corpus under its appellate jurisdiction.

Application for a writ of habeas corpus.

Mr. Solicitor-General, Mr. Assistant Attorney-General Simons and *Mr. Hall McAllister* for the petitioner.

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

This is an application for a writ of habeas corpus for the purpose of an inquiry into the legality of the detention of the petitioner, Hung Hang, a subject of the Emperor of China, by

the chief of police, under a warrant for his arrest, issued by the police judge of the city and county of San Francisco, California, for a violation of an order or ordinance of the board of supervisors of such city and county, alleged to be in contravention of the Constitution and of a treaty of the United States.

It has long been settled that ordinarily this court cannot issue a writ of habeas corpus except under its appellate jurisdiction. *Ex parte Bollman & Swartwout*, 4 Cranch, 75; *Ex parte Watkins*, 7 Pet. 568; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, Ib. 371.

Section 751 of the Revised Statutes, which re-enacts a similar provision in the judiciary act of 1789 (sec. 14), gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party, it can only be done for a review of the judicial decision of some inferior officer or court. This petition presents no such case.

The writ is consequently denied.

MEATH *v.* PHILLIPS COUNTY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Decided May 7th, 1883.

Limitations.

The facts in this case showed no claim in the plaintiff against the county defendant. The claim, if any, was against the district in the county benefited by the levees which he claims to have constructed.

It being conceded that an action at law for the enforcement of the claims set up in this suit was barred when this suit was brought, no equitable reason was found why the limitation of the statute should not be applied in equity.

Mr. S. P. Walker for appellant.

Opinion of the Court.

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

The first question presented by this appeal is, whether the drafts drawn by levee inspectors on the levee treasurer of the county of Phillips, under the authority of the act of February 16th, 1859, "to provide for making and repairing levees in Desha and Phillips counties," and the renewal bonds or scrip issued by the county clerk of the county under the provisions of the act of January 15th, 1861, to amend the act of February 16th, 1859, constitute an indebtedness of the county for which bonds of the county may be demanded under the act of April 29th, 1873, "to authorize certain counties to fund their outstanding indebtedness," or a money judgment or decree recovered against the county. To this question we have no hesitation in giving an answer in the negative. The act of 1859 provided for the division of the overflowed lands of the counties of Desha and Phillips into levee districts for the purpose of reclaiming the lands, and for the taxation of such lands to pay the expenses incurred in that behalf. The business was to be managed by levee inspectors, at first appointed by the county court of the county, but afterwards elected by the voters of the several levee districts, and payments for work done or expenses incurred, were to be made by the drafts of the levee inspectors for the district on the levee treasurer appointed by the county court of the county to receive and disburse according to law all funds raised from levee taxes in the county. Only lands benefited by protection from overflow by the levees could be taxed. These lands were to be selected by a board of three freeholders appointed by the county court of the county for each levee district, and valued for taxation by the levee inspector. The county court was then to levy a tax upon the property charged, to be collected like other taxes, and this tax, when collected, was to be paid over to the levee treasurer to be by him disbursed on the drafts of the inspectors. The funds collected from each district were to be appropriated to the payment of the drafts of its own inspector. The bonds, scrip, or drafts issued by the county clerk under the act of 1861 were to be renewals of the inspector's drafts, and created no new obligation. Any debt incurred in the levee work was clearly the

debt of the levee district, to be discharged through a tax levied by the county court for that special purpose. In this the county court acted not as the representative of the county, but of the district. In effect the county court and the sheriff of the county were made the officers and agents of the levee district for the levy and collection of the special tax which was required. This tax was not a county tax, but a district tax, levied and assessed under the authority of law by the county court. In levying the tax the court acted for the district, not the county.

The cases of *County of Cass* v. *Johnson*, 95 U. S. 360, and *Davenport* v. *Dodge County*, 105 U. S. 237, presented entirely different facts. In the case of the county of Cass, the law provided in terms for an issue of bonds in the name of the county, and in that of the county of Davenport we construed the law to be in effect the same. Consequently there were in those cases obligations of the counties payable out of special funds. Here, however, there was a manifest intention to bind the levee districts only by the obligations incurred, and not to make the county, in its political capacity, responsible for the payment of the debts that were created for levee purposes under these laws. The machinery of the county was to be used in the levy and collection of the special taxes required, but the county, as a county, was to be in no way involved. It follows that the prayer for a money decree against the county, as well as that for an exchange of the bonds authorized by the act of 1873 for the orders or warrants held by the appellant, must be denied.

The next and only remaining question is, whether the county court of the county can be required, in this suit, to levy and impose taxes on the levee districts to pay the demands. All the demands fell due on or before April 1st, 1862. This suit was not brought until December 17th, 1877. It was in effect conceded by the counsel for the appellant, that an action at law for the enforcement of the claims would have been barred in ten years from their maturity, adding only the time between December 1st, 1862, and March 16th, 1864, when the operation of the statute of limitations was suspended. This proceeding is in equity, but no sufficient reason

is shown why the limitation of the statute should not be applied. Without, therefore, considering any other objection to the bill and the relief that is asked, we hold that the suit, so far as it seeks to have the tax imposed by the county court, is barred by lapse of time.

The decree of the circuit court is affirmed.

EX PARTE TOM TONG.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Decided May 7th, 1883.

Habeas Corpus—Jurisdiction—Proceedings Civil and Criminal—Practice.

The proceedings under a petition for *habeas corpus* are in their nature civil proceedings, even when instituted to arrest a criminal prosecution and secure personal freedom: and the appellate revisory jurisdiction of this court is governed by the statutes regulating civil proceedings.

As the statute authorizes a certificate of division of opinion between judges sitting in circuit only after final judgment in civil proceedings, the court cannot take jurisdiction under a certificate by which it appears that there was a difference in opinion between the judges as to the points certified, without entry of final judgment.

The petitioner was proceeded against criminally in the police court of San Francisco for a misdemeanor in unlawfully establishing, maintaining and carrying on the business of a public laundry. Being restrained of his liberty under this process, he applied to the Circuit Court of the United States for the District of California, for a writ of habeas corpus. The judges certified a difference of opinion upon the following questions.

At the hearing of said case at the present term of this court upon the said papers and record there occurred as questions, arising on said record:

"1. Whether upon the facts stated in the petition filed in this case a writ of *habeas corpus* ought to have been issued by this court according to the prayer of said petition?

Argument for Petitioner.

"2. Whether upon the facts stated in the petition, and in the return to the writ issued herein, said petitioner ought to be discharged from custody?

"3. Whether, assuming said ordinance set out in the petition herein to be void, the petitioner is 'in custody in violation of the Constitution, or of a law or treaty of the United States,' within the meaning of section 753 of the Revised Statutes of the United States, and whether he ought to be discharged on that ground?

"4. Whether, assuming said ordinance to be void, the court is forbidden to discharge the petitioner by the provisions of section 753 of the Revised Statutes of the United States?

"5. Whether the ordinance set out in the petition in this case is void on the ground that it does not fix any terms or conditions upon complying with which the petitioner and others similarly situated are entitled, absolutely, to a license to pursue their calling, but still leaves it in the discretion of the board of supervisors to pass, or refuse to pass, a resolution granting a permit, or authorizing the issue of a license, the ordinance only allowing the board of supervisors to pass a resolution granting such permit, or authorizing the issue of a license in its discretion, after the applicant has performed all the conditions prescribed by said ordinance, without making it obligatory upon the board to pass such resolution?

"6. Whether the ordinance set out in the petition is void on the ground that it is unreasonable in its requirements, or upon any other ground apparent upon the face of the ordinance or appearing in the petition and return, or in the record herein?"

Mr. Hall McAllister for the petitioner argued the merits of the case, but as it turned on a question of jurisdiction, his position on this point only is presented.

Section 753 of the Revised Statutes of the United States provides that: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or committed, in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in *violation of the Constitution or of a law or treaty of the United States;* or, being a subject or a citizen of

a foreign State and domiciled therein, is in custody for an act done or committed under an alleged right, title, authority, privilege, protection or exemption, claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations, or unless it is necessary to bring the prisoner into court to testify." The portion of the language of this section, under which jurisdiction of the circuit court to award the writ is claimed, is in these words: "Or is in custody in violation of the Constitution, or of a law or treaty of the United States." The contention upon this point is, that subjects of the Emperor of China in California, under the Constitution of the United States and the provisions of the Burlingame Treaty, to which the attention of the court has already been called, are guaranteed the right to pursue all lawful vocations in a lawful manner, and that the ordinance in question and the judicial proceedings founded thereon, are in invasion of the rights thus secured, redress for which may legally be had on writ of *habeas corpus* awarded by the circuit court. *Ex parte Bridges*, 2 Woods C. C. 428; *In re Wong Yung Quy*, 6 Sawyer, 237; *Ex parte Turner*, 3 Woods C. C. R. 603.

Mr. L. D. Latimer opposing.

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

This is a writ of habeas corpus sued out of the Circuit Court of the United States for the District of California by the petitioner, Tom Tong, a subject of the Emperor of China, for the purpose of an inquiry into the legality of his detention by the chief of police of the city and county of San Francisco, for an alleged violation of an order or ordinance of the board of supervisors of such city and county regulating the licensing, &c., of public laundries, and the case comes here, before judgment below, on a certificate of division of opinion between the judges holding the court as to certain questions which arose at the hearing. The allegation in the petition is that the order, for the violation of which the petitioner is held, is in contravention of the Constitution of the United States and of a treaty between the United States and the Emperor of China.

Opinion of the Court.

A question which meets us at the outset is whether we have jurisdiction, and that depends on whether the proceeding is to be treated as civil or criminal. Section 650 of the Revised Statutes provides that whenever, in any civil suit or proceeding in a circuit court, there occurs a difference of opinion between the judges holding the court as to any matter to be decided, ruled, or ordered, the opinion of the presiding judge shall prevail and be considered the opinion of the court for the time being; and section 652, that when final judgment or decree is rendered, the points of disagreement shall be certified and entered of record under the direction of the judges. That being done, the judgment or decree may, under the provisions of section 693, be brought here for review by writ of error or appeal, as the case may be.

By section 651 it is provided that whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court, and the judges are divided in opinion, the point on which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified under the seal of the court to this court at its next session.

It follows, from these provisions of the statutes, that, if this is a civil suit or proceeding, we have no jurisdiction, as there has been no final judgment in the circuit court, but, if it is a criminal proceeding, we have.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil

right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The porceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago as *Ex parte Bollman & Swartwout*, 4 Cranch, 75–101:

"The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts."

The questions that may be certified to us on a division of opinion before judgment are those which occur on the trial or hearing of a criminal proceeding before a circuit court. It follows that we cannot take jurisdiction of the case in its present form, and it is consequently

Remanded to the circuit court for further proceedings according to law.

GIBSON *v.* BRUCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Decided May 7th, 1883.

Removal of Causes.

A suit cannot be removed from a State court, under the act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal was filed.

Motion to dismiss or affirm. The only point at issue was whether the case was one which could be removed from the State court. When the suit was brought in the State court the appellant and the appellee were citizens of different States. The defendant at the term of the court at which the cause could be first tried, and before the trial thereof, moved for its removal to the federal court, and after hearing an order of removal was made in the State court. The plaintiff then in the federal court moved to remand it on the ground that at the time of the filing of the motion to remand, and at the time of the application for removal, the plaintiff and defendant were both citizens of the same State. The court below heard the parties on this motion, and granted it; from which order an appeal was taken.

Mr. T. McDougall, *Mr. G. Hoadly*, *Mr. E. M. Johnson*, and *Mr. E. Colston* for appellant, cited *Insurance Company* v. *Pechner*, 95 U. S. 183; *Mollan* v. *Torrance*, 9 Wheaton, 537; *Holden* v. *Putnam Fire Insurance Company*, 46 N Y. 1; *Burdick* v. *Peterson*, 6 Fed. Rep. 840; *Houser* v. *Clayton*, 3 Woods C. Ct. 273; *Tapley* v. *Martin*, 116 Mass. 275; *Kaeiser* v. *Illinois Central Railroad Company*, 6 Fed. Rep. 1; *Beede* v. *Cheeney*, 5 Fed. Rep. 388; *Rawle* v. *Phelps*, 9 Central Law Journal, 46; *Indianapolis, &c., Railway Company* v. *Risley*, 50 Ind. 64; *French* v. *Hay*, 22 Wall. 231; Dillon on Removal of Causes, § 66.

Mr. T. D. Lincoln for appellee, cited *Murray* v. *Holden*, 1

McCrary's Reports, 341; *Cramer* v. *Mack*, 12 Fed. Rep. 803; *Babbitt* v. *Clarke*, 103 U. S. 606; *Fulton* v. *Golden*, 9 Cent. Law Journal, 286; *Scott* v. *Clinton, &c., Railroad Company*, 6 Biss. 529; *Ames* v. *Colorado Central Railroad Company*, 4 Dillon, 260; *Kerting* v. *American Oleograph Company*, 10 Fed. Rep. 17; *Hebert* v. *Lefevre*, 31 La. An. 363; *The C. B. & Q. Railroad Company* v. *Welch*, 44 Iowa, 665; *Stough* v. *Hatch*, 16 Blatchford, 233; *Miller* v. *Kent*, 60 Howard's Practice R. 451; *Berrian* v. *Chetwood*, 9 Fed. Rep. 678; *Traders' Bank* v. *Tallmadge*, 9 Fed. Rep. 363; *Aldrich* v. *Crouch*, 10 Fed. Rep. 305; *New York Warehouse, &c., Company* v. *Loomis*, 122 Mass. 431.

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

In this case the court below decided that under the act of March 3d, 1875, c. 137, there could not be a removal to the Circuit Court of the United States of a suit in a State court between parties who were citizens of different States when the suit was begun, if when the petition for removal was filed the parties were all citizens of the same State. To reverse an order remanding a suit on that ground, this appeal was taken.

Under the judiciary act of 1789 (sec. 12), it was held, in *Insurance Company* v. *Pechner*, 95 U. S. 183, that there could not be a removal unless the necessary citizenship existed when the suit was begun. That act provided only for a removal on the application of the defendant when the plaintiff was a citizen of the State in which the suit was brought, and the defendant was required to file his petition for removal at the time of entering his appearance in the State court. Under such circumstances changes of citizenship, after the suit was begun and before the time for applying for a removal, would not often occur.

The act of 1875 is radically different from any which preceded it. Under that act either party may petition for removal, and neither party need be a citizen of the State in which the suit was brought. The material language is as follows:

"That any suit of a civil nature at law or in equity, now pend-

ing or hereafter brought in any State court, . . . in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the circuit court of the United States for the proper district."

In order to obtain the removal, a petition therefor must be filed in the State court at or before the term at which the cause could be first tried, and before the trial. In the present case the petition was not filed until nearly two years after the commencement of the suit.

The construction of the act is by no means free from doubt, but on full consideration we are of opinion that the requirement of the old law, that the necessary citizenship should exist when the suit was brought, was not abolished. We cannot believe it was intended to allow a party to deprive a State court of the jurisdiction it has once rightfully acquired over him by changing his citizenship after a suit is begun, and that would be the effect of the law if the right of removal is made to depend only on the citizenship existing at the time a removal is applied for. But we are also of opinion that because of the extension of the time for applying for a removal, and because neither party need be a citizen of the State in which the suit is brought and either party may apply, it was the intention to provide that the controversy should be between citizens of different States at the time of the removal. In this way the jurisdiction of the Circuit Court of the United States will only attach when there shall be a controversy between citizens of different States at the time the suit is transferred, and the right to the transfer will depend on the citizenship when the suit was begun and when the petition for removal is filed.

We, therefore, hold that a suit cannot be removed from a State court under the act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal is filed.

The order remanding the cause is affirmed.

NEW JERSEY ZINC COMPANY *v.* TROTTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Decided May 7th, 1883.

Jurisdiction—Pleading—Practice—Trespass.

Where, in an action of trespass in which a count of trespass *quare clausum*, is joined to a count of trespass *de bonis asportatis*, the defendant sets up no plea of title, and it does not in any way appear by the record that title is involved, and the plaintiff recovers judgment for a sum less than $5,000, the defendant cannot bring the cause here on a writ of error, even though the judgment below may operate collaterally to estop the parties in another suit.

Trespass *quare clausum*, to which was joined a count of trespass *de bonis asportatis*. General issue. Trial and judgment for the plaintiff for $4,072.25, damages, costs, and charges. Defendant brought the cause here on error. Defendant in error moved to dismiss the writ of error, and joined with it a motion to affirm, grounding the first motion on the insufficiency of the amount of the judgment. The defendant resisted the motion on the ground that the real issue tried between the parties in the court below was the title to real estate of much greater value than $5,000.

Mr. John Linn, for plaintiff in error.

Mr. Cortlandt Parker and *Mr. Richard Wayne Parker*, for defendant in error.

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

This was an action of trespass brought by Trotter to recover damages of the New Jersey Zinc Company for entering on his lands and digging up and carrying away a quantity of franklinite ore. There were three counts in the declaration: two *quare clausum fregit*, and one *de bonis asportatis*. The plea was not guilty. No other issue was raised by the pleadings. Neither party set up title, so that the only matter in dispute was the liability of the zinc company to pay for the ore which

it was alleged had been wrongfully taken and carried away. Trotter recovered a judgment for $3,320 damages and $752.25 costs of suit. From that judgment the zinc company brought this writ of error, which Trotter now moves to dismiss because the value of the matter in dispute does not exceed $5,000.

As we decided at the present term, in *Hilton* v. *Dickinson*, *ante*, 165, our jurisdiction is determined by the value of the matter in dispute in this court, and the matter in dispute here in the present case is the judgment below for less than $5,000. It may be that the question actually litigated below related to the title of the parties to the land from which the ore in controversy was taken, and that the verdict will be conclusive on that question as an estoppel in some other case; but, as was also said at the present term, in *Elgin* v. *Marshall*, 106 U. S. 578, for the purpose of estimating the value on which our jurisdiction depends, reference can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered, and we are not permitted to consider the collateral effect of the judgment in another suit between the same or other parties. It is the money value of what has been actually adjudged in the cause that is to be taken into the account, not the probative force of the judgment in some other suit. Here the thing, and the only thing, adjudged is that the zinc company was guilty of the particular trespass complained of, and must pay Trotter $3,320 for the ore taken away. Had the zinc company pleaded title to the land from which the ore was taken, and issue had been joined on that plea, a different question would have been presented. In that way, the land might have been made the matter for adjudication, and thus the matter in dispute on the record. But, as this case stands, only the possession of Trotter and his right to the ore are involved. It may be that, in order to find possession in Trotter, the jury were compelled to find that he had title to the land, and that in this way the verdict and judgment may estop the parties in another suit, but that will be a collateral, not the direct, effect of the judgment.

The motion to dismiss is granted.

EX PARTE BALTIMORE & OHIO RAILROAD COMPANY.

ORIGINAL.

Decided May 7th, 1883.

Mandamus—Jurisdiction—Practice—Replevin.

A writ of mandamus cannot be used to bring up for review a judgment of a circuit court on a plea to the jurisdiction.

Where a circuit court on demurrer vacated and quashed a writ of replevin for want of jurisdiction, it was a final judgment, and it was, if the case was otherwise within the court's jurisdiction, subject to review on a writ of error.

Motion to dismiss a petition for mandamus to the Circuit Court of the United States for the Western District of Virginia to direct that court to take jurisdiction in a replevin suit.

Mr. John K. Cowen and *Mr. Hugh L. Bond, Jr.*, for petitioner.

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

This petition shows that the Baltimore & Ohio Railroad Company brought an action of replevin against John E. Hamilton in the Circuit Court of the United States for the Eastern District of Virginia to recover the possession of certain railroad cars; that a summons for the defendant and a writ of replevin for the property were issued in the suit; that the defendant Hamilton was duly served with the summons; that the property sued for was taken by the marshal under the writ of replevin and delivered to the company; that a declaration was filed, and that before pleading thereto Hamilton appeared and moved to vacate the writ of replevin because the court had no jurisdiction to issue the same. This motion was heard, and thereupon the court ordered and adjudged "that said writ be quashed and vacated, and all proceedings subsequent to be of no avail;" and that the action "be dismissed at the costs of the plaintiff, for which execution may issue, &c."

Opinion of the Court.

This is a final judgment in the action and, if the case is otherwise within our jurisdiction, subject to review here on a writ of error. Upon such a writ the question of the right to maintain the action on which the case was adjudged below, if presented by the record, may be re-examined here. This being so, a writ of mandamus cannot issue. It has been often held that mandamus cannot be used to perform the office of a writ of error. *Ex parte Hoard*, 105 U. S. 578; *Ex parte Loring*, 94 U. S. 418.

In *Ex parte Railway Company*, 103 U. S. 794, it was expressly decided that a writ of mandamus could not be used to bring up for review a judgment of the circuit court on a plea to the jurisdiction. That is practically what is asked in this case.

The writ is denied.

SCARBOROUGH *v.* PARGOUD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Decided May 7th, 1883.

Limitations.

No judgment or decree of a State court can be reviewed in this court unless the writ of error is filed in the court which rendered the judgment within two years from the entry of the judgment.

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

The final decree in this case was rendered on the 13th of July, 1878, and while the writ of error was allowed by the Chief Justice of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not lodged in the clerk's office until the 16th of that month.

No judgment or decree of a State court can be reviewed in this court unless the writ of error is brought within two years after the entry of the judgment. Rev. Stats. § 1008;

Statement of Facts.

Cummings v. *Jones*, 104 U. S. 419. In *Brooks* v. *Norris*, 11 How. 204, it was decided, Chief Justice Taney speaking for the court, that "the writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." This case is cited with approval in *Mussina* v. *Cavazos*, 6 Wall. 355.

It follows that the writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction. For that reason

The writ is dismissed.

LOUISIANA *ex rel.* NEW ORLEANS GAS LIGHT COMPANY *v.* CITY COUNCIL OF NEW ORLEANS & Another.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Decided May 7th, 1883.

Constitutional Law—Jurisdiction.

Where a party seeks a writ of mandamus from a State court to compel a city government of which he is a creditor to apply to the payment of his debt the proceeds of a proposed sale of city property, and to exhaust its powers of taxation, and continue to do so until the relator's debt is paid, and the State court denies the prayer as to the application of the proceeds of sale of the property, on the ground that the State laws require it to be applied to the retirement of other debts of the city, and grants the writ as to the residue of the prayer, no federal question arises.

Petition to the judge of the Fourth District Court of the Parish of Orleans in Louisiana, setting forth that the petitioners are judgment creditors of the city of New Orleans; that the city government has power to levy taxes to an amount named in the petition; that it is about to part with valuable privileges for a large sum of money; and praying that the city government may be required to include in its next

estimate of receipts the proceeds of the sales of the privileges, and in its next budget of expenses the debt of the relators, and to exhaust its powers of taxation and continue to do so till the relator's judgment is paid and satisfied. Pending the proceedings the city government made sale of the privileges and placed the proceeds to the credit of the premium bond fund. The court held that this was rightly done, and granted the petitioners' prayer as to the remainder of their petition. They appealed to the Supreme Court of Louisiana, where the judgment below was sustained. They then brought their writ of error to review the case here.

Mr. Thomas J. Semmes for relators and plaintiffs in error.
Mr. C. N. Buck for defendants in error.

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

We have no jurisdiction in this case. No title, right, privilege, or immunity set up or claimed by the relator under the Constitution of the United States has been denied him by the judgment of the court below. The prayer of the petition for mandamus was, among other things, that in order to secure a sufficient fund to provide for the payment of certain judgments in favor of the relator against the city of New Orleans, the council of the city might be required, if necessary, to "exhaust their powers of taxation, and continue so to do until relator's judgment is paid and satisfied." No request was made in the petition for a determination of the extent of the power of taxation for the purpose specified. A judgment was entered in the court of original jurisdiction granting the writ in the exact form prayed for. This judgment was affirmed by the supreme court of the State on appeal. After the judgment of affirmance was entered, a rehearing was asked, in order that the judgment of the court of original jurisdiction might be made more clear and specific. This was refused. No right to any specific rate of taxation has been denied. That question has been left unsettled, and there was nothing in the pleadings which required the court to do more than it has done. As the judgment is for a writ requiring the council to do all it has in

law the power to do to raise the money to pay the relator's demand, no right has been denied. While the court might have defined in more exact terms the precise power to be exercised, its omission to do so is not ground for appeal to our jurisdiction.

It follows that the writ of error in this case must be dismissed for want of jurisdiction, and an order to that effect is made.

II.

OCTOBER TERM, 1883.

RULES

ANNOUNCED JANUARY 7TH, 1884.

RULES

OF THE

SUPREME COURT OF THE UNITED STATES

ANNOUNCED

JANUARY 7, 1884.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practise, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. 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, except as provided by Rule 10.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practise in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

I, —— ——, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

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

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

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

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

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8.

WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to

and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case

and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered stating the case, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, and Idaho.

10.

PRINTING RECORDS.

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

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1st, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, Section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attach-

ment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this

court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided, however*, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: *Provided, however*, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before

the beginning of the term of the Supreme Court then next ensuing: *And provided, also,* That in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also,* That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared

to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

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

21.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no

printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

22.

ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: *Provided, always*, That a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, interest shall not be allowed, unless specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3d, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order; (except as hereinafter provided;) and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term, including the one under argument.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the attorney-general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall

desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

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

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer

all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

32.

WRITS OF ERROR AND APPEALS UNDER SECTION 5 OF THE ACT OF MARCH 3D, 1875.

1. Writs of error and citations under section 5 of the act of March 3d, 1875, "to determine the jurisdiction of the circuit

courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," for the review of orders of the circuit courts dismissing suits, or remanding suits to a State court, must be made returnable within thirty days after date, and be served before the return-day.

2. In all cases where writ of error or appeal is brought to this court under the provisions of that act, it shall be the duty of the plaintiff in error or the appellant to docket the case and file the record in this court within thirty-six days after the date of the writ of error, or the taking of the appeal, if there shall be a term of the court pending at that time, and if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. All such cases will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

4. As soon as such a case is docketed and advanced, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

5. In all cases where a period of thirty days is included in the times fixed by this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, or Nevada.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

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 case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, 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.

INDEX.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMIRALTY.

1. A final decree in a collision suit in admiralty where the *res* has been surrendered, on a stipulation under the provisions of § 941, Rev. Stat., may be entered against both principal and sureties at the time of its rendition. *The Belgenland*, 153.

See CONTRACT, 1; SALVAGE, 1, 2;
JURISDICTION, A, 17, 18; SUPERSEDEAS, 1, 2.

AFFREIGHTMENT.

See CONTRACT, 1.

APPEAL.

1. Cross-appeals must be prosecuted like other appeals. When a party making a cross-appeal fails, for a period long after the time allowed by law, to perfect his cross-appeal, the court, of its own motion, will dismiss it for want of prosecution. *Hilton* v. *Dickinson*, 165.
2. When it appears on the face of the record that the value of the matter in dispute is not sufficient to give jurisdiction, the court will, of its own motion, dismiss an appeal. *Id.*

See JURISDICTION, A, 4;
PRIZE, (1);
SUPERSEDEAS, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A general assignment for the benefit of creditors, made without intent to hinder, delay, or defraud creditors, is valid for the purpose of securing an equal distribution of the estate of the assignor among his creditors, in proportion to their several demands, except as against

CONSTITUTIONAL LAW.

CONTRACT.

named in the agreement communicated it to the defendant in error, and employed him as counsel in resisting the suits. On a suit for professional service brought by him against the company jointly: *Held*, That any contract there may have been between him and the companies was several not joint. *Adriatic Fire Insurance Company*, v. *Treadwell*, 361.

See DISTRICT OF COLUMBIA, 1; INTEREST; MISTAKE; PRINCIPAL AND AGENT; SURETY; USURY.

CONTRIBUTORY NEGLIGENCE.

A passenger who rests his elbow on the sill of an open window in a car, but without protruding it beyond the car, and whose arm is then thrown by the force of a collision outside of the car, and is injured in the collision, does not contribute to the cause of the injury by his own negligence. *Farlow* v. *Kelley*, 288.

CORPORATIONS.

1. Corporations may recover as plaintiffs for injuries done to their property by a nuisance; and where the corporation plaintiff is a religious corporation, and its members suffer personal discomfort and apprehension of danger in the use of the corporate property, the corporation may recover for such injuries. A religious congregation has the same right to the comfortable enjoyment of its church for its own purposes, that a private individual has to the comfortable enjoyment of his house. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 317.
2. Certificates of preferred stock of the Ohio and Mississippi Railway Company were issued containing the following language: "The preferred stock is to be and remain a first claim upon the property of the company, after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share:" *Held*, That the preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the company subsequently to the issue of the

under the direction of another professional sculptor, whether from models just made by a professional sculptor, or from antique models whose author is unknown, are "professional productions of a statuary or of a sculptor," liable to a duty of only ten per cent. ad valorem, under the Revised Statues, § 2504, Schedule M. *Tutton* v. *Viti*, 312.

DAMAGES.

The measure of damages in an action at law against the maintenance of a nuisance affecting real estate is not simply the depreciation of the property. The jury are authorized also to take into consideration personal discomfort which may be caused by the nuisance, and any causes which produce a constant apprehension of danger in their estimate of damages, even if there be no arithmetical rule for the estimate. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 317.

See NUISANCE, 1, 2, 4.

DEED.

See EVIDENCE, 2, 3, 4, 6, 7.

ILLINOIS, 1, 2.

DEMURRAGE.

See PRIZE.

DEPOSITION.

See EVIDENCE, 5.

DISTRICT OF COLUMBIA.

1. In May, 1870, Congress authorized the Washington Market Company to construct a market building on a tract in Washington between Pennsylvania and Louisiana avenues and B street, and between Seventh and Ninth streets, then belonging to the United States, and to occupy the same for a term of 99 years, paying a rental therefor to the city of Washington of $25,000 a year. Buildings were to be constructed thereon by the company, within a period named and in accordance with specified plans. In 1871, some changes were made in the plans, and in March, 1873, no building having been erected, Congress authorized the governor and board of public works of the District of Columbia (the successor of the city), to erect a building for District offices and to "make arrangements to secure sufficient land fronting on Pennsylvania avenue between Seventh and Ninth streets." Under this authority the market company conveyed to the District a part of the tract described in the act of 1870; the District assumed

DIVISION OF OPINION.

See JURISDICTION, A, 21.

EQUITY.

ESTOPPEL.

EVIDENCE.

INDICTMENT.

INTEREST.

INTERNAL REVENUE.

JUDGMENT.

JURISDICTION.

A. OF THE SUPREME COURT.

See INDICTMENT, 6, (4);
PRACTICE, 7.

B. Of Circuit Courts of the United States.

The treasurer of a State, being brought into a Circuit Court of the United States to contest the ownership of a fund to which the State laid claim, demurred on the ground that the suit was really against the State; subsequently the fund was, by order of court, paid into court, when the State appeared and claimed it: *Held*, That the voluntary appearance of the State disposed of the demurrer and conferred jurisdiction to adjudicate upon the rights of the State. The case distinguished from *Georgia* v. *Jesup*, 106 U. S. 458. *Clark* v. *Barnard*, 436.

See Conflict of Law, 1;
Removal of Causes;
Review.

C. Of District Courts of the United States.

1. The District Court of the United States for the District of New Jersey has jurisdiction of a suit in admiralty, *in personam*, against a New York corporation, where it acquires such jurisdiction by the seizure, under process of attachment, of a vessel belonging to such corporation, when such vessel is afloat in the Kill van Kull, between Staten Island and New Jersey, at the end of the dock at Bayonne, New Jersey, at a place at least 300 feet below high-water mark, and nearly the same distance below low-water mark, and is fastened to said dock by means of a line running from the vessel and attached to spiles on the dock. *Ex parte Devoe Manufacturing Company*, 401.
2. A vessel so situated is within the territorial limits of the State of New Jersey and of the District of New Jersey, and is not within the territorial limits of the State of New York, or of the Eastern District of New York. *Id.*
3. The subject-matter of the dispute as to boundary between New York and New Jersey explained, and the settlement as to the same made by the agreement of September 16th, 1833, between the two States, as set forth in, and consented to by, the act of Congress of June 28th, 1834 (chap. 126, 4 Stat. 708), interpreted. *Id.*
4. When Congress enacts that a judicial district shall consist of a State, the boundaries of the district vary afterwards as those of the State vary. *Id.*

LACHES.

See Mistake, (5).

LEASE.

A railroad company agreed with A that he might erect a building on property of the company, paying a ground rent therefor for a period terminable by notice, and that at the expiration or termination of the

MISSOURI.

See MUNICIPAL CORPORATIONS, 5.

MISTAKE.

By a written agreement between S and E, S agreed to convey land to E "subject to" an incumbrance on it of $9,000, and E agreed to pay to S $15,000, by conveying to him land, some of it "subject to" an incumbrance. Without any further bargain, S delivered to E a deed, conveying the land "subject to" the incumbrance, and also containing a clause stating that E assumes and agrees to pay the debt secured by the incumbrance, as a part of the consideration of the conveyance. E being ill, did not read the clause in the deed respecting the assumption of the debt, but discovered it afterwards, and promptly brought this suit to have the deed reformed. He had made two payments of interest on the incumbrance. In the negotiations prior to the agreement, S, through his agent, had solicited E to assume and agree to pay the incumbrance, but E refused. S understood the difference in meaning between the two forms of expression. D, the owner of the incumbrance, was no party to the transaction, and had done nothing in reliance on the deed. He was, on his own application, made a party to the suit, and also filed a cross-bill for a foreclosure of the incumbrance, and the inforcement of a personal liability against S and E for the debt. The circuit court made a decree dismissing the bill in the original suit, and adjudging that E had agreed with S to pay the amount due on the incumbrance; that S and E, or one of them, should pay the debt due to D, and, in default thereof, the land should be sold, and the deficiency reported; and that, if S should pay any part of the debt, he might apply for an order requiring E to repay the amount to him. On an appeal by E: *Held*, (1) The decree was a final decree, as to E. (2) The amount involved in the original suit was the $9,000. (3) The agreement created no liability on the part of E to pay the debt to D. (4) There was a departure in the deed, through mutual mistake, from the terms of the actual agreement. (5) Under the special circumstances of the case E had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches in not observing the provisions of the deed as should preclude him from relief, nor was he guilty of any laches in seeking a remedy. (6) The payment by E of interest on the incumbrance was not inconsistent with his not having assumed the payment of the debt. (7) E is entitled to have the deed reformed. The case of *Snell* v. *Insurance Company*, 98 U. S. 85, cited and applied. *Elliott* v. *Sackett*, 132.

MORTGAGE.

1. The Illinois statute of 1879, entitling the purchaser in case of redemp-

MOTION TO DISMISS.

MUNICIPAL BONDS.

MUNICIPAL CORPORATIONS.

NEW JERSEY.

See JURISDICTION, C.

NEW ORLEANS.

See PRACTICE, 4.

NUISANCE.

1. In an action at law damages may be recovered against a person who maintains a nuisance which renders the ordinary use and occupation of property physically uncomfortable to its owner ; and if the cause of the annoyance and discomfort be continuous, equity will restrain it. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 317.
2. Corporations are equally responsible with individuals to respond in damages for injuries caused by nuisances maintained by their servants by the authority of the corporation. *Id.*
3. Legislative authority to a railroad company to bring its tracks within municipal limits and to construct shops and engine houses there, does not confer authority to maintain a nuisance. *Id.*
4. Legislative authorization exempts from liability to suits, civil or criminal, at the instance of the State ; but it does not affect claims of private citizens for damages for special inconvenience and discomfort, not experienced by the public at large. *Id.*

PARTIES.

On appeal from the decree of the court below executing the mandate of the court on the judgment entered in *Blake* v. *Hawkins*, 98 U. S. 315 : *Held*, That it was no error in the execution of the mandate to permit a new party to become party and set up rights under the decree, when it appears by the record that all parties consented. *Hawkins* v. *Blake*, 422.

PATENT.

The doctrine reaffirmed that the earlier printed and published description of a subject of a patent which is put in evidence to invalidate a patent must be in terms that would enable a person skilled in the art or science to which it appertains to make, construct and practise the invention as completely as he could do by the aid of information derived from a prior patent ; and that unless it is sufficiently full to enable such person to comprehend it without assistance from the patent, or to make it or repeat the process claimed, it is insufficient to invalidate the patent. Applying the doctrine to this case, the appellant's patent *held* to be void. *Downton* v. *Yeager Milling Company*, 466.

PENALTY.

See BOND.

PERJURY.

See INDICTMENT.

PLEADING.

See JURISDICTION, A, 19.

PRACTICE.

1. It appearing that a personal decree for money could not be given, and the circumstances of the parties not being shown to have changed since the security was taken, a motion for additional security on the supersedeas bond is denied. *Johnson* v. *Waters*, 4.
2. Motions to dismiss, with which are united motions to affirm, to strike out certain assignments of error, and to advance, denied when, in the absence of a printed record, the assignment of errors in defendant's brief presents questions of which the court has jurisdiction. *Crane Iron Company* v. *Hoagland*, 5.
3. A mortgaged real estate in New Orleans to B. Proceedings being taken against it under the Confiscation Acts as the property of A, B intervened. The estate was condemned, and sold to C, and the proceeds paid to B under decree of court. After the death of A, suit was brought on behalf of his heirs to recover possession of the property. *Held*, That C acquired only the life estate of A ; that the heirs of A are entitled to recover ; and that neither the United States nor C is subrogated to the rights of B ; also, That under the practice of Louisiana, C cannot, after going to trial on the petition, object that it is defective by reason of not setting forth the deed under which he claims title. *Waples* v. *Hays*, 6.
4. The board of liquidation of the city debt of New Orleans, a corporate body created by the legislature of Louisiana, created pending the appeal of this suit, appeared and claimed authority over the subject-matter of the controversy. The court refused to enter judgment according to the terms of stipulation made with the attorney of the city of New Orleans by authority of the city council, without first giving the board opportunity to be heard. *New Orleans* v. *New Orleans, Mobile & Texas Railroad*, 15.
5. Where on the face of the decree it appears that a case was disposed of on demurrer to the bill, the evidence on file is not necessary for the hearing of the bill. *Missouri, Kansas & Texas Railway* v. *Dinsmore*, 30.
6. When a record has not been printed, and parties do not agree as to its

PREFERRED STOCK.

PRINCIPAL AND AGENT.

An agreement in writing, between "W., superintendent of the Keets Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine (owned by the company) to be crushed and milled by P.; and signed by "W., Supt. Keets Mining Co.," and by P.; is the contract of the company. *Post* v. *Pearson*, 418.

PRIZE.

The *Nuestra Señora de Regla* was seized in November, 1861, by the army. In December, 1861, the master chartered her to the quartermaster's department for two hundred dollars a day. She remained in the service of the quartermaster till January 29th, 1862, when she was delivered to the navy, by whom she was used as a transport till March 1st, 1862. She was then sent to New York and libelled as prize. A decree of restitution was made June 20th, 1863. Proceedings to fix the amount of demurrage were stayed to enable the matter to be adjusted diplomatically. In 1870 the Department of State informed the Spanish Minister that it would be more satisfactory to the United States to have the question settled by the court. A reference to a commissioner resulted in a decree for demurrage to the date of the decree for restoration, in all 268 days. On appeal the decree was set aside as excessive, and the case remanded. Under a new reference the same

REMOVAL OF CAUSES.

7. A suit cannot be removed from a State court, under the act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal was filed. *Gibson* v. *Bruce*, 561.

REVIEW.

1. A decree, in a suit in equity, set forth a hearing on pleadings and proofs, and awarded relief, but it ordered that a bill of exceptions signed by the court be filed as a part of the record. The bill of exceptions showed that the judge who held the court refused to permit the counsel for plaintiff to argue the cause, and allowed the counsel for the defendant to determine whether the case fell within a prior decision of another judge, and refused to determine that question himself, and then directed that the decree be entered, which was in favor of the defendant. On a bill of review, filed by the plaintiff: *Held*, That, the decree must be held for naught. *Ensminger* v. *Powers*, 292.

RULES.

Review of the legislation and practice of the court relating to taxation of the clerk's fees for printed copies of records. Change in Rules announced, 1.

RULES ANNOUNCED JANUARY 7, 1884.

SALVAGE.

1. A ship, towed by a steam tug down the river, came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awakened by a smell of smoke arising from a fire which had broken out in part of the cargo stowed in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug; and he and the officers, crew and passengers of the tug, working together, and by means of a steam pump and hose upon the tug, and unaided by the officers and crew of the ship, put out the fire in twenty minutes: *Held*, That this was a salvage service, and that the passenger on board the ship, as well as the owner, officers, crew and passengers of the tug, might share in the salvage. *The Connemara*, 352.
2. Under the act of Congress of 16th February, 1875, c. 77, a decree of salvage by the circuit court is not to be altered by this court for excess in the amount awarded, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. *Id.*

SPECIFIC PERFORMANCE.

See EQUITY, 1.

SPIRITUOUS LIQUORS.

See INDIAN COUNTRY.

STATUTES.

A. CONSTRUCTION OF STATUTES.

When there is an ambiguity in the language of a statute it may be necessary to inquire into the objects of the legislature in its enactment; or if it be a private act, the purposes of the beneficiaries in asking for it; but when the language is clear, and needs no interpretation, and leads to no absurd conclusion, this will not be done. *Ruggles* v. *Illinois*, 526.

See CORPORATION, 4;
DISTRICT OF COLUMBIA, 1, (3);
MUNICIPAL CORPORATIONS, 3, 4.

STATUTE OF FRAUDS.

SUBROGATION.

1. When one of two sureties gives a mortgage of his real estate to his co-surety to protect him against loss by reason of having become security for the principal, a creditor of the principal is not entitled to be subrogated in equity in place of the co-surety, and enjoy the benefit of the mortgage. *Hampton* v. *Phipps*, 260.
2. The distinction in principle between the rights of creditors of the principal debtor in the security where the debtor furnishes it to his sureties, and their rights where such security is furnished by one co-surety to the other, examined and explained. *Id.*

SUPERSEDEAS.

1. If a decree in admiralty is entered against claimant and sureties, and claimant appeal, and sureties sign the *supersedeas* bond also as sureties, an alternative writ of mandamus will not be granted to vacate the decree below as to the sureties. *The Belgenland*, 153.
2. Nor will this court, on the stipulator's motion, order the decree set aside here as to them. *Id.*

SUPPLEMENTAL ORDER.

SUPREME COURT.

SURETY.

TACIT MORTGAGES.

TAX.

TOTAL LOSS.

TRADE-MARK.

TREATY.

See INDIAN COUNTRY.

TRUST.

See DISTRICT OF COLUMBIA, 1, (2).

USURY.

A contract of a kind which a statute in Texas makes "void" for usury, is voidable only; and a repeal of the statute declaring such contracts void deprives the debtor of the statutory defence. *Ewell* v. *Daggs*, 143.

WITNESS.

See EVIDENCE, 5.